

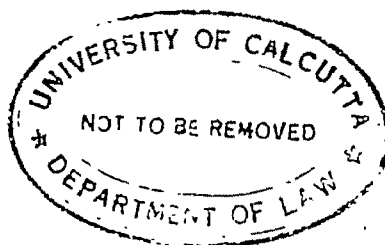
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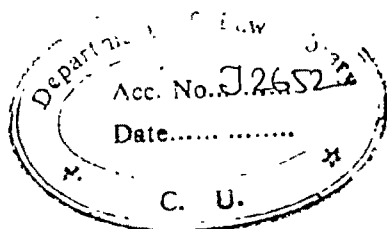
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MANHAR RATANLAL VAKIL, B.A., LL.D.,
BARRISTER-AT-LAW,



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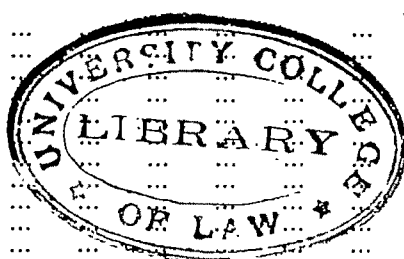
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THE HON'BLE MR. H. K. CHAINANI (*Died on November 28, 1965*).

” ” ” Y. S. TAMBE (*Acting Chief Justice from November 22, 1965*).

Puisne Judges :

THE HON'BLE MR. Y. S. TAMBE.

” ” ” S. P. KOTVAL.

” ” ” N. A. MODY.

” ” ” V. M. TARKUNDE.

” ” ” D. V. PATEL.

” ” ” V. S. DESAI.

” ” ” K. K. DESAI.

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CORRIGENDA

At p. 510 of 67 Bom. L.R., in lines 8 and 9, for words "photographs collected in book form without the medical text would" read "informations of public interest or profit the approach to the problem."

At p. 693 of 67 Bom. L.R. after line 11 read as follows:

In *C. R. As. Nos. 288 and 289 of 1963*:

L. V. Deshpande, for the applicants.

C. P. Patel, for the opponent.

In *C.R.A. No. 290 of 1963*:

L. V. Deshpande, for the applicants.

V. V. Albal, for the opponent.

further writ, direction or order restraining the Department from setting off the refund against the tax dues and directing them to hand over the balance of the Official Liquidator.

The High Court held that the demand of Rs. 8,737-12-0 in respect of the assessment year 1948-49, being adjudged and certified, came to have all the incidents and character of an unsecured debt payable by the Official Liquidator to the Department. The High Court observed that

"this claim thereafter was governed by the provisions of the Company law and could be paid to the creditor only in accordance with the provisions of the Company law. No other remedy nor any other method of obtaining satisfaction of this claim was available to the creditor thereafter. It was no longer the amount of tax remaining payable by a person to whom the refund was due within the meaning of Section 49E of the Income Tax Act. In our opinion, therefore, the provision of Section 49E was not available to the Department for setting off the amount of the excess towards the balance of its claim of Rs. 8,737/15/- which the department had proved in the insolvency of the company and was being dealt with in the Insolvency."

The High Court accordingly set aside the orders passed by the Department in so far as they set off the amount of the refund towards the tax remaining payable, and directed the Income Tax Officer to deal with and dispose of the claim of the present respondent for the refund and pass appropriate orders in respect of the said amount of refund under the provisions of s. 48 of the Income-tax Act.

The learned Additional Solicitor-General, on behalf of the appellant, contends that s. 49E gives statutory power to the Income-tax Officer, *inter alia*, to set off the amount to be refunded or any part of that amount against the tax remaining payable by the person to whom the refund is due, and this statutory power is not subject to any provision of any other law. He says that the Companies Act does not take away this power. Section 49E is in the following terms:

"Where under any of the provisions of this Act, a refund is found to be due to any person the Income-tax Officer, Appellate Assistant Commissioner or Commissioner, as the case may be, may, in lieu of payment of the refund, set off the amount to be refunded, or any part of that amount against the tax, interest or penalty, if any, remaining payable by the person to whom the refund is due."

On the face of this provision, there is no doubt that this section is not subject to any other provision of law. But it will be surprising if this power can be exercised in such a way as to defeat the provisions of the Indian Companies Act. It is not denied by the learned Additional Solicitor-General that the State has no priority in respect of this claim. The question then arises whether s. 49E is subject to the Insolvency Rules contained in the Companies Act. Section 228 of the Companies Act, 1913, provides:

"228. *Debts of all descriptions to be proved.*—In every winding up (subject in the case of insolvent companies to the application in accordance with the provisions of this Act of the law of insolvency) all debts payable on a contingency, and all claims against the company, present or future, certain or contingent, shall be admissible to proof against the company, a just estimate being made, so far as possible, of the value of such debts or claims as may be subject to any contingency or for some other reason do not bear a certain value."

Section 229 provides:

"*Application of insolvency rules in winding up of insolvent companies.*—In the winding up of an insolvent company the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and to debts provable and to the valuation of annuities and future and contingent liabilities as are in force for the time being under the law of insolvency with respect to the estates of persons adjudged insolvent; and all persons who in any such case would be entitled to prove for and receive dividends out of the assets of the company may come in under the winding up, and make such claims against the company as they respectively are entitled to by virtue of this section."

The effect of these statutory provisions is, *inter alia*, that an unsecured creditor must prove his debts and all unsecured debts are to be paid *pari passu*. Therefore, once the claim of the Department has to be proved and is proved in the liquidation proceedings, the Department cannot by exercising the right under s. 49E of the Income-tax Act get priority over the other unsecured creditors. If we were to read s. 49E in the way suggested by the learned Additional Solicitor-General, it would be defeating the very object underlying ss. 228 and 229 of the Companies Act, 1913. If there is an apparent conflict between two independent provisions of law, the special provision must prevail. Section 49E is a general provision applicable to all assesseees and in all circumstances; ss. 228 and 229 deal with the proof of debts and their payment in liquidation. In our opinion, s. 49E can be reconciled with ss. 228 and 229 by holding that s. 49E applies when insolvency rules do not apply. Accordingly, agreeing with the High Court, we hold that the Income-tax Officer was in error in applying s. 49E and setting off the refund due. The Commissioner was equally in error in affirming this order.

The learned Additional Solicitor-General also urged that the application under art. 226 was misconceived because the Income-tax Officer had jurisdiction. But if we interpret s. 49E as we have done, it is a clear case of lack of jurisdiction. At any rate, there is an error apparent on the face of the orders and the High Court was quite right in exercising its jurisdiction under art. 226.

The appeal is accordingly dismissed with costs.

Appeal dismissed.

[END OF VOL. LXVII.]

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ACCIDENT, arising out of employment.
See WORKMEN'S COMPENSATION ACT, 1923,
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—death caused by.

Where there is a balance of probabilities as to whether death is caused by accident or design and there is no clear evidence as to the cause of death, death must be presumed to be accidental. An innocent cause of death must be preferred to a cause which, if accepted, would lead to an inference of crime.

IBRAHIM V. MACKINNON MACKENZIE & Co.
67 Bom. L.R. 735.

ACCOMPLICE EVIDENCE, corroboration of.

It is not safe to accept the evidence of an accomplice as corroboration to the evidence of another accomplice and the confession of a co-accused as a piece of evidence lending assurance to the mind of the Court in considering the evidence of the accomplice. There may, however, be exceptional cases where evidence of an accomplice could be taken as corroboration to the evidence of another accomplice and the confession of a co-accused could be relied on for lending assurance to the mind of the Court. In considering the question as to whether a conviction could be founded on a testimony of the accomplice without corroboration, the latter part of s. 114, ill. (b) of the Indian Evidence Act, 1872, is relevant.

LAXMAN PADMA V. STATE.

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—1951—XXIII.

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- XV.
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- ADOPTION.** *See* HINDU ADOPTIONS AND MAINTENANCE ACT, 1956, S. 11.
67 Bom. L.R. 864.
- ADVOCATE**, threatening to an, in the course of hearing of case, whether amounts to contempt of Court. *See* CONTEMPT OF COURT.
67 Bom. L.R. 380.

ANNUAL LETTING VALUE. See MUNICIPAL ACT (CORPORATION), 1888, S. 154.

67 Bom. L.R. 202.

ASSESSEE, whether can claim a smaller relief than urged before the Tribunal.

When a larger relief is claimed by the assessee before the Tribunal on the strength of a certain provision of law, he is not prevented from arguing in a reference that he is entitled to a lesser relief under the same provision of law on the ground that the claim for a smaller relief is not one arising out of the order of the Tribunal.

COMMR., GIFT-TAX v. G. G. MORARJI.

67 Bom. L.R. 406.

BALLOT PAPER. See BOMBAY VILLAGE PANCHAYAT ELECTION RULES, 1959.

67 Bom. L.R. 41.

BERAR REGULATION OF AGRICULTURAL LEASES ACT (XXIV of 1951), S. 2(j)

—*Berar Land Revenue Code, 1928—Absence of notification under s. 2(j) appointing Revenue Officer to discharge functions under s. 16—Whether Civil Court in absence of such appointment can decide question under s. 16(1).*

As no notification is issued by the State Government under s. 2(j) of the Berar Regulation of Agricultural Leases Act, 1951, appointing any officer to discharge the functions of a Revenue Officer under s. 16 of the Act, the Civil Court has jurisdiction to decide the question referred to in s. 16(1) of the Act.

If a Civil Court is deprived of its jurisdiction, because the Legislature has provided for trial of the matter by a special tribunal, then if the tribunal is not constituted, the provisions made for referring the matter to the tribunal having become ineffective, the aggrieved person has the right to proceed in an ordinary Civil Court and the Civil Court will be competent to decide the matter.

RAJE VYANKATRAO v. SITLAPRASAD.

67 Bom. L.R. (F.B.) 868.

—**S. 9.** See BOMBAY TENANCY AND AGRICULTURAL LANDS (VIDARBHA REGION AND KUTCH AREA) ACT, 1958, S. 52.

67 Bom. L.R. 931.

—**S. 16.** See BERAR REGULATION OF AGRICULTURAL LEASES ACT, 1951, S. 2(j).

67 Bom. L.R. (F.B.) 868.

BOMBAY COMMISSIONERS OF DIVISIONS ACT (Bom. VIII of 1958), S. 3.

The amendments effected in the Land Acquisition Act, 1894, by the State Government by virtue of S. 3(4) of the Bombay Commissioners of Divisions Act, 1957, empowering the Commissioners to acquire land under ss. 4, 6, 9 and 17 of the Land Acquisition Act, are valid amendments so far as the State is concerned.

SADRUDDIN v. PATWARDHAN.

67 Bom. L.R. 101.

BOMBAY COURT-FEES ACT (Bom. XXXVI of 1959), S. 2(c). See BOMBAY COURT-FEES ACT, 1959, S. 5(f).

67 Bom. L.R. (O.C.J.) 644.

BOMBAY COURT-FEES ACT, S. 5(iv)(f). See BOMBAY COURT-FEES ACT, 1959, S. 6.

67 Bom. L.R. 210.

—**S. 5(1)—Bombay High Court Original Side Rules, Rules 151-155—Indian Divorce Act (IV of 1869), Secs. 10, 14, 18, 19—Hindu Marriage Act (XXV of 1955), Sec. 13—Civil Procedure Code (Act V of 1908), Sec. 26; O. IV, r. 1—Whether Court-fee leviable on third party notice—Third party notice whether a plaint for purposes of Court-fees Act—Applicability of art. 7, Sch. I to Court-fees Act.**

Under the Bombay Court-fees Act, 1959, Court-fee is leviable on a third party notice as an application to the Court to obtain relief specified in the third party notice.

If the application made to the Court is to obtain relief of the nature referred to in art. 7 in Sch. I to the Bombay Court-fees Act, 1959, this Article and not sub-cl (iii) in cl. (f) of Art. 1 in Sch. II to the Act will apply.

STATE TRADING CORPN. v. IRONSIDE LTD.

67 Bom. L.R. (O.C.J.) 644.

—**S. 6—Bombay Rents, Hotel and Lodging House Rates Control Act (Bom. LVII of 1947)—Suit by sub-tenant for declaration that he is entitled to be sub-tenant of landlord on termination of head-tenant's tenancy—Consequential relief for injunction restraining landlord from evicting him—Whether suit governed by s. 6(iv)(d) of Bombay Court-fees Act.**

The word "tenancy" as used in s. 6(iv)(d) of the Bombay Court-fees Act, 1959, relates to tenancy as understood under the ordinary law, which is interest in immovable property, and not to statutory tenancy under the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, which is not tenancy of immovable property.

Therefore, a suit by a sub-tenant of the original tenant for a declaration that he is entitled to be the sub-tenant of the landlord on the termination of the tenancy of the head-tenant in view of s. 14 of the Rent Act and for an injunction restraining the landlord from evicting him from the suit premises, is not a suit governed by s. 6(iv)(d) of the Bombay Court-fees Act, 1959. The appropriate provision applicable to the suit is s. 5(iv)(f) of the Act.

Quære: Whether power of revision given to the Courts of appeal under the Rent Act is only in respect of such decrees or orders in suits or proceedings where the right of appeal is taken away by the provisions of s. 29 of the Act itself and not in respect of those from which no appeal lies under the Civil Procedure Code.

SOCIETY OF SERVANTS OF GOD v. HANMANT-RAO.

67 Bom. L.R. 210.

—**S. 8.**

Section 8 or s. 10 of the Bombay Court-fees Act, 1959, does not lay down any special procedure for the inquiry. Section 8 of the Act only gives discretion to the Court to hold "such inquiry as it deems proper" and

BOMBAY COURT-FEES ACT, S. 8—
(Contd.)

s. 10 only confers powers of a Court upon the Court or the Commissioner holding the inquiry.

ANINHA D'COSTA v. PARVATIBAI.

67 Bom. L.R. 452.

———S. 10. See TRANSFER OF PROPERTY ACT, 1882, S. 105.

67 Bom. L.R. 452.

———SCH. I, art. 4. See BOMBAY COURT-FEES ACT, 1959, S. 5(1).

67 Bom. L.R. (O.C.J.) 644.

———SCH. I, art. 7. See BOMBAY COURT-FEES ACT, 1959, S. 5(1).

67 Bom. L.R. (O.C.J.) 644.

———SCH. II, art. 1(f)(iii). See BOMBAY COURT-FEES ACT, 1959, S. 5(1).

67 Bom. L.R. (O.C.J.) 644.

———SCH. II, art. 1(iii)—Insurance Act (IV of 1938), Sec. 53(1)—Companies Act (I of 1956), Sec. 439—Petition filed under s. 53 (1) of Insurance Act—Applicability of art. 1 (iii) or 34 of Bombay Court-fees Act.

The provisions in art. 1 (iii) in Sch. II to the Bombay Court-fees Act, 1959, apply to a petition for winding up filed under s. 53(1) of the Insurance Act, 1938.

GOVERNMENT PLEADER v. JAIN.

67 Bom. L.R. 901.

———SCH. II, arts. 20-23. See BOMBAY COURT-FEES ACT, 1959, S. 5(1).

67 Bom. L.R. (O.C.J.) 644.

BOMBAY HIGH COURT APPELLATE SIDE RULES, 1960. CHAPTER XVII. RULE 15-A—Constitution of India, Arts. 133, 225, 14—Validity of r. 15-A—Source of power of High Court to make rules—Nature, scope and extent of such power.

Rule 15-A in Chapter XVII of the Bombay High Court Appellate Side Rules, 1960, is valid and therefore all matters such as are specified in it are liable to be heard and disposed of by a single Judge on or after July 15, 1964.

SALUBAI RAMCHANDRA v. CHANDU.

67 Bom. L.R. 69.

BOMBAY HIGH COURT ORIGINAL SIDE RULES, RR. 151-155. See BOMBAY COURT-FEES ACT, 1959, S. 5.

67 Bom. L.R. (O.C.J.) 644.

BOMBAY LAND REVENUE CODE (Bom. V of 1879), S. 12. See BOMBAY LAND REVENUE CODE, S. 150.

67 Bom. L.R. 823.

———S. 70. See BOMBAY PARAGANA AND KULKARNI WATANS (ABOLITION) ACT, 1950, S. 4.

67 Bom. L.R. 908.

———S. 150—Indian Income-tax Act (XI of 1922), Sec. 46(2)—Civil Procedure Code (Act V of 1908), O. XXI, rr. 43, 46—Constitution of India, Arts. 31(1), 265—Income-tax Officer issuing certificate under s. 46(2) of Income-tax Act and revenue officers attaching goods of assessee pledged to and in pos-

BOMBAY LAND REVENUE CODE, S. 150—
(Contd.)

session of assessee's creditor—Goods damaged during subsistence of attachment—Suit against Government by creditor to recover amount of debt secured by pledge whether maintainable.

The defendants, who were constituents of the plaintiff-bank, took advances under an agreement from the plaintiff on the security of certain agricultural produce. A part of the produce was kept in the defendants' godown and the key of the same was handed over to the plaintiff, thus giving the goods in its possession. The defendants owed a sum towards income-tax dues and the Income-tax Officer issued a certificate under s. 46(2) of the Indian Income-tax Act, 1922, and forwarded it to the Collector and by a letter called upon him to make recoveries by attachment and sale of the goods lying in the defendants' godown. The Collector forwarded the letter to the Mamlatdar for taking necessary action. The Circle Officer under order from the Mamlatdar went to the godown and, notwithstanding the plaintiff's protest, attached the goods. During the subsistence of the attachment the goods were badly damaged as a result of rain water leaking through the roof of the godown. The plaintiff filed a suit against the defendants, the State of Bombay, the Collector, the Mamlatdar, the Circle Officer and the Union of India, alleging that the attachment and seizure of goods from its possession was illegal and claimed the amount of the debt secured by the pledge. It was contended *inter alia* by the Government that it was not responsible for the illegal attachment as it had not ratified the act of officers attaching the goods:—

Held, that crown debt such as e.g. income-tax dues, cannot have priority over secured debts.

that the question of special authorisation or of subsequent ratification did not arise in the circumstances of the case, as the Circle Officer had exercised powers delegated to him under the provisions of law when he proceeded to attach the goods.

that in seizing the goods he had acted in excess of the powers and the seizure of the goods was, therefore, illegal and unconstitutional, and

that, therefore, the plaintiff was entitled to a decree against all the defendants.

The immunity of the State in respect of the acts of its subordinates in the exercise of its sovereign powers cannot be treated as a dogma or a *mantra* and will have to be considered on the facts of each case. Immunity cannot be claimed for acts which are either illegal or unconstitutional.

The distinction between rr. 43 and 46 of O. XXI of the Civil Procedure Code, 1908, is of prime importance. When the goods are in possession of a pledgee, the seizure of the goods amounts to wrongful deprivation of the goods which the pledgee is entitled to retain in his possession.

LASALGAON CO-OP. BANK v. PRABHUDAS.

67 Bom. L.R. 823.

BOMBAY LAND REVENUE CODE, S. 154.
See BOMBAY LAND REVENUE CODE, 1879, S. 150.
 67 Bom. L.R. 823.

BOMBAY PARAGANA AND KULKARNI WATANS (ABOLITION) ACT (Bom. LX of 1950), S. 4—Bombay Land Revenue Code (Bom. V of 1879), Sec. 70—Occupancy of land regranted under s. 4(1) of Act whether could be sold or partitioned by order of Court—Whether decree-holder can apply to Collector to obtain sanction for sale of such land.

The combined effect of s. 4(2) of the Bombay Paragana and Kulkarni Watans (Abolition) Act, 1950, and s. 70 of the Bombay Land Revenue Code, 1879, is that the occupancy of land regranted under s. 4(1) of the Act is not liable to be sold or partitioned by execution of an order of a Court. A decree-holder during execution proceedings can, however, on behalf of the Court obtain sanction for sale of the land from the Collector under s. 4(2) of the Act.

TUKARAM ZIPRU V. BABAN.

67 Bom. L.R. 908.

BOMBAY PERSONAL INAMS ABOLITION ACT (Bom. XLII of 1953), S. 5—Inamdar in possession of uncultivated lands on appointed date—Whether such lands will vest in State Government under s. 7.

Section 7 of the Bombay Personal Inams Abolition Act, 1952, does not apply to lands which on the appointed date were in actual possession of the inamdar even if they were uncultivated lands. Therefore, where it is shown that the lands, cultivated or uncultivated, were in possession of the inamdar on the appointed date, the inamdar would become the occupant of such lands under s. 5 of the Act and such lands will not vest in the State Government under s. 7 of the Act.

Section 7 of the Act deals with lands and other properties, which were not in the possession of any person on the appointed date, while s. 5 of the Act makes provision for lands, which on that date were in possession of the inamdar or some other person.

AMBABAI V. STATE.

67 Bom. L.R. 291.

—S. 7. *See* BOMBAY PERSONAL INAMS ABOLITION ACT, 1953, S. 5.

67 Bom. L.R. 291.

—S. 10. *See* BOMBAY PERSONAL INAMS ABOLITION ACT, 1953, S. 5.

67 Bom. L.R. 291.

BOMBAY POLICE ACT (XXIII of 1951), S. 4. *See* BOMBAY POLICE ACT, 1951, S. 25.
 67 Bom. L.R. 852.

—S. 25—*Rules made under s. 29, District Police Act (IV of 1890); Bombay Police Manual 1950. Chapter XV. Ss. 535-537, 556-558—Bombay Civil Services Conduct, Discipline and Appeal Rules. Appendix II—Police officer exonerated in departmental enquiry into alleged misconduct—Whether State Government barred from ordering fresh departmental enquiry in connection with same charge of misconduct—State Government whether can institute enquiry against default-*

BOMBAY POLICE ACT, S. 25—(Contd.)

ing police officers under procedure prescribed in Appendix II of Civil Services etc. Rules.

There is no bar under the Bombay Police Act, 1951, or the Rules made thereunder preventing the State Government from ordering a fresh departmental enquiry in connection with charges of misconduct against a police officer in respect whereof he has been exonerated in a prior departmental enquiry.

In matters of departmental action taken by officers authorised under s. 25(2) of the Act for punishment of members of the subordinate ranks, the State Government can at any stage intervene under the power of superintendence reserved to it under s. 4. In those very cases, if it finds it necessary, the State Government can directly for itself proceed to exercise punitive powers and after enquiry inflict necessary punishments. There is no direct provision in the Act providing for ordering of a further fresh enquiry for punishment of members of Police Force in respect of their misconduct. That, however, does not result into a position that there is no jurisdiction in the authorities mentioned in ss. 4 and 25 to order further fresh enquiry when the facts of a particular case warrant such directions.

There is no prescribed procedure binding on the State Government in connection with punitive powers exercised by the State Government under the first part of s. 25 of the Bombay Police Act, 1951.

STATE V. GANPAT DHONDIBA.

67 Bom. L.R. 852.

—S. 26. *See* BOMBAY POLICE ACT, 1951, S. 4.
 67 Bom. L.R. 852.

—S. 27. *See* BOMBAY POLICE ACT, 1951, S. 4.
 67 Bom. L.R. 852.

—S. 161—*Criminal Procedure Code (Act V of 1898), Sec. 197—Indian Penal Code (XLV of 1860), Sec. 99—Bombay District Police Act (Bom. VII of 1867), Sec. 80—Police officials when investigating murder case wrongfully detaining and assaulting suspects—Whether such wrongful acts done under colour of duty and in excess of duty—Applicability of s. 161 of Bom. Act XXII of 1951—Distinction between s. 161, Bombay Police Act and s. 197 of Criminal Procedure Code.*

The accused who were police officials were charged with the duty of proceeding with the investigation in connection with a suspected murder case and they questioned the suspects for that purpose. In order to enable them to carry out this duty, they wrongfully detained these persons and assaulted them for the purpose of extorting statements or confessions in course of that investigation. On the question whether the acts of the accused came within the ambit of s. 161(1) of the Bombay Police Act, 1951:—

Held, that the wrongful acts of detention and assault were committed by the accused in the course of their official duty of investigation and though their impugned acts were

BOMBAY POLICE ACT, S. 161—(Contd.)

not by virtue of their duty and though they were in dereliction of their duty, they were clearly under the cloak of duty within the meaning of s. 161 of the Bombay Police Act, 1951.

Held further, that the impugned acts were in excess of the accused's duty or authority of questioning the witnesses for the purpose of investigation and consequently their acts would also be covered by the clause "in excess of duty imposed or authority conferred on them," and therefore the acts would come within the ambit of s. 161 of the Act.

ATMARAM LAXMAN v. STATE.

67 Bom. L.R. 25.

BOMBAY PROHIBITION ACT (Bom. XXV of 1949)—*Test whether liquid claimed to be liquor is in fact liquor or not—Syke's Hydrometer test whether a reliable test for this purpose.*

Syke's Hydrometer test furnishes no data to determine whether a particular liquid is liquor or contains alcohol. Once it is known that a particular liquid contains alcohol, the percentage of alcohol in that liquid may be found by the Hydrometer test. Therefore when the basic question to be determined is whether the liquid does or does not contain alcohol, the Hydrometer test alone is not the proper test to come to any such determination.

STATE v. MADHUKAR GOPINATH.

67 Bom. L.R. 226.

BOMBAY PUBLIC TRUSTS ACT (Bom. XXIX of 1950), S. 55. See BOMBAY PUBLIC TRUSTS ACT, 1950, S. 56.

67 Bom. L.R. (S.C.) 432.

—S. 22-A. See BOMBAY PUBLIC TRUSTS ACT, 1950, S. 79. 67 Bom. L.R. 49.

—S. 56—*Court giving directions under s. 56(1) to give effect to original intention of founder—Method indicated by founder cannot be carried out—Applicability of doctrine of cy pres.*

In giving directions under the first part of s. 56(1) of the Bombay Public Trusts Act, 1950, the Court should give effect to the original intention of the founder as far as that intention can be carried out. If the method indicated by the founder cannot be carried out, the Court will substitute another method *cy pres*, that is to say, as nearly as possible to the method specified by the founder.

CHHOTALAL v. CHARITY COMM.

67 Bom. L.R. (S.C.) 432.

—S. 70-A. See BOMBAY PUBLIC TRUSTS ACT, 1950, S. 79. 67 Bom. L.R. 49.

—S. 79—*Person not party to proceedings under Act finding his property registered as trust pursuant to such proceedings—Whether person precluded from filing suit for declaration of his title to property.*

BOMBAY PUBLIC TRUSTS ACT, S. 79—(Contd.)

A person who was not a party to the proceedings under the Bombay Public Trusts Act, 1950, but finds that his property is registered as trust property pursuant to the said proceedings, is not precluded under ss. 79 and 80 of the Act from filing a suit for declaration of his title to such property in a Civil Court.

A Hindu widow who had inherited her husband's property donated it to a Jain Mandir by a gift-deed executed in 1945. After her death the plaintiff as one of the reversioners filed a suit for partition and separate possession of his share in the property on the ground that the widow who had a limited estate had no right to donate the property. On the question whether the Civil Court had jurisdiction to entertain and try the suit in view of s. 80 of the Bombay Public Trusts Act, 1950:—

Held, that the question for determination in the suit was whether the widow had the authority to create the trust,

that the said question was not covered by s. 79 of the Act, and

that, therefore, the suit was not barred under s. 80 read with s. 79 of the Act.

ADINATH TIRTHANKAR MANDIR v. SHANTAPPA.

67 Bom. L.R. 49.

—S. 80. See BOMBAY PUBLIC TRUSTS ACT, 1950, S. 79. 67 Bom. L.R. 49.

BOMBAY RENTS, HOTEL & LODGING HOUSE RATES CONTROL ACT (Bom. LVII of 1947), S. 5—*Standard rent in connection with premises first let after September 1, 1940, how to be ascertained—Whether open to Court to consider circumstance of landlord having acquired land at much smaller price at anterior date than date of first letting.*

Under the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, in connection with premises first let after September 1, 1940, the standard rent should be ascertained as regards the land involved by determining fair return on the basis of the market value of the land at the time of the first letting. Even so, it would be open to the Court to consider the circumstance of the landlord having become owner of the land for a much smaller price at anterior date than the date of first letting and as to how the amount of standard rent should be affected because of that circumstance. Therefore before fixing the amount of standard rent the Court is bound to consider all the relevant circumstances of the case.

RUKMANIBAI v. SHIVNARAYAN.

67 Bom. L.R. 692.

—S. 5. See BOMBAY RENTS, HOTEL AND LODGING HOUSE RATES CONTROL ACT, 1947, S. 11. 67 Bom. L.R. 352.

—S. 11—*Standard rent whether to be fixed only by apportionment of rents—"Premises", meaning of word in s. 11(1)(c).*

BOMBAY RENTS, HOTEL & LODGING HOUSE RATES CONTROL ACT, S. 11—(Contd.)

Standard rent of a part of a building cannot exceed the standard rent of the whole building and the standard rent of the whole building cannot be more than the total of the standard rents of the different parts. Any investments made by the landlord must be considered and a fair return on such investments must be given to the landlord. If the property is wholly changed then apportionment of rent for different portions becomes a difficult problem. If it has not so changed the Court considers such apportioned rent and all such other circumstances as are brought to the notice of the Court. If no other circumstances are proved before the Court then such apportioned rent is the standard rent.

The word "premises" in s. 11(1)(c) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, is used in the wider sense meaning the whole building of which part was let then or now. The qualifying word "separately let" in s. 5(8)(b) of the Act does not apply to it.

NARAYANLAL V. VENKATRAO.

67 Bom. L.R. 352.

—S. 11. See BOMBAY RENTS, HOTEL AND LODGING HOUSE RATES CONTROL ACT, 1947, S. 5.

67 Bom. L.R. 692.

—S. 13(1)(i)—"Suitable residence", what is—Circumstances of tenant whether to be considered by Court in deciding suitability of other accommodation.

Under s. 13(1)(i) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, "suitable residence" cannot be only for one purpose; it must be suitable for the tenant's reasonable needs. Therefore, in order to decide suitability of residence for the tenant, the Court has to consider the needs of the tenant and his family and consider whether or not the other accommodation that has been acquired by the tenant is suitable for his needs.

KRISHNAJI V. DR. SHANKAR ABHYANKAR.

67 Bom. L.R. 690.

—S. 14. See BOMBAY COURT-FEES ACT, 1959, S. 6.

67 Bom. L.R. 210.

—S. 29. See CIVIL PROCEDURE CODE, 1908, O. XLI, R. 11.

67 Bom. L.R. 231.

BOMBAY RENTS, HOTEL AND LODGING HOUSE RATES CONTROL RULES, 1948, R. 8.

Rule 8 of the Bombay Rents, Hotel and Lodging House Rates Control Rules, 1948, is not *ultra vires*.

RAMKARANDAS V. BHAGWANDAS.

67 Bom. L.R. (S.C.) 779.

BOMBAY TENANCY ACT (Bom. XXIX of 1939), S. 2A—Bombay Tenancy and Agricultural Lands Act (Bom. LXVII of 1948), Secs. 4, 4A, 3, 31, 14—Transfer of Property Act (IV of 1882), Secs. 60, 76—Bombay Agricul-

BOMBAY TENANCY ACT, S. 2A—(Contd.)

tural Debtor's Relief Act (Bom. XXVIII of 1939), Secs. 45, 54(2)(i)—Bombay Agricultural Debtors Relief Act (Bom. XXVIII of 1947), Secs. 24, 32(2)(v)—Mortgagee in possession whether a deemed tenant under s. 2A of Tenancy Act of 1939—Construction of statute—General words and phrases in statute how to be construed.

A mortgagee in possession cannot be deemed to be a tenant under s. 2A of the Bombay Tenancy Act, 1939.

One of the presumptions in law is that the Legislature does not intend to make any substantial alteration in the law beyond what it explicitly declares, either in express terms or by clear implication, or, in other words, beyond the immediate scope and object of the statute. In all general matters outside those limits the law remains undisturbed. General words and phrases, therefore, however wide and comprehensive they may be in their literal sense, must usually be construed as being limited to the actual objects of the Act.

ISHWARA BHAI V. PANDURANG.

67 Bom. L.R. 558.

—S. 3A. See BOMBAY TENANCY ACT, 1939, S. 2A.

67 Bom. L.R. 558.

—S. 7. See BOMBAY TENANCY ACT, 1939, S. 2A.

67 Bom. L.R. 558.

—S. 34. See BOMBAY TENANCY ACT, 1939, S. 2A.

67 Bom. L.R. 558.

BOMBAY TENANCY AND AGRICULTURAL LANDS ACT (Bom. LXVII of 1948), S. 14. See BOMBAY TENANCY AND AGRICULTURAL LANDS ACT, 1948, S. 29.

67 Bom. L.R. 465.

—S. 29—Notice terminating tenancy for default in payment of rent served on 29-12-1954—Application for possession made on 23-3-1957—Whether application time-barred—Right to obtain possession whether accrues on expiry of period of notice or date on which default made.

The petitioner who was a tenant of certain lands made defaults in payment of rent to the opponents-owners for the years 1951-52, 1952-53 and 1953-54. A notice terminating the tenancy was served on the petitioner on December 29, 1954 and on March 23, 1957 the opponents made an application under s. 29 of the Bombay Tenancy and Agricultural Lands Act, 1948, for obtaining possession of the lands. The petitioner contended that the opponents' application was time-barred under s. 29(2) of the Act, whereas the opponents contended that as the right to obtain possession of the lands accrued to them on the expiry of the period of notice terminating the tenancy i.e. on March 29, 1955, their application was in time:—

Held, that the period of limitation must be counted from the date on which there were defaults in the payment of rent,

that the last default which took place being for the year 1953-54, the last date for pay-

BOMBAY TENANCY AND AGRICULTURAL LANDS ACT, S. 29—(Contd.)

ment of rent under s. 14 of the Act as it then stood, was April 20, 1954, which was the date on which the right to obtain possession must be deemed to have accrued to the opponents, and

that as the application for possession was made more than two years later i.e. on March 23, 1957, it was beyond the period of limitation and was consequently not maintainable. **DATTU BALA v. VINAYAKRAO.**

67 Bom. L.R. 465.

—S. 29. See **BOMBAY TENANCY AND AGRICULTURAL LANDS ACT, 1948, S. 33B.**

67 Bom. L.R. 468.

—S. 31. See **BOMBAY TENANCY AND AGRICULTURAL LANDS ACT, 1948, S. 33B.**

67 Bom. L.R. 468.

—S. 33B—*Application under s. 29 read with s. 31 pending when tenancy terminated and application under s. 33B(3) made—Subsequent order under s. 31—Applicability of s. 33B(5)(a).*

Section 33B(5)(a) of the Bombay Tenancy and Agricultural Lands Act, 1948, can only apply if the other land is resumed before the application is made under this section. It will have no application if the order under s. 31 of the Act is made after the application under s. 33B was filed, and the landlord will not be deprived of his right to have his application under s. 33B disposed of in accordance with the provisions of the Act. **BHAGIRATHIBAI v. POPAT.** **67 Bom. L.R. 468.**

—S. 65(1)—*Enquiry to be made under s. 65(1) whether should be made only by delegate of State Government himself.*

Section 65(1) of the Bombay Tenancy and Agricultural Lands Act, 1948, requires that the State Government and, therefore, its delegate may after making such enquiry as it thinks fit, declare that the management of the land shall be resumed. In what form the enquiry should be held is a matter left entirely in the discretion of the State Government or its delegate. Therefore, where the Dy. Collector is the delegate of the State Government, s. 65(1) of the Act does not require that the Dy. Collector must himself go to the agricultural fields and enquire on the spot whether they are lying fallow. He may, if he so desires, record evidence himself, or the recording of the evidence and the actual inspection on the spot can be left to some subordinate officer.

STATE v. SHIVABALAK.

67 Bom. L.R. (S.C.) 438.

—S. 83. See **BOMBAY TENANCY AND AGRICULTURAL LANDS ACT, 1948, S. 65(1).**

67 Bom. L.R. (S.C.) 438.

BOMBAY TENANCY AND AGRICULTURAL LANDS (VIDARBHA REGION AND KUTCH AREA) ACT (Bom. XCIX of 1958), S. 30(1)—Order passed by Tahsildar under s. 30(1) calling upon tenant to pay arrears of

BOMBAY TENANCY AND AGRICULTURAL LANDS (VIDARBHA REGION AND KUTCH AREA) ACT, S. 30(1)—(Contd.)

rent within three months—Whether Tahsildar can further extend time under proviso to s. 30(1) on failure of tenant to pay arrears within time originally fixed.

Under the proviso to s. 30(1) of the Bombay Tenancy and Agricultural Lands (Vidarbha Region and Kutch area) Act, 1958, the extended time is permissible to be granted to the defaulting tenant in the very first enquiry contemplated by s. 30(1) of the Act.

The proviso and the main s. 30(1) have to be read together and are part and parcel of the same scheme under which the statute permits the defaulting tenant to get an extended period for payment of arrears of rent, ordinarily as a matter of course for three months, but in case of failure to make payment due to failure of crops or similar calamity, up to a period of one year. This proviso cannot be interpreted as creating a further *locum penitentiae* without payment of rent merely because an order passed by the Tahsildar under s. 30(1) may come to be made in a year in which there may be failure of crops.

KASHIRAM v. MAHARASHTRA REV. TRIB.

67 Bom. L.R. 940.

—S. 52—*Berar Regulation of Agricultural Leases Act (XXIV of 1951), Sec. 9—Berar Agricultural Leases Rules, 1952. Rule 9—Landlord terminating tenancy under s. 9(1) of Act XXIV of 1951 and obtaining possession of land—Landlord selling land two years after obtaining possession—Application by tenant under s. 52 of Bom. Act XCIX of 1958—Whether tenant entitled to claim restoration of possession from transferee—Applicability of s. 52.*

The word "landlord" in s. 52 of the Bombay Tenancy and Agricultural Lands (Vidarbha Region and Kutch area) Act, 1958, is restricted to those landlords who had terminated the tenancy under s. 9 of the Berar Regulation of Agricultural Leases Act, 1951, and who were in possession of land on the date of the coming into force of the aforesaid Tenancy Act and on the date on which the cause of action for the ex-tenant to claim restoration of possession accrued.

Section 52 of the Tenancy Act postulates a case of the landlord who entered into possession after terminating the tenancy under s. 9 of the Berar Regulation of Agricultural Leases Act but also continued to hold the ownership of the property as a tenure-holder after the Tenancy Act came into force and was in a position to comply with the provisions thereto; s. 52 cannot apply to a person who lawfully came on land prior to the coming into force of the Tenancy Act. **SHAMJI DEOJI v. NAMDEO.**

67 Bom. L.R. 931.

BOMBAY VILLAGE PANCHAYATS ACT (Bom. III of 1959), S. 40(1)(b)—Period of six months of absence whether to be reckoned from date of meeting at which member last present.

BOMBAY VILLAGE PANCHAYATS ACT, S. 40—(Contd.)

Under s. 40(1)(b) of the Bombay Village Panchayats Act, 1958, the period of six months must be reckoned from the date of the meeting at which the member remained absent and not from the date of the meeting at which he was last present.

CHIRAK CHANDU v. KSHIRSAGAR.

67 Bom. L.R. 657.

BOMBAY VILLAGE PANCHAYAT ELECTION RULES, 1959—Ballot paper contained in ballot box of one constituency whether can be considered while counting votes in respect of another constituency.

Under the Bombay Village Panchayat Election Rules, 1959, a ballot paper contained in a ballot box for one constituency cannot be considered while counting votes of candidates from another constituency.

Therefore, if a voting paper issued to a voter from a certain ward is found in the ballot box pertaining to another ward, it cannot be taken into consideration in counting the votes of candidates who had stood for election from the former ward.

LAXMAN DAMODHAR v. SHAMRAO.

67 Bom. L.R. 41.

R. 8—Nomination paper presented through representative of candidate—Authority authorising representative to present nomination paper not produced along with nomination paper—Validity of nomination paper.

Under rule 8(1) of the Bombay Village Panchayats Election Rules, 1959, in cases in which a nomination paper is not presented personally by the candidate, the requirements of the rule will be complied with, if the authority authorising the representative to present the nomination paper on behalf of the candidate is given in writing before the nomination paper is presented, and it is immaterial whether such authority is produced or not at the time when the nomination paper is presented. It must, however, be produced before the nominations are scrutinised so as to enable the returning officer to decide whether the nomination paper was presented properly. The question whether the representative had been given the authority before the nomination paper was presented will have to be decided in each case on the facts of that case.

SHIVSHANKAR v. ANNA BALA.

67 Bom. L.R. 378.

BONUS. See WORKMEN'S COMPENSATION ACT, 1923, S. 2(m).

67 Bom. L.R. 893.

CANTONMENTS ELECTORAL RULES, 1945. R. 44—Election petition presented without depositing security deposit—Maintainability of petition.

Rule 44 of the Cantonments Electoral Rules, 1945, is mandatory and, therefore, an election petition presented without depositing the security deposit as required by the rule is not competent and cannot be heard.

DR. S. W. V. FREDRICKS v. KRISHNA.

67 Bom. L.R. 928.

CANTONMENTS ELECTORAL RULES, 1945. R. 45.—See CANTONMENT ELECTORAL RULES, 1945, R. 44.

67 Bom. L.R. 928.

CARGO. See FOREIGN EXCHANGE REGULATION ACT, 1947, S. 8(1).

67 Bom. L.R. (S.C.) 583.

C.P. & BERAR INDUSTRIAL DISPUTES SETTLEMENT ACT (XXIII of 1947).

Section 91 of the Maharashtra Co-operative Societies Act, 1960, does not operate as a bar to a dispute between a co-operative society and its employee in regard to a demand for a change in the terms of employment or for reinstatement of the employee, being decided under the C.P. & Berar Industrial Disputes Settlement Act, 1947, or the Industrial Disputes Act, 1947.

RAMBHAI JAIRAM v. PRESIDENT, VINKAR CO-OP. SOC.

67 Bom. L.R. (F.B.) 877.

C.P. AND BERAR MONEYLENDERS ACT (XIII of 1934), S. 11-B—Money-lender not registered under s. 11-B on date of loan—Whether money-lender's suit to recover loan liable to be dismissed.

A suit for the recovery of a loan advanced by a money-lender is not liable to be dismissed merely because the money-lender was not registered under s. 11-B of the C.P. and Berar Moneylenders Act, 1934, on the date of the transaction.

Section 11-H of the Act contemplates that if after the suit has been instituted, the Court finds that the plaintiff moneylender does not hold a valid registration certificate, it shall stay the suit for a reasonable time until a valid registration certificate is produced. If no such certificate is produced thereafter, the Court will not pass a decree in the plaintiff's favour.

HAJARIMAL GIRDHARILALJI v. HARINARAYAN.

67 Bom. L.R. (F.B.) 816.

S. 11-H. See C.P. AND BERAR MONEYLENDERS ACT, 1934, S. 11-B.

67 Bom. L.R. (F.B.) 816.

CENTRAL PROVINCES AND BERAR MUNICIPALITIES ACT. See MUNICIPALITIES ACT (C.P. & BERAR), 1922.

C.P. & BERAR SALES TAX ACT (XXI of 1947), S. 10—Constitution of India. Seventh Schedule. List II entry 54—Government of India Act, 1935, [25 & 26 Geo. 5, Ch. 42]. Seventh Schedule, Provincial Legislative List, entry 48—Whether notice under s. 10(1) of Act XXI of 1947 necessary before proceedings under s. 11(5) can be started against unregistered dealer—Provisions of s. 11(5) whether can be invoked for entire period for which tax liability incurred—Hire-purchase agreement, nature of law to be determined—Terms of option to purchase to buyer and of liberty reserved to him to return goods whether conclusive of nature of transaction—Transactions in substance sales or containing predominant element of sale whether "sale of goods".

A notice under s. 10(1) in Form VI of the C.P. and Berar Sales Tax Act, 1947, is not obligatory in the case of an unregistered

C.P. & BERAR SALES TAX ACT, S. 10
—(Contd.)

dealer before a proceeding for a best judgment assessment can be started against him under s. 11(5) of the Act.

The provisions of s. 11(5) of the C.P. and Berar Sales Tax Act, 1947, can be invoked only for the period or periods of a quarter or quarters which are within three years from the date of the notice issued under this section.

The proper test to determine what the true nature of a hire-purchase agreement is, is to look at the substance of the transaction, the intention of the parties in entering into that transaction, and what it is really intended by them to be. An option to purchase given to the buyer may be indicative that no sale may have been intended by the parties. The mere circumstance that an option to the buyer has been given may not necessarily involve the conclusion that it is not a sale, nor intended to be a sale. What has got to be considered is to consider the terms of the contract including the option which may have been given to the buyer under the terms of the contract and consider what is the real nature of the transaction.

In determining the true nature of a transaction of hire-purchase the term of option given to the hirer and the term of liberty reserved to him to return the goods during the continuance of the contract are terms which have an important bearing in determining the nature of the transaction; but they are not in every case conclusive of the nature of the transaction. They are of great help in determining the true nature of the transaction, but it is on a consideration of the entire terms of the contract read in the light of the surrounding circumstances that the true nature of the transaction has to be determined, and it is possible that even in cases where the option to purchase and the liberty to return the goods are reserved in the contract, the contract in its true nature may still be a contract of sale and not merely a contract of hiring with an option to purchase. It is necessary to see what is the purpose of introducing the terms as to the option to purchase and liberty to return the goods during the subsistence of the contract. If on a consideration of all the terms of the agreement, it is found that these terms have been intended for the benefit of a buyer who has not made up his mind to buy at the time when he entered into the contract, to leave him free to make up his mind at any later stage and have an option of buying or not buying the article and return it to the owner at any time he liked, then the contract will not be an agreement of sale. If, on the other hand, it is clear that the parties to the contract have intended it to be a sale although they have introduced these terms in the working out of the contract for their mutual benefit and convenience, the mere presence of the terms will not destroy the character of the contract between the parties as an agreement to buy and to sell. What is necessary to consider is whether the

C.P. & BERAR SALES TAX ACT, S. 10
—(Contd.)

transaction in substance is a transaction of sale although an element of bailment is added to it, or whether it is a contract of hiring with an added offer to the hirer to buy the hired article at his option.

Transactions which are in substance sales or which contain to a predominant extent an element of sale in them can come within the expression "sale of goods" in entry 48 in the Provincial Legislative List in the Government of India Act, 1935, or entry 54 in the State List in the Constitution of India.

COMMERCIAL CREDIT CORPN. v. STATE.

67 Bom. L.R. 138.

—S. 11. See C.P. AND BERAR SALES TAX ACT, 1947, S. 10. 67 Bom. L.R. 138.

CHEQUE. See FOREIGN EXCHANGE REGULATION ACT, 1947, S. 2. 67 Bom. L.R. 532.

CITY OF NAGPUR CORPORATION ACT (II of 1950), S. 374—*Corporation alleging damages due to it for breach of contract—Whether Corporation can recover such damages by distress and sale of property from person alleged to have caused such breach of contract.*

Section 374 of the City of Nagpur Corporation Act, 1948, does not empower the Corporation to recover damages or any other sum, which, according to the Corporation, is due to it on account of a breach of a contract entered into by the Corporation for carrying out a work on behalf of the Corporation, by distress and sale of the property of a person from whom such sum is alleged to be due.

NARENDRASINGH BHASIN & CO. v. LIMAYE.

67 Bom. L.R. 43.

CIVIL COURT, jurisdiction of.

A civil Court has no jurisdiction to entertain a suit by an employee against his employer for recovery of wages, after the expiry of the period of limitation prescribed by s. 15(2) of the Payment of Wages Act, 1936 for making an application to the Authority appointed under the Act, or after the Authority has refused to condone the delay in making such an application.

KEWALRAM v. RAM MANOHARDAS.

67 Bom. L.R. (F.B.) 45.

—**jurisdiction of.**

A Hindu widow who had inherited her husband's property donated it to a Jain Mandir by a gift-deed executed in 1945. After her death the plaintiff as one of the reversioners filed a suit for partition and separate possession of his share in the property on the ground that the widow who had a limited estate had no right to donate the property. On the question whether the Civil Court had jurisdiction to entertain and try the suit in view of s. 80 of the Bombay Public Trusts Act, 1950:—

Held, that the question for determination in the suit was whether the widow had the authority to create the trust,

CIVIL COURT—(Contd.)

that the said question was not covered by s. 79 of the Act, and

that, therefore, the suit was not barred under s. 80 read with s. 79 of the Act.

SHRI ADINATH TIRTHANKAR MANDIR v. SHANTAPPA.
67 Bom. L.R. 49.

—jurisdiction of, where no special tribunal constituted.

If a Civil Court is deprived of its jurisdiction, because the Legislature has provided for trial of the matter by a special tribunal, then if the tribunal is not constituted, the provisions made for referring the matter to the tribunal having become ineffective, the aggrieved person has the right to proceed in an ordinary Civil Court and the Civil Court will be competent to decide the matter.

RAJE VYANKATRAO v. SITALPRASAD.
67 Bom. L.R. (F.B.) 868.

CIVIL PROCEDURE CODE (Act V of 1908).
-S. 11—*Constitution of India. Arts. 226, 32—Decision of High Court on merits on writ petition under art. 226—Whether such decision operates as res judicata in subsequent suit between same parties in respect of same matter—Provisions of s. 11 whether exhaustive—Applicability of general principles of res judicata.*

On the general principle of *res judicata*, the decision of the High Court on a writ petition under art. 226 of the Constitution of India on the merits on a matter after contest will operate as *res judicata* in a subsequent regular suit between the same parties with respect to the same matter.

The provisions of s. 11 of the Civil Procedure Code, 1908, are not exhaustive with respect to an earlier decision operating as *res judicata* between the same parties on the same matter in controversy in a subsequent regular suit and on the general principle of *res judicata*, any previous decision on a matter in controversy, decided after full contest or after affording fair opportunity to the parties to prove their case by a Court competent to decide it, will operate as *res judicata* in a subsequent regular suit. It is not necessary that the Court deciding the matter formerly be competent to decide the subsequent suit or that the former proceeding and the subsequent suit have the same subject-matter. The nature of the former proceeding is immaterial.

Decisions on matters in controversy in writ proceedings under arts. 226 or 32 of the Constitution are not precluded from operating as *res judicata* in subsequent regular suits on the same matters in controversy between the same parties.

Quære: Whether the principles of constructive *res judicata* can be invoked by a party to the subsequent suit on the ground that a matter which might or ought to have been raised in the earlier proceeding was not so raised therein.

GULABCHAND v. STATE OF GUJARAT.
67 Bom. L.R. (S.C.) 673.

CIVIL PROCEDURE CODE, S. 151. See CIVIL PROCEDURE CODE, 1908, O. XXXVII.
67 Bom. L.R. (S.C.) 779.

—O. XXI, RR. 43, 46.

The distinction between rr. 43 and 46 of O. XXI of the Civil Procedure Code, 1908, is of prime importance. When the goods are in possession of a pledgee, the seizure of the goods amounts to a wrongful deprivation of the goods which the pledgee is entitled to retain in his possession.

LASALGAON CO-OP. BANK v. PRABHUDAS.
67 Bom. L.R. 823.

—O. XXI, R. 103.—*Transfer of Property Act (IV of 1882), Secs. 53A, 54—Indian Registration Act (XVI of 1908), Sec. 49—Person in possession of property under agreement for sale—Whether such person can file suit under O. XXI, r. 103 of Code against auction purchaser of same property—Whether auction purchaser person claiming under transferor within s. 53A of Transfer of Property Act.*

A suit filed under O. XXI, 103, of the Civil Procedure Code, 1908, by a person who has obtained possession of the property on the basis of a contract of sale for protecting that possession is maintainable on the basis of the doctrine of part performance under s. 53A of the Transfer of Property Act, 1882, inasmuch as such a suit is essentially of a defensive character.

Such a suit, however, is not maintainable against an auction purchaser of the same property, as the latter is not a person claiming under the transferor within the meaning of s. 53A of the Transfer of Property Act, 1882.

MARUTI GURAPPA v. KRISHNA BALA.
67 Bom. L.R. 767.

—O. XXXVII—*Bombay Rents, Hotel and Lodging House Rates Control Rules, 1948, Rule 8—Decree passed under O. XXXVII—Application to set aside decree under O. XXXVII, r. 4 dismissed as no special ground made out—Whether resort to s. 151 to set aside decree permissible—Validity of r. 8.*

Express provision is made by O. XXXVII, r. 4, of the Civil Procedure Code, 1908, for setting aside a decree passed under O. XXXVII of the Code and, therefore, if a case does not come within the provisions of that rule, there is no scope to resort to s. 151 of the Code for setting aside such a decree.

Rule 8 of the Bombay Rents, Hotel and Lodging House Rates Control Rules, 1948, is not *ultra vires*.

RAMKARANDAS v. BHAGWANDAS.
67 Bom. L.R. (S.C.) 779.

—O. XL, R. 1—*Companies Act (I of 1956), Secs. 434, 439, 433—Proceeding by way of winding-up petition whether a proceeding for realization of property within O. XL, r. 1—Court Receiver managing and administering joint family property—Whether Receiver can file winding-up petition in respect of debt due from company to joint family—Notice under s. 434 of Companies Act whether should de-*

CIVIL PROCEDURE CODE, O. XL, R. 1—
(Contd.)

mand debtor to make payment only to creditor himself.

A proceeding which is initiated by filing a winding-up petition for realising a debt due to a creditor of the company is a proceeding for realization of the property within O. XL, r. 1(1)(d) of the Civil Procedure Code, 1908.

A Court Receiver appointed in a partition suit who has assumed management and administration of the entire joint family property can file a winding-up petition in his own name in respect of a debt due from the company to the members of the joint family. In such a case under ss. 434 and 439 of the Companies Act, 1956, read with O. XL, r. 1 of the Civil Procedure Code, 1908, the Court Receiver would be a creditor of the Company.

Section 434 of the Companies Act, 1956, does not require that a notice issued under it by a creditor should make a demand upon the debtor to make payment of the debt to himself. It is competent for the creditor to direct his debtor to make payment to a third party under such notice.

HARINAGAR SUGAR MILLS v. PRADHAN.

67 Bom. L.R. (O.C.J.) 294.

—O. XLI, R. 11—*Bombay Rents, Hotel and Lodging House Rates Control Act* (Bom. LVII of 1947), Sec. 29—*High Court Act, 1861, Sec. 15—Government of India Acts, 1915 and 1935. Sec. 107(c) and Sec. 224(b)—Constitution of India, Art. 227(b)—Court summarily rejecting appeal under s. 29 of Rent Act—Whether Court must record reasons for rejecting appeal.*

The Court hearing an appeal under s. 29 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, must follow the rule of practice framed by the High Court under Civil Circular 51 of 1890, and therefore, while summarily rejecting the appeal under O. XLI, r. 11, of the Civil Procedure Code, 1908, must give reasons in short for rejecting it.

GANGABAI v. GOURISHANKAR.

67 Bom. L.R. 231.

—O. XLI, R. 27(1)(b).

Order XLI, r. 27(1)(b) of the Civil Procedure Code, 1908, does not entitle the High Court to let in fresh evidence at the appellate stage where even without such evidence it can pronounce judgment in a case. It does not entitle the appellate Court to let in fresh evidence only for the purpose of pronouncing judgment in a particular way. It is only for removing a lacuna in the evidence that the appellate Court is empowered to admit additional evidence.

MUNICIPAL CORPORATION v. LALA PANCHAM.

67 Bom. L.R. (S.C.) 782.

—O. XLI, R. 33—*Trial Court refusing to pass decree in favour of plaintiff for non-production of succession certificate—Succession certificate produced before appellate Court—Whether appellate Court can reverse decree of trial Court.*

CIVIL PROCEDURE CODE, O. XLI, R. 33—
(Contd.)

If a plaintiff fails to produce a succession certificate in the trial Court and on that ground the trial Court refuses to pass a decree in his favour to which he is otherwise entitled, the appellate Court can reverse the decree of the trial Court if the succession certificate is produced before the appellate Court.

SARJUBAI MADANGOPAL v. PUKHRAJ.

67 Bom. L.R. 926.

CIVIL SERVICES CONDUCT, DISCIPLINE AND APPEAL RULES, R. 57.

Where the original order of dismissal itself is passed by the Governor there can be no appeal to the Governor against his own order under r. 57 of the Civil Services Conduct, Discipline and Appeal Rules.

SYED MOHAMMAD v. STATE.

67 Bom. L.R. 170.

COMPANIES ACT (1 of 1956), S. 17—Application for confirmation of alteration in objects of company involving new departure from existing business—Whether Court can refuse confirmation—Present desire to carry on new business in near future whether essential for such confirmation.

Under s. 17 of the Companies Act, 1956, the additional business proposed to be carried on by a company in respect of which confirmation from the Court is sought may involve a new departure from its existing business. The additional business may be one which is different from the original business, but that by itself is not a sufficient ground to refuse confirmation. What the Court has to consider is whether the additional business is destructive of or inconsistent with the existing business. If it is not so, then it may very well be capable of being conveniently and advantageously combined with the existing businesses of the company.

Unless there is a present desire on the part of the company to carry on the new business in the near future, the Court cannot grant the application for confirmation of alteration in the objects of the company.

In the exercise of jurisdiction under s. 17 of the Act, the Court should not overlook the fact that it is for the shareholders to decide what business should be carried on by the company and it is not for the Court to tell the company what business it should carry on and how it should be carried on.

IN THE MATTER OF GAGALBHAI JUTE MILLS.

67 Bom. L.R. (O.C.J.) 723.

—S. 89—*General Clauses Act (X of 1897), Secs. 21, 14—Exemption granted by Central Government under s. 89(4) of Companies Act—Whether Central Government can revoke such exemption under s. 89(4).*

The power of exemption created under s. 89(4) of the Companies Act, 1956, can be exercised by the Central Government once and finally only, and there is no right of revocation of exemption once granted under it.

NAVA SAMAJ LTD. v. REGISTRAR OF COMPANIES.

67 Bom. L.R. 362

COMPANIES ACT, S. 106. See COMPANIES ACT, 1956, S. 89.

67 Bom. L.R. 362.

—S. 107. See COMPANIES ACT, 1956, S. 89.

67 Bom. L.R. 362.

—S. 434.

Section 434 of the Companies Act, 1956, does not require that a notice issued under it by a creditor should make a demand upon the debtor to make payment of the debt to himself. It is competent for the creditor to direct his debtor to make payment to a third party under such notice.

HARINAGAR SUGAR MILLS v. PRADHAN.

67 Bom. L.R. (O.C.J.) 294.

—S. 439. See CIVIL PROCEDURE CODE, 1908, O. XL, R. 1.

67 Bom. L.R. (O.C.J.) 294.

—S. 439. See COMPANIES (COURT) RULES, R. 96.

67 Bom. L.R. (O.C.J.) 376.

—S. 442. See COMPANIES (COURT) RULES, R. 96.

67 Bom. L.R. (O.C.J.) 376.

—S. 443. See COMPANIES (COURT) RULES, R. 96.

67 Bom. L.R. (O.C.J.) 376.

COMPANIES (COURT) RULES, R. 96—*Companies Act (1 of 1956), Secs. 439, 442, 443—Whether Company should be heard before admission of petition for its winding up.*

Under rule 96 of the Companies (Court) Rules, 1959, there is no right in a company to be issued a notice before a petition for winding-up is admitted nor before the Court fixes the date of hearing of the petition. There can, therefore, be no question of hearing the company at the stage of admission. As to giving of notice to the Company before giving directions regarding advertisements there is a discretion left in the Court.

Mere admission of a petition for winding-up will not necessarily mean that a Provisional Liquidator should follow as a matter of course.

EXTRUSION PROCESSES v. JIVABHAI.

67 Bom. L.R. (O.C.J.) 376.

COMPENSATION. See DISPLACED PERSONS (COMPENSATION AND REHABILITATION) RULES, 1955.

67 Bom. L.R. 470.

CONFESSION—Recorded by Excise Officer—Whether hit by s. 25, Evidence Act, 1872.

Confession recorded by an Officer of the Central Excise Department while enquiring into a case falling under the Sea Customs Act, 1878, under which later Act he is also appointed an officer, cannot be said to be made to a police officer and is, therefore, not hit by the provisions of s. 25 of the Indian Evidence Act.

LAXMAN PADMA v. STATE. 67 Bom. L.R. 317.

CONSTITUTION OF INDIA, ART. 14—*Government's discretion in issuing passport.*

Article 14 of the Constitution of India is expressly directed to the "State" (which includes the Government of India) and its

CONSTITUTION OF INDIA, ART. 14
—(Contd.)

effect is that, in the absence of any regulation in regard to the issue of passports, the Government of India must issue passports to all citizens who ask for them, or to none at all.

CHOITHRAM v. A. G. KAZI.

67 Bom. L.R. (O.C.J.) 544.

—ART. 20(3)—*Defence of India Rules [Part XII-A, Gold Control], Rule 126 L.*

Any step or proceeding including a Search Authorization taken under rule 126L of the Defence of India Rules, 1962 (Part XIIA, Gold Control) is of an exploratory nature for the purpose of ascertaining whether any contravention of the Rules has been committed or not and is not a step or proceeding amounting to an accusation of an offence.

In a Search Authorization issued under r. 126L of the Defence of India Rules, 1962 the mere use of the present tense for the effect "that gold is secreted" and the further fact that the same was authorised to be seized, will not convert the Search Authorization into any accusation of offence.

AMBALAL CHIMANLAL v. H. R. JOKHI.

67 Bom. L.R. 54.

—ART. 21—*Right to go abroad whether part of "personal liberty" within art. 21.*

Article 21 of the Constitution recognises and protects the right of every person to "personal liberty" of which he cannot be deprived, "except according to procedure established by law". An Indian citizen has, therefore, the right, in the absence of any law to the contrary, to obtain a passport which is necessary for the exercise of his right to go abroad, which right is clearly a part of the "personal liberty" guaranteed to him.

CHOITHRAM v. A. G. KAZI.

67 Bom. L.R. (O.C.J.) 544.

—ART. 25.

The definition of Hindu contained in Explanation II to art. 25 of the Constitution of India is expanded for the special purposes of art. 25(2)(b) and for no other.

PUNJABRAO v. DR. D. P. MESHRA.

67 Bom. L.R. (S.C.) 812.

—ART. 31.

The definition of "public purpose" in s. 3(f) of the Land Acquisition Act, 1894, as amended by the inclusion of cl. (2) therein by the Land Acquisition (Bombay Amendment) Act, 1953, is *intra vires* of art. 31 of the Constitution of India as well as s. 6 of the Land Acquisition Act.

The question whether there is a public purpose or not does not fall to be considered merely upon the recitals of the particular notification impugned, but must be gathered from the facts and circumstances before the Court.

SADRUDDIN v. J. H. PATWARDHAN.

67 Bom. L.R. 101.

CONSTITUTION OF INDIA, ART. 31-B.

Article 31B of the Constitution of India is not governed by art. 31-A of the Constitution and art. 31-B is a constitutional device to place the specified statutes beyond any attack on the ground that they infringe Part III of the Constitution.

N. B. JEEJEEBHAY V. ASST. COLLECTOR.

67 Bom. L.R. (S.C.) 575.

ARTS. 214-216. See CONSTITUTION OF INDIA, ART. 225.

67 Bom. L.R. 214.

ART. 225—*Letters Patent. Cl. 36—Judicial order passed by Single Judge of High Court—Jurisdiction of Bench of same High Court to interfere with such order by writ.*

In respect of an order passed by a Single Judge of the High Court in his judicial capacity no other Bench of the same Court has jurisdiction to issue any writ against him, in the exercise of its constitutional powers.

NARESH SHRIDHAR V. TARKUNDE J.

67 Bom. L.R. 214.

ART. 226—*Delay in presenting petition.*

Where a constitutional objection to the validity of a legislation is in question, question of mere delay will not affect the maintainability of a petition under art. 226 of the Constitution of India.

KAMALABAI V. T. B. DESAI.

67 Bom. L.R. (O.C.J.) 85.

ART. 226. See CONSTITUTION OF INDIA, ART. 225.

67 Bom. L.R. 214.

ART. 226—*Decision of High Court on merits on writ petition—Whether such decision operative as res judicata in subsequent suit between the same parties in respect of same matter.*

On the general principle of *res judicata*, the decision of the High Court on a writ petition under art. 226 of the Constitution of India on the merits on a matter after contest will operate as *res judicata* in a subsequent regular suit between the same parties with respect to the same matter.

Decisions on matters in controversy in writ proceedings under arts. 226 or 32 of the Constitution are not precluded from operating as *res judicata* in subsequent regular suits on the same matters in controversy between the same parties.

GULABCHAND V. STATE OF GUJARAT.

67 Bom. L.R. (S.C.) 673.

ART. 227. See CONSTITUTION OF INDIA, ART. 225.

67 Bom. L.R. 214.

ART. 227—*Letters Patent (Bombay), Cl. 15.*

An appeal does not lie under cl. 15 of the Letters Patent against the decision of Single Judge given in a special civil application filed under art. 227 of the Constitution of India.

JAGANNATH GANBAJI V. GULABRAO.

67 Bom. L.R. 609.

CONSTITUTION OF INDIA, ART. 233.

The power conferred on the Governor by art. 233 read with art. 310 of the Constitution and s. 16 of the General Clauses Act, 1897, to dismiss or suspend a civil servant has to be exercised in the same manner as the power of appointment under art. 233 is to be exercised, that is, in consultation with the High Court.

SYED MOHAMMAD V. STATE.

67 Bom. L.R. 170.

ART. 235—*General Clauses Act (X of 1897), Sec. 16—Government of India Act, 1935 [25 & 26 Geo. 5, Ch. 42], Secs. 253, 254, 255—Bombay Civil Services Conduct, Discipline and Appeal Rules. Appendix 1. Civil Services (Classification, Control and Appeal) Rules. Rule 57—Disciplinary jurisdiction over District Judges and Judges subordinate to them—Such jurisdiction whether vests exclusively in High Court—Whether decision regarding holding departmental inquiry or action for misconduct against aforesaid Judges vests exclusively with High Court—Power of dismissal or removal of such Judges how to be exercised—Course to be adopted where High Court finds that probable consequence of charges against judicial officer being proved would end in his dismissal or removal—Observations made by High Court on report of Enquiry Officer or on reply to show cause notice whether must be disclosed to party affected—Such observations whether privileged document.*

Under the Constitution of India the disciplinary jurisdiction over District Judges and Judges subordinate to them vests exclusively in the High Court except making an order of dismissal or removal. The decision in the matter of starting a departmental enquiry or action for misconduct against a District Judge or a Judge subordinate to a District Judge vests exclusively with the High Court. The power of dismissal and removal of District Judges and Judges subordinate to District Judges vests in the Governor. Thus exercise of the aforesaid power of dismissal and removal of District Judges by the Governor has to be in consultation with the High Court.

Where on preliminary investigation the High Court comes to the conclusion that the probable consequence of the charges against a judicial officer being proved would be one of dismissal or removal of the judicial officer, the course that should be adopted would be to refer the matter to the Governor recommending appointment of an enquiry officer which is the first stage of giving a reasonable opportunity to a public servant.

The power conferred on the Governor by art. 233 read with art. 310 of the Constitution and s. 16 of the General Clauses Act, 1897, to dismiss or suspend a civil servant has to be exercised in the same manner as the power of appointment under art. 233 is to be exercised, that is, in consultation with the High Court.

The observations of the High Court made on the report of the Enquiry Officer appointed by the Governor on the recommendation

CONSTITUTION OF INDIA, ART. 235—
(Contd.)

of the High Court to hold a departmental inquiry on a charge of corruption against a civil servant and also the observations of the High Court on the cause shown by the civil servant form part of the consultation provided for in art. 233, and the civil servant cannot make a grievance for non-disclosure of these observations to him. Such observations do not form part of the evidence which goes to establish his guilt or innocence.

The observations of the High Court would be a privileged document and, therefore, no complaint can be made of non-disclosure of that document.

Where the original order of dismissal itself is passed by the Governor there can be no appeal to the Governor against his own order under r. 57 of the Civil Services Conduct, Discipline and Appeal Rules.

The authority which is enjoined with a duty to act in a quasi judicial manner must disclose to the person against whom action has been taken material which is in the nature of evidence on the acceptance or rejection of which turns the decision as to the guilt or innocence of the person against whom an enquiry is held or against whom an action is being taken. Evidence tendered to establish a case must not be received behind the back of the person inasmuch as that would result in denial of an opportunity to that person of rebutting that evidence.

SYED MOHAMMAD V. STATE.

67 Bom. L.R. 170.

—**ART. 254(2)—Minimum Wages (Maharashtra Amendment) Act, (Mah. Act III of 1963)—State Legislature passing Act amending Central Act—State Act repealed by Central Amending Act—State Legislature again passing another amending Act re-enacting repealed law—Competency of State Legislature to enact such law.**

Article 254(2) or the proviso thereunder of the Constitution of India does not limit the powers of the State Legislature so as to preclude it from enacting on the same point again after the Parliament has once acted under the proviso to override an earlier amendment made by the State Legislature under art. 254(2).

Minimum Wages (Maharashtra Amendment) Act, 1962, is not *ultra vires* of the powers of the State Legislature.

NAGPUR HOTEL OWNERS ASSOC. V. STATE.

67 Bom. L.R. 206.

—**ART. 310.** See CONSTITUTION OF INDIA, ART. 235.

—**ART. 311.** See CONSTITUTION OF INDIA, ART. 235.

—**List I, entry 53.**

The provisions of Entry No. 53 in List I of the Seventh Schedule to the Constitution of India, and the provisions of Entries Nos. 1, 5 and 6 in List II of the Constitution do not stand in conflict with one another.

LALJI MULJI V. STATE. 67 Bom. L.R. 484.

B. L. R.-61

CONSTITUTION OF INDIA, Seventh Schedule, List II, entry No. 54.

Transactions which are in substance sales or which contain to a predominant extent an element of sale in them can come within the expression "sale of goods" in entry 48 in the Provincial Legislative List in the Government of India Act, 1935, or entry 54 in the State List in the Constitution of India. COMMERCIAL CREDIT CORPN. V. STATE.

67 Bom. L.R. 138.

Sch. VII, List II, entry No. 60.

The word "employments" in entry 60 in List II in Schedule VII to the Constitution of India includes service or occupation in which a person works for another and in which there is a relationship of employer and employee.

KISAN SUPDU V. BHUSAWAL MUNICIPALITY.

67 Bom. L.R. 286.

CONSTITUTION (SCHEDULED CASTES) ORDER, 1950. Cl. 3—Constitution of India, Art. 25—Word "profess" in cl. 3 of Order, meaning of—Definition of Hindu in Explanation II to art. 25.

The word "profess" in clause 3 of the Constitution (Scheduled Castes) Order, 1950, is used in the sense of an open declaration or practice by a person of the Hindu or the Sikh religion. Where, therefore, a person makes a public declaration that he has ceased to be a Hindu and has accepted the Buddhist religion he cannot derive any benefit from that Order and claim to be treated as one belonging to a Scheduled Caste.

In clause 3 of the Order the word "Hindu" is used in the narrower sense of the orthodox Hindu religion which recognises castes and contains injunctions based on caste distinctions.

The definition of Hindu contained in Explanation II to art. 25 of the Constitution of India is expanded for the special purposes of art. 25(2)(b) and for no other.

PUNJABRAO V. DR. D. P. MESHRA.

67 Bom. L.R. (S.C.) 812.

CONSTRUCTION OF DOCUMENT.

While construing a document, the Court has to consider the whole document and cannot refuse to give effect to a term of the document on the ground that it is placed at one place and not at the other. Therefore, as long as the agreement between the parties is clear, the place where a term of the document is found cannot matter much.

ANINHA D'COSTA V. PARVATIBAI.

67 Bom. L.R. 452.

CONSTRUCTION OF STATUTE—Circumstances in which enactment passed.

The circumstances in which an enactment has been passed is a relevant circumstance from which assistance can be sought by the Court. Therefore it is permissible for the Court to ascertain the conditions prevailing which caused the mischief to cure which the enactment was directed.

AMICHAND V. G. B. KOTAK.

67 Bom. L.R. (O.C.J.) 234.

CONSTRUCTION OF STATUTE—Delegated legislation.

When the validity of an act, rule, regulation or order made by an executive authority, to which the power has been delegated by legislation, is challenged, then, it is open to the Court to see whether the act done by the delegated authority has any connection with securing or realisation of the purposes for which the power has been conferred on the delegated authority.

In considering the degree or nature of such connection required to be established the tests laid down by the Federal Court and the Supreme Court that the connection must be "real and proximate and not far-fetched or problematical" and by the Privy Council that the connection should be "capable of being related to the authorised purposes", are not of general application. The tests laid down are in the context of the contents of the relevant legislative power which their Lordships were considering in each case.

AMICHAND v. G. B. KOTAK.

67 Bom. L.R. (O.C.J.) 234.

Draftsman using word in a sense not ordinarily used.

The intention of the Legislature must not be allowed to be defeated merely because the draftsman has used a word in a sense in which it is not ordinarily used.

CHAITRAM v. MALEGAON PANCHAYAT SAMITI.

67 Bom. L.R. (F.B.) 516.

General words and phrases how construed.

One of the presumptions in law is that the Legislature does not intend to make any substantial alteration in the law beyond what it explicitly declares, either in express terms or by clear implication, or, in other words, beyond the immediate scope and object of the statute. In all general matters outside those limits the law remains undisturbed. General words and phrases, therefore, however wide and comprehensive they may be in their literal sense, must usually be construed as being limited to the actual objects of the Act.

ISHWARA BHAI v. PANDURANG.

67 Bom. L.R. 558.

meaning of word, in cases where dictionaries differ.

Where dictionaries differ as to the meaning of a word used in a statute, a judicial interpretation of the word even in a "persuasive" precedent will be of prime importance.

SADRUDDIN v. J. H. PATWARDHAN.

67 Bom. L.R. 101.

omission of words in later statute.

Presumption as to the change of intention on the part of the Legislature on account of the variation in language between an earlier Act and a later Act is of the slightest weight especially when the omission of certain words in the later Act is of words, which were more or less superfluous in the earlier Act. In such cases the omission of words cannot necessarily be said to be indicative of a change of intention on the part of the Legislature. It is equally possible that a drafts-

CONSTRUCTION OF STATUTE—(Contd.)

man of a later Act may omit the unnecessary words.

COMMR. OF GIFT-TAX v. H.H. SIR SAHAJI.

67 Bom. L.R. 417.

Penal statute, how construed.

Where two views are reasonably possible about the provisions of a penal statute, the Court must prefer the one which imposes a lesser restriction and a lesser obligation on a citizen and which does not make a citizen liable to a penalty in a doubtful case.

ABDUS SHUKOOR v. A. M. CHATTERJEA.

67 Bom. L.R. 532.

Provision to be so construed as to make it and other provisions workable.

The Court should, if possible, so construe a provision in an Act as will make it and the other provisions of the Act workable and as will not render any of them ineffective or incapable of being carried out.

CHAITRAM v. MALEGAON PANCHAYAT SAMITI.

67 Bom. L.R. (F.B.) 516.

testing the validity of legislation.

(*Per Naik J*): There are two rival tests, one for testing the validity of a legislation passed by a Legislature whose powers have been defined and limited under the Constitution as also a legislation which makes an encroachment or an invasion upon the fundamental rights of the citizens. In judging the validity of a legislation which encroaches upon the legislative functions of another legislative body or which invades upon the fundamental rights of the citizens the test which must be followed is the test of direct, proximate and intimate nexus between the exercise of the powers and the authority conferred upon the Legislature. In a matter of this nature, the Court is the sole judge to decide as to whether the powers have been exceeded. Another, in the case of a delegated legislation where there is no inherent lack of jurisdiction in the parent body which delegates the power and where the delegate has been given wide discretion in choosing the topic. In the latter case the test that will have to be invoked is whether the exercise of legislative authority is wholly unrelated to the purpose or is not capable of being connected to the purposes for which it is meant to be exercised.

The principle that should be applied in testing the validity of the Rules framed on the authority of a section which is as widely worded as s. 3 of the Defence of India Act, 1962, is the principle enunciated by the Privy Council in *Attorney General for Canada's case* (1952 A.C. 427). When wide powers have been conferred upon the Central Government and when the Central Government have been given the right to choose the topic in respect of which legislation is to be framed, the principle that would hold good would be the principle whether the Rules framed are capable of being connected with the purposes for which they were intended. It is

CONSTRUCTION OF STATUTES—(Contd.)

not the direct, proximate and intimate connection that should be insisted upon, but some connection which would correlate the Rules with the purposes mentioned in sub-s. (1) or with the matters enumerated in sub-s. (2) of s. 3 of the Defence of India Act, 1962.

AMICHAND v. G. B. KOTAK.

67 Bom. L.R. (O.C.J.) 234.

—wider or narrower meaning given to words.

While construing a statutory provision the Court must give the words used their ordinary grammatical meaning. A word may take colour from the context, and in the setting in which it is used may have a wider or narrower meaning. The words must be construed, therefore, with due regard to the context, the circumstances under which the same came to be enacted and the mischief that was intended to be prevented.

SHALIGRAM HIRALAL v. GOVINDRAO.

67 Bom. L.R. 702.

CONTEMPT OF COURT—Contempt by defendant appearing in person—Defendant at hearing threatening plaintiff's advocate with prosecution for defamation for statements made by advocate at hearing—Whether such threat amounts to contempt of Court.

In the course of the hearing of a case in Court the defendant, who appeared in person, gave a threat to the plaintiff's advocate suggesting that prosecution for defamation would be launched against him in respect of statements made by him against the defendant which were supported by unimpeachable evidence. One prosecution for defamation for similar statements was launched by the defendant against the advocate before the threat was administered and a second prosecution for defamation against the advocate for statements made by the advocate in the aforesaid litigation was subsequently started by the defendant. On the question whether the threat held out by the defendant amounted to contempt of Court:—

Held, that the threat held out by the defendant was intended to operate upon the mind of the advocate so that he should flinch from performing his duties towards his client, the plaintiff, and

that, therefore, it amounted to contempt of Court.

A piece of conduct intended or calculated to bring pressure upon a party, which must necessarily include his advocate, not to pursue the matter according to his choice, would amount to an attempt to interfere with the administration of justice. The threat need not be direct in the sense that the contemner specifically asserted that he would take such action. It is sufficient if the context showed that the action contemplated was the action of the contemner himself.

The question as to whether the words amounted to a threat is not of the essence of the matter. What is of the essence of the matter is the course of conduct adopted by

CONTEMPT OF COURT—(Contd.)

the contemner, and if, on the whole, the conduct has a tendency to interfere with the course of administration of justice or subvert the course of justice it would amount to contempt of Court. The nexus between the threat and the demand for doing something or refraining from doing something need not be express or need be expressly stated. It is enough if from the context the link between the two is apparent.

DAMAYANTI v. S. VANBY. 67 Bom. L.R. 380.

COPARCENER—Partition—Coparcener obtaining asset at partial partition of joint Hindu family—Whether such asset source created by the family within s. 4(ii) of the Expenditure-tax Act, 1957?

What a coparcener in a joint Hindu family gets at the partition even when the partition is partial, does not constitute a source created by the Hindu undivided family within the meaning of s. 4(ii) of the Expenditure-tax Act, 1957, before its amendment in 1959.

COMMR., EXPENDITURE TAX v. LALCHAND.

67 Bom. L.R. 664.

CORRUPT PRACTICE, WHAT IS. See REPRESENTATION OF THE PEOPLE ACT, 1951, S. 123(4).

67 Bom. L.R. 702.

COUNCILLOR, right to attend the meeting of a municipality, whether fundamental right.

A right of a member or councillor to attend the meeting of a municipality is not a fundamental right as enshrined in the Constitution of India.

TENDULKAR v. MATHIAS. 67 Bom. L.R. 11.

COURT, discretion of, in ordering production of document or thing.

Section 94 of the Criminal Procedure Code, 1898, confers no right upon any party to a criminal proceeding to obtain production of any document or thing. The provisions of the section can be invoked at any stage of any investigation, inquiry or trial and they confer discretion upon the Court enabling it to order production of any document or thing. Before the Court exercises its discretion and orders the production of any document or thing under this section, it must satisfy itself that such production of the document or thing is either necessary or desirable for the purpose of the trial and in deciding that question the Court has to exercise its discretion judicially, in the sense that it must satisfy itself that the document or the thing has a bearing upon and is relevant to the case. While deciding whether production of a document or a thing is necessary or desirable or not, the Court must take into consideration the aspect of the relevancy of such document to the issues involved in the case but that is not the only consideration which would guide the Court for ordering production. Everything that is relevant to the facts in issue may not necessarily be either necessary or desirable for the purpose of a trial. Therefore, the relevancy of a

COURT—(Contd.)

statement or document or thing of which production is sought would be one of the considerations which the Court will have to take into account, while deciding the question of the necessity or desirability of production of such statement, document or thing. Before ordering production of any such statement, document or thing the Court might consider whether such statement, document or thing is being suppressed or might be tampered with or destroyed by the party in whose possession it is or might be lost altogether or whether it would come before it in a normal way without resorting to the compelling processes contained in s. 94 or 96 of Chapter VII of the Code. These considerations would also weigh with the Court in exercising its judicial discretion while deciding the question whether the production of a document or a thing is either necessary or desirable for the purposes of an inquiry or trial.

BASHIR HUSSEIN v. H. R. JOKHI.
67 Bom. L.R. 748.

———**jurisdiction of**, in the matter of granting application for alteration in the objects of company.

67 Bom. L.R. (O.C.J.) 723.

———**power to compel party to make particular kind of pleading.**

It is not open to a Court to compel a party to make a particular kind of pleading or to amend his pleading and it is also beyond its competence to virtually oblige a party to examine any particular witness.

MUNICIPAL CORPORATION v. LALA PANCHAM.
67 Bom. L.R. (S.C.) 782.

COURT RECEIVER, right to file winding up petition in his own name.

A Court Receiver appointed in a partition suit who has assumed management and administration of the entire joint family property can file a winding-up petition in his own name in respect of a debt due from the company to the members of the joint family. In such a case under ss. 434 and 439 of the Companies Act, 1956, read with O. XL, r. 1 of the Civil Procedure Code, 1908, the Court Receiver would be a creditor of the Company.

HARINAGAR SUGAR MILLS v. PRADHAN.
67 Bom. L.R. (O.C.J.) 294.

CRIMINAL PROCEDURE CODE (Act V of 1908), S. 94.

Section 94 of the Criminal Procedure Code, 1898, confers no right upon any party to a criminal proceeding to obtain production of any document or thing. The provisions of the section can be invoked at any stage of any investigation, inquiry or trial and they confer discretion upon the Court enabling it to order production of any document or thing. Before the Court exercises its discretion and orders the production of any document or thing under this section, it must

CRIMINAL PROCEDURE CODE, S. 94—(Contd.)

satisfy itself that such production of the document or thing is necessary or desirable for the purpose of the trial and in deciding that question the Court has to exercise its discretion judicially, in the sense that it must satisfy itself that the document or the thing has a bearing upon and is relevant to the case. While deciding whether production of a document of a thing is necessary or desirable or not, the Court must take into consideration the aspect of the relevancy of such document to the issues involved in the case, but that is not the only consideration which would guide the Court for ordering production. Everything that is relevant to the facts in issue may not necessarily be either necessary or desirable for the purpose of a trial. Therefore, the relevancy of a statement or document or thing of which production is sought would be one of the considerations which the Court will have to take into account, while deciding the question of the necessity or desirability of production of such statement, document or thing. Before ordering production of any such statement, document or thing the Court might consider whether such statement, document or thing is being suppressed or might be tampered with or destroyed by the party in whose possession it is or might be lost altogether or whether it would come before it in a normal way without resorting to the compelling processes contained in s. 94 or 96 of Chapter VII of the Code. These considerations would also weigh with the Court in exercising its judicial discretion while deciding the question whether the production of a document or a thing is either necessary or desirable for the purposes of an inquiry or trial.

BASHIR HUSSEIN v. H. R. JOKHI.
67 Bom. L.R. 748.

———**S. 169.** See CRIMINAL PROCEDURE CODE, 1898, S. 337. 67 Bom. L.R. 618.

———**S. 170.** See CRIMINAL PROCEDURE CODE, 1898, S. 337. 67 Bom. L.R. 618.

———**S. 173—Police Manual, Vol. III, Para 219—Request for grant of summary on report to magistrate—Whether obligatory on magistrate to hear accused before granting summary.**

On a report made to a magistrate under s. 173 of the Criminal Procedure Code, 1898, requesting grant of a summary, it is not obligatory on the magistrate to hear the accused before he decides as to which summary he should grant.

KRISHNA GUNDU v. STATE.
67 Bom. L.R. 822.

———**S. 173(4)—Accused in warrant case upon private complaint—Whether accused entitled to copies of statements and documents on which prosecution going to rely—Whether such copies to be made available on principles analogous to s. 173(4)—Prosecution witness's name disclosed after framing**

CRIMINAL PROCEDURE CODE, S. 173(4)
—(Contd.)

of charge—Maintainability of accused's application for reasonable time to prepare cross-examination of such witness—Permissibility of accused's request for roving discovery of all materials collected by prosecution during investigation—Court under s. 94 how should decide question of necessity or desirability of production of documents or thing.

Section 173(4) of the Criminal Procedure Code, 1898, is applicable only to those cases in which the investigation has been made by a police officer and that too under Chapter XIV of the Code. Therefore, an accused person against whom a warrant case has been launched on the basis of a private complaint is not entitled as a matter of right to get copies of all the statements of witnesses whom the prosecution is going to examine and of all the documents on which the prosecution is going to rely at or before the commencement of the inquiry or the trial against him. Copies of such statements and documents cannot also be made available to the accused on principles analogous to the provisions of s. 173(4) of the Code.

In a warrant case instituted upon a private complaint if the prosecution examines any important witness whose name has been disclosed for the first time after the charge was framed and if such witness gives out a long drawn out or complicated narration, it would be open to the Magistrate to entertain or grant a request for reasonable time on the part of the accused to enable him to prepare for cross-examination of such witness.

Where in such a case an offer was made by the prosecution before the Magistrate that copies of the previous statements of all witnesses who would be examined—either before a charge was framed or thereafter—would be furnished to the accused as and when the examination-in-chief of each of such witnesses was over and the documents on which the prosecution were going to rely as and when they would be tendered in evidence, *Held*, that such an offer met the ends of justice and fair trial.

A request made by an accused in a warrant case instituted upon a private complaint for roving discovery or fishing inspection of all the materials collected by the prosecution during investigation, irrespective of whether the prosecution was going to make use of such materials at the trial or not, on the ground that a study of such materials might be helpful to the accused in the preparation of his defence cannot be granted.

Section 94 of the Criminal Procedure Code, 1898, confers no right upon any party to a criminal proceeding to obtain production of any document or thing. The provisions of the section can be invoked at any stage of any investigation, inquiry or trial and they confer discretion upon the Court enabling it to order production of any document or thing. Before the Court exercises its discretion and orders the production of any document or thing under this section, it must

CRIMINAL PROCEDURE CODE, S. 173(4)
—(Contd.)

satisfy itself that such production of the document or the thing is either necessary or desirable for the purposes of the trial and in deciding that question the Court has to exercise its discretion judicially, in the sense that it must satisfy itself that the document or the thing has a bearing upon and is relevant to the case. While deciding whether production of a document or a thing is necessary or desirable or not, the Court must take into consideration the aspect of the relevancy of such document to the issues involved in the case, but that is not the only consideration which would guide the Court for ordering production. Everything that is relevant to the facts in issue may not necessarily be either necessary or desirable for the purpose of a trial. Therefore, the relevancy of a statement or document or a thing of which production is sought would be one of the considerations which the Court will have to take into account, while deciding the question of the necessity or desirability of production of such statement, document or thing. Before ordering production of any such statement, document or thing the Court might consider whether such statement, document or thing is being suppressed or might be tampered with or destroyed by the party in whose possession it is or might be lost altogether or whether it would come before it in a normal way without resorting to the compelling processes contained in s. 94 or 96 of Chapter VII of the Code. These considerations would also weigh with the Court in exercising its judicial discretion while deciding the question whether the production of a document or a thing is either necessary or desirable for the purposes of an inquiry or trial.

BASHIR HUSSEIN v. H. R. JOKHI.

67 Bom. L.R. 748.

—S. 197. See BOMBAY POLICE ACT, 1951, S. 161. 67 Bom. L.R. 25.

—S. 204. See CRIMINAL PROCEDURE CODE, 1898, S. 337. 67 Bom. L.R. 618.

—S. 204. See CRIMINAL PROCEDURE CODE, 1898, S. 173(4). 67 Bom. L.R. 748.

—S. 337—*Sea Customs Act (VIII of 1878), Secs. 167(81), 187A—Person against whom process not issued by Magistrate whether competent witness against his accomplice—Admissibility of such person's evidence—Whether police officer bound to forward to Magistrate every person who might be guilty of commission of offence—Magistrate whether bound to issue process against all persons shown to be accused—Mere admission of guilt or confession during investigation of offence whether amounts to sufficient evidence within s. 170, Criminal Procedure Code—Whether such admission or confession amounts to sufficient ground for proceeding under s. 204 of Code—Magistrate before whom complaint made by Customs Officer under s. 167(81) of Sea Customs Act—Whether Magis-*

CRIMINAL PROCEDURE CODE, S. 337—
(Contd.)

trate can proceed against person whose name not mentioned in complaint.

A person becomes an accused person only when a process is issued against him by a Magistrate. It is only such an accused who is incompetent to depose at the trial against his other co-accused in absence of any conditional grant of pardon under s. 337, Criminal Procedure Code, 1898, by a competent authority, or withdrawal of the prosecution case against him under s. 494, Criminal Procedure Code and after a formal order of discharge or acquittal having been recorded by a Magistrate in that respect. A person over whom the Magistrate does not exercise jurisdiction by issuing a process against him is a competent witness against his accomplice. There is no legal bar to the admissibility of his evidence.

It is not obligatory on a police officer to forward to a Magistrate each and every person who might be guilty of having committed an offence. A discretion has been given to him in this matter. Sections 169 and 170 of the Criminal Procedure Code read together make it clear that on completion of the investigation, the investigating officer has to consider whether there is "sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate to stand his trial." If he comes to the conclusion that there is sufficient evidence or reasonable ground to justify the forwarding of the accused then s. 170 makes it obligatory on him to forward him to a Magistrate and not otherwise.

Similarly, when an accused is forwarded to a Magistrate, and the Magistrate has taken cognizance of an offence, it is not obligatory on the Magistrate to issue process against each and every person, shown to be an accused, and forward him for trial. But, on the other hand, under the provisions of s. 204 the Magistrate has, at that stage, before issuing process, to apply his mind and, it is only if in his opinion there is sufficient ground for proceeding against the person on the material placed before him, he has to issue a process.

A mere admission of guilt or confession during the investigation of an offence does not necessarily amount to sufficient evidence within the meaning of s. 170 of the Criminal Procedure Code, requiring the Police Officer to forward an accused person to a Magistrate; neither such admission or confession necessarily amounts to a sufficient ground for proceeding against him within the meaning of s. 204 of the Code.

When a complaint is made by a Customs Officer under s. 167(81) of the Sea Customs Act, 1878, it is open to the Magistrate before whom the complaint is lodged, to proceed against a person against whom in his opinion there is sufficient material on record, even if his name is not mentioned as an accused in the complaint filed by the Customs Officer.

LAKSHMIPAT CHORARIA v. STATE.

67 Bom. L.R. 618.

CRIMINAL PROCEDURE CODE, S. 403.
See CRIMINAL PROCEDURE CODE, 1898, S. 173(4).
67 Bom. L.R. 748.

—S. 488—*Woman living separate from husband whether entitled to maintenance on ground that he has contracted marriage with another—Desertion by wife at anterior date whether disentitles her to maintenance—Marriage referred to in explanation to proviso in s. 488(3) whether refers to only second marriage.*

A wife living separate from her husband on the ground that her husband has contracted marriage with another wife, is entitled to maintenance under s. 488 of the Criminal Procedure Code, 1898.

The proper approach to the case of such a husband's offer to maintain on condition of his wife's living with him, whether made before the issue of any order under s. 488(1) of the Code, or, after the issue of the order under s. 488(3) of the Code, would be to hold that there was no valid offer by the husband to maintain his wife. And, if there was no such offer, it must be held in view of the contest raised to the claim that there had been either neglect or refusal to maintain the wife within the meaning of s. 488(1) of the Code.

Desertion by the wife at some anterior date is not made a ground under s. 488 of the Code for disallowing maintenance. It is her refusal to go back to her husband, when a genuine offer is made which disentitles her to maintenance.

The marriage referred to in the explanation to the proviso under s. 488(3) of the Criminal Procedure Code, 1898, may have been contracted at any time and will refer to the first as well as the second marriage.

SHANKERRAO v. TEJABAI. 67 Bom. L.R. 478.

—S. 494. See CRIMINAL PROCEDURE CODE, 1898, S. 337. 67 Bom. L.R. 618.

CY PRES, application of doctrine of. See BOMBAY PUBLIC TRUSTS ACT, 1950, S. 56.
67 Bom. L.R. (S.C.) 432.

DAMAGES—Measure of,—Damage to person's property—Whether person entitled to compensation or restitution.

A person to whom a wrong is done is entitled to full compensation for restoring the thing damaged to its original condition. This applies equally to a private person as to a corporation or trustee. If this is called restitution, the corporation as well as a private person would be entitled to it, but if by restitution is meant complete reconstruction irrespective of the damage done, then neither a private person nor a corporation or a trustee is entitled to complete reconstruction irrespective of the damage done.

LOTUS LINE (P) LTD. v. STATE.

67 Bom. L.R. (S.C.) 429.

DAMDUPAT—Applicability of rule of damdupat to interest payable by trustee on breach of trust with respect to trust fund—Rate of interest payable.

DAMDUPAT—(Contd.)

The rule of Damdupat does not apply with respect to the interest adjudged payable by a trustee on his committing breach of trust with respect to the trust funds in his hands.

Though a trustee who has custody of trust funds, has a pecuniary liability to make good those funds if he has used them and may, on the basis of such a liability, be said to be a debtor of a trust, yet he, as an individual, is not a borrower of the funds from the trust and cannot be said to have taken a loan from himself as a trustee in charge of the trust funds. His liability to pay interest, when ordered by the Court on equitable grounds, does not come within the provisions dealing with interest in Hindu Law, as mentioned in Colebrooke's Digest.

When a trustee in breach of his duty retains the trust money in his own hands uninvested or mixes it with his own money or property he is liable to pay interest on it. There is no fixed rate of interest which a trustee is liable to pay but in general he is charged simple interest at the rate of 4 per cent. per annum.

HUKUMCHAND v. FULCHAND.

67 Bom. L.R. (S.C.) 807.

DEATH, inference as to. See WORKMEN'S COMPENSATION ACT, 1923, S. 3.

67 Bom. L.R. 735.

DEFENCE OF INDIA ACT (LI of 1962), S. 3.

The connection that is required to be established between the rules framed and the purposes prescribed under s. 3(1) of the Defence of India Act, 1962, must be one which is real and not far-fetched, problematical hypothetical or too remote. It need not necessarily be proximate. Therefore, rules which would, if observed, serve to promote one or more of the purposes mentioned in s. 3(1) of the Act will be within the rule making power conferred on the Central Government thereunder.

AMICHAND v. G. B. KOTAK.

67 Bom. L.R. (O.C.J.) 234.

—S. 3.

Per Naik J. There is no conflict between sub-ss. (1) and (2) of s. 3 of the Defence of India Act. The clauses listed in s. 3(2) are mere elaboration of what is stated in a general way in s. 3(1). The clauses are 'statutory definitions' and would stand by themselves, unless there is any ambiguity about any of them.

AMICHAND v. G. B. KOTAK.

67 Bom. L.R. (O.C.J.) 234.

—S. 3.

Per Tambe J. No additional rule making authority or power is conferred on the Central Government in any of the clauses of s. 3(2) of the Defence of India Act, 1962. Therefore, the limitation imposed in s. 3(1) of the Act will be equally applicable and govern the rule making power of the Central Government relating to the subjects men-

DEFENCE OF INDIA ACT, S. 3—(Contd.)

tioned in cls. 1 to 57 of s. 3(2) of the Act. The power of the Central Government to make rules on any of those subjects is exercisable only for securing the purposes authorised by s. 3(1), in the event the Central Government forms an opinion that it was necessary or expedient for it to do so.

AMICHAND v. G. B. KOTAK.

67 Bom. L.R. (O.C.J.) 234.

—S. 44.

The expression "authority" in s. 44 of the Defence of India Act, 1962, does not include the Central Government, nor does s. 44 impose any fetter on the rule making power of the Central Government, but is directive relating to administrative or executive acts performed by any person or authority in execution of the powers delegated to them by the Central Government.

AMICHAND v. G. B. KOTAK.

67 Bom. L.R. (O.C.J.) 234.

DEFENCE OF INDIA RULES, 1962 [PART XIIA, GOLD CONTROL], RULES 126A-126Z—*Defence of India Act (51 of 1962), Secs. 3, 44—Constitution of India, Arts. 25, 26—Sea Customs Act (VIII of 1878), Sec. 123(2)—Rules 126A-126Z whether ultra vires rule making power of Central Government—Relation inter se between s. 3(1) and 3(2) of Defence of India Act—Connection between rules framed and purposes prescribed under parent Act, nature of—Expression "authority" in s. 44 whether includes Central Government—Construction of statute—Circumstances in which enactment passed whether could be considered by Court.*

Rules 126A to 126Z of the Defence of India Rules, 1962, are not *ultra vires* the rule making power of the Central Government and are not a colourable piece of legislation in the sense that they have been framed for some purpose other than the prescribed purposes in s. 3(1) of the Defence of India Act, 1962.

Per Tambe J. No additional or independent rule making authority or power is conferred on the Central Government in any of the clauses of s. 3(2) of the Defence of India Act, 1962. Therefore, the limitation imposed in s. 3(1) of the Act will be equally applicable and govern the rule making power of the Central Government relating to the subjects mentioned in clauses 1 to 57 of s. 3(2) of the Act. The power of the Central Government to make rules on any of those subjects is exercisable only for securing the purposes authorised by s. 3(1), in the event the Central Government forms an opinion that it was necessary or expedient for it to do so.

The connection that is required to be established between the rules framed and the purposes prescribed under s. 3(1) of the Defence of India Act, 1962, must be one which is real and not far-fetched, problematical, hypothetical or too remote. It need not necessarily be proximate. Therefore, rules which would, if observed, serve to promote

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126A-126Z—(Contd.)**

one or more of the purposes mentioned in s. 3(1) of the Act will be within the rule making power conferred on the Central Government thereunder.

When validity of an act, rule, regulation or order made by an executive authority, to which the power has been delegated by the legislation, is challenged, then, it is open to the Court to see whether the act done by the delegated authority has any connection with securing or realization of the purposes for which the power has been conferred on the delegated authority.

In considering the degree or nature of such connection required to be established the tests laid down by the Federal Court and the Supreme Court that the connection must be "real and proximate and not far-fetched or problematical" and by the Privy Council that the connection should be "capable of being related to the authorised purposes", are not of general application. The tests laid down are in the context of the contents of the relevant legislative power which their Lordships were considering in each case.

The circumstances in which an enactment has been passed is a relevant circumstance from which assistance could be sought by Court. Therefore, it is permissible for the Court to ascertain the conditions prevailing which caused the mischief to cure which the enactment was directed.

The expression "authority" in s. 44 of the Defence of India Act, 1962, does not include the Central Government, nor does s. 44 impose any fetter on the rule making power of the Central Government, but is directive relating to administrative or executive acts performed by any person or authority in execution of the powers delegated to them by the Central Government.

Per Naik J. There is no conflict between sub-ss. (1) and (2) of s. 3 of the Defence of India Act. The clauses listed in s. 3(2) are mere elaboration of what is stated in a general way in s. 3(1). These clauses make explicit what is implicit in s. 3(1). The clauses are 'statutory definitions' and would stand by themselves, unless there is any ambiguity about any of them.

There are two rival tests, one for testing the validity of a legislation passed by a Legislature whose powers have been defined and limited under the Constitution as also a legislation which makes an encroachment or an invasion upon the fundamental rights of the citizens. In judging the validity of a legislation which encroaches upon the legislative functions of another legislative body or which invades upon the fundamental rights of the citizens, the test which must be followed is the test of direct, proximate and intimate nexus between the exercise of the powers and the authority conferred upon the Legislature. In a matter of this nature, the Court is the sole judge to decide as to whether the powers have been exceeded. Another, in the case of a delegated legislation where there is

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no inherent lack of jurisdiction in the parent body which delegates the power and where the delegate has been given wide discretion in choosing the topic. In the latter case, the test that will have to be invoked is whether the exercise of the legislative authority is wholly unrelated to the purpose or is not capable of being connected to the purposes for which it is meant to be exercised.

The principle that should be applied in testing the validity of the Rules framed on the authority of a section which is as widely worded as s. 3 of the Defence of India Act, 1962, is the principle enunciated by the Privy Council in *Attorney General for Canada's case* (1952 A.C. 427). When wide powers have been conferred upon the Central Government and when the Central Government has been given the right to choose the topic in respect of which legislation is to be framed, the principle that would hold good would be the principle whether the Rules framed are capable of being connected with the purposes for which they are intended. It is not the direct, proximate and intimate connection that should be insisted upon, but some connection which would correlate the Rules with the purposes mentioned in sub-s. (1) or with the matters enumerated in sub-s. (2) of s. 3 of the Defence of India Act, 1962. Therefore, the Court can set aside the Rules if on the face of them, the Rules appear to be wholly unrelated or if it is found on examination that they are not capable of being related to any of the purposes mentioned in s. 3(1) of the Act.

AMICHAND v. G. B. KOTAK.

67 Bom. L.R. (O.C.J.) 234.

—RULES 126L, 126P—Constitution of India, Art. 20(3)—Search Authorization issued under r. 126L whether amounts to accusation of offence—Whether r. 126P(1) (ii) attracted if person fails to furnish information when interrogated under r. 126L(4).

Any step or proceeding including a Search Authorization taken under rule 126L of the Defence of India Rules, 1962 (Part XIII. Gold Control), is of an exploratory nature for the purpose of ascertaining whether any contravention of the Rules has been committed or not and is not a step or proceeding amounting to an accusation of an offence.

In a Search Authorization issued under r. 126L of the Defence of India Rules, 1962, the mere use of the present tense to the effect "that gold... is secreted" and the further fact that the same was authorised to be seized, will not convert the Search Authorization into any accusation of an offence.

The penal provisions of rule 126P(1) (ii) of the Defence of India Rules, 1962, will be attracted if a person fails to furnish information by omitting to make statements when he is interrogated by the officer concerned under r. 126L(4) of the Rules.

AMBALAL CHIMANLAL v. H. R. JOKHI.

67 Bom. L.R. 54.

DISCRETION AND DISCRIMINATION, comparison between.

A discretion given under a law, however wide it may be, cannot necessarily be equated with discrimination, and in so far as there is a possibility of the misuse of a discretion the normal presumption of law is that the authority invested with a discretionary power will act fairly and honestly and not abuse it. If it does however abuse it in a given case, that is an indication of human frailty rather than the power being discriminatory.

SADRUDDIN v. J. H. PATWARDHAN.

67 Bom. L.R. 101.

DISCRETIONARY POWER, presumption in cases of exercise of.

A discretion given under a law, however wide it may be, cannot necessarily be equated with discrimination, and in so far as there is a possibility of the misuse of a discretion the normal presumption of law is that the authority invested with a discretionary power will act fairly and honestly and not abuse it. If it does however abuse it in a given case, that is an indication of human frailty rather than the power being discriminatory.

SADRUDDIN v. J. H. PATWARDHAN.

67 Bom. L.R. 101.

DISPLACED PERSONS (COMPENSATION AND REHABILITATION) ACT (XLIV of 1954). See DISPLACED PERSONS (COMPENSATION AND REHABILITATION) RULES, 1955, R. 23.

67 Bom. L.R. 911.

DISPLACED PERSONS (COMPENSATION AND REHABILITATION) RULES, 1955, R. 18. See DISPLACED PERSONS (COMPENSATION AND REHABILITATION) RULES, 1955, R. 23.

67 Bom. L.R. 911.

RULE 19—Lineal descendants of member of joint Hindu family entitled to claim partition, who are—Father and four sons forming joint family—Applicability of rule 19(2)(b).

The condition for the exclusion of a member of the joint family contained in clause (b) of rule 19(3) of the Displaced Persons (Compensation and Rehabilitation) Rules, 1955, is intended to apply to a case where a joint family consists of more than two persons where each one of them is entitled to claim partition and the members sought to be excluded are lineal descendants of one of such members. It is only in such case that it can be said that they were lineal descendants of a member who was entitled to claim partition against another.

ARJANDAS DAYARAM v. BAJAJ.

67 Bom. L.R. 721.

R. 20. See DISPLACED PERSONS (COMPENSATION AND REHABILITATION) RULES, 1955, R. 23.

67 Bom. L.R. 911.

R. 22. See DISPLACED PERSONS (COMPENSATION AND REHABILITATION) RULES, 1955, R. 23.

67 Bom. L.R. 911.

RULE 23—Displaced Persons (Compensation and Rehabilitation) Act (XLIV of**DISPLACED PERSONS (COMPENSATION AND REHABILITATION) RULES—(Contd.)**

1954), Secs. 8, 20, 40—*Applicability of r. 23—Whether it applies to agricultural land—Amendment of heading of Chap. VIII of Rules whether retrospective.*

Rule 23 of the Displaced Persons (Compensation and Rehabilitation) Rules, 1955, applies only to such classes of properties as were dealt with by rule 22 of the Rules but which could not be allotted under that rule, namely, urban houses, shops etc.

The amendment made in the heading of Chapter VIII of the Rules is not retrospective.

Quaere: Whether Government can by notification amend rule 18 of the Rules so as to exclude agricultural land in rural areas only, retrospectively.

Whether Rule 65 is *ultra vires* in that it is in contravention of s. 8 of the Displaced Persons (Compensation and Rehabilitation) Act, 1954.

GAGANDAS HOTCHAND v. BAJAJ.

67 Bom. L.R. 911.

RULE 39—Whether word “may” in rule 39 mean “shall”—Claimant whether can claim open plot as matter of right.

Under rule 39 of the Displaced Persons (Compensation and Rehabilitation) Rules, 1955, there is no obligation to sell an open plot by public auction; it is open to the appropriate authority to allot it if he so deems proper. But a claimant cannot claim as a matter of right that an open plot must be allotted to him. The authority has a discretion in the matter and he may pay compensation by the allotment of a Government plot, but he is not bound to do so.

RAGHUMAL v. TIKAMDAS. 67 Bom. L.R. 470.

R. 65. See DISPLACED PERSONS (COMPENSATION AND REHABILITATION) RULES, 1955, R. 23.

67 Bom. L.R. 911.

DIARY, maintenance of. See EVIDENCE ACT, 1872, S. 25.

67 Bom. L.R. 317.

DISTRICT JUDGE, disciplinary jurisdiction of High Court over. See CONSTITUTION OF INDIA, ART. 235.

67 Bom. L.R. 170.

DOCUMENT, construction of. See CONSTRUCTION OF DOCUMENT.

67 Bom. L.R. 452.

ELECTRICITY ACT (IX of 1919), S. 24(1)—Whether s. 24(1) applies to a Board.

The effect of s. 26 of the Electricity (Supply) Act, 1948, is that if the Board has laid supply mains and has commenced to supply the energy then it becomes a licensee to that extent and acquires all the powers and obligations under the Indian Electricity Act, 1910, and all the provisions of the latter Act apply except such as are excluded. Section 24 is not excluded and, therefore, s. 24(1) applies to the case of a supply of electrical energy by the Board to a consumer and the Board can discontinue the supply only if the conditions of s. 24(1) are satisfied, i.e. there

ELECTRICITY ACT, S. 24(1)—(Contd.)

must be neglect on the part of the consumer to pay the electrical charges.

MAHARASHTRA STATE E. Bd. v. MADHUSUDAN.
67 Bom. L.R. 919.

—S. 33—*Indian Electricity (Amendment) Act (XXXII of 1959), Sec. 24—General Clauses Act (X of 1897), Sec. 24—Constitution of India, Art. 20—Notification issued under s. 33 prior to its amendment whether actually and factually in force at date of its amendment—Notice required to be given under notification whether must be in writing—Meaning of expression “unless it is otherwise expressly provided” in s. 24, General Clauses Act.*

The notification issued by the Government of Bombay on February 9, 1953, under s. 33 of the Indian Electricity Act, 1910, before its amendment, was actually and factually in force on the date on which s. 33 as amended by the Indian Electricity (Amendment) Act, 1959, came into force.

The notification to the extent that it requires notice to be given regarding the particulars mentioned therein must be considered to be an absolute requirement which must be complied with. But to the extent to which it says that it must be in writing, it must be treated to be directory and not absolute. Substantial compliance with the requirement of notice, if proved, must be treated as sufficient compliance for the purpose of s. 33 of the Indian Electricity Act, 1910.

The expression “unless it is otherwise expressly provided” in s. 24 of the General Clauses Act, 1897, means that the notifications, rules, etc. under the repealed Act shall continue in force provided they are not inconsistent with the re-enacted provision, unless there is an express provision in the re-enacted legislation to the effect that they shall not so continue in force.

POONA ELECTRIC SUPPLY v. STATE.

67 Bom. L.R. 534.

ELECTRICITY (SUPPLY) ACT (LIV of 1948), S. 26—Indian Electricity Act (IX of 1910), Sec. 24(1)—Whether s. 24(1) of Act IX of 1910 applies to a Board.

The effect of s. 26 of the Electricity (Supply) Act, 1948, is that if the Board has laid supply mains and has commenced to supply the energy then it becomes a licensee to that extent and acquires all the powers and obligations under the Indian Electricity Act, 1910, and all the provisions of the latter Act apply except such as are excluded. Section 24 is not excluded and, therefore, s. 24(1) applies to the case of a supply of electrical energy by the Board to a consumer and the Board can discontinue the supply only if the conditions of s. 24(1) are satisfied, i.e. there must be neglect on the part of the consumer to pay the electrical charges.

MAHARASHTRA STATE E. Bd. v. MADHUSUDAN.
67 Bom. L.R. 919.

EMPLOYEES' PROVIDENT FUNDS ACT (XIX of 1952), S. 10(1)—Presidency-towns Insolvency Act (III of 1909), Sec. 17—Amount

EMPLOYEES' PROVIDENT FUNDS ACT, S. 10(1)—(Contd.)

in Fund standing to credit of member adjudicated insolvent and not paid to him—Whether Official Assignee can claim it.

Under s. 10(1) of the Employees' Provident Funds Act, 1952, so long as an amount stands in the Fund to the credit of a member who is adjudicated insolvent and has not been paid to such member, the amount does not vest in the official assignee and he cannot lay claim to it. The immunity given by s. 10(1) of the Act will not continue after the amount has been paid to the insolvent member.

PEARLY ANDREW v. OFFICIAL ASSIGNEE.
67 Bom. L.R. (O.C.J.) 654.

EVIDENCE ACT (I of 1872), S. 8, Explanation 1—Statement explaining conduct, admissibility of.

The accused was charged for an offence under s. 376 of the Indian Penal Code for rape on a young girl of four years of age. There was no direct evidence in regard to the offence but the following statement was made by the mother of the girl in her evidence: “I saw her answering call of nature outside in the open and on seeing me she began crying and on questioning she told me that accused had placed her on his lap and blood came out.” It was held that the latter part the statement which was by way of explanation of her crying was admissible under Explanation 1 to s. 8 of the Indian Evidence Act, 1872.

STATE v. HIRAMAN PUNJA.

67 Bom. L.R. 16.

—S. 24. See EVIDENCE ACT, 1872, S. 25.
67 Bom. L.R. 317.

—S. 25—*Sea Customs Act (VIII of 1878), Secs. 171A, 6, 187A, 167(81)—Central Excise and Salt Act (I of 1944), Sec. 21—Land Customs Act (XIX of 1924), Sec. 3—Criminal Procedure Code (Act V of 1898), Secs. 164, 154-176—Indian Penal Code (XIV of 1860), Sec. 191—Constitution of India, Art. 20—Excise officer discharging duties under Sea Customs Act whether police officer within s. 25, Evidence Act—Whether Central Government can appoint officers of customs by issuing notification—Person in authority merely explaining provisions of s. 171A of Sea Customs Act to accused before recording his confession—Such confession whether hit by s. 24, Evidence Act—Whether service of summons a condition precedent to recording of statement under s. 171A—Evidence of accomplice whether can be taken as corroboration to evidence of another accomplice—Confession of co-accused whether can be relied on in considering evidence of accomplice—Whether statements made by person under s. 171A affected by art. 20(3) of Constitution—Customs Officers whether bound to maintain diary.*

An officer of the Central Excise Department is not a police officer within the meaning of s. 25 of the Indian Evidence Act, 1872, for all purposes, though he may be such a police officer so far as he conducts an inves-

EVIDENCE ACT, S. 25—(Contd.)

tigation in respect of offences under the Central Excise and Salt Act, 1944. Therefore, an Excise officer while discharging his duties under the Sea Customs Act, 1878, is not a police officer within s. 25 of the Indian Evidence Act.

Confession recorded by an officer of the Central Excise Department while enquiring into a case falling under the Sea Customs Act, 1878, under which latter Act he is also appointed an officer, cannot be said to be made to a police officer and is, therefore, not hit by the provisions of s. 25 of the Indian Evidence Act.

Under s. 6 of the Sea Customs Act, 1878, it is open to the Central Government to adopt any mode of appointment of officers of customs. It may make a general order of appointment by issuing a notification, or it may make appointment by issuing an order individually appointing any individual person named in the order to be an officer.

Section 24 of the Indian Evidence Act, 1872, contemplates that the threat referred to therein must emanate from the person in authority. Therefore, where a person in authority before recording the confession of an accused merely explains to him the provisions of s. 171A of the Sea Customs Act, 1878, the confession is not hit by the provisions of s. 24 of the Indian Evidence Act as it cannot be said to have been obtained by a threat within the meaning of s. 24. Further, in merely explaining the provisions of s. 171A of the Sea Customs Act to the accused making the confession there is no threat given by the person in authority recording the confession which could have raised any hope in the mind of the accused or led him to suppose that he was to gain any advantage in reference to the proceeding against him relating to the offence of smuggling.

Section 171A of the Sea Customs Act, 1878, does not contemplate the service of a summons as a condition precedent enabling the Customs Officer to record the statement under s. 171A of the Act.

It is not safe to accept the evidence of an accomplice as corroboration to the evidence of another accomplice and the confession of a co-accused as a piece of evidence lending assurance to the mind of the Court in considering the evidence of the accomplice. There may, however, be exceptional cases where evidence of an accomplice could be taken as corroboration to the evidence of another accomplice and the confession of a co-accused could be relied on for lending assurance to the mind of the Court. In considering the question as to whether a conviction could be founded on a testimony of the accomplice without corroboration, the latter part of s. 114, ill (b) of the Indian Evidence Act, 1872, is relevant.

A person examined under s. 171A of the Sea Customs Act, 1878, does not stand in the character of an accused person inasmuch as there is no formal accusation made against him by any person at that time. The fact

EVIDENCE ACT, S. 25—(Contd.)

that subsequent to the making of the statement he becomes an accused person is not sufficient to bring the statement within the mischief of art. 20(3) of the Constitution of India.

There is no provision in the Sea Customs Act, 1878, requiring the Customs officer to maintain any diary.

LAXMAN PADMA v. STATE. 67 Bom. L.R. 317.

—S. 108.

Section 108 of the Indian Evidence Act is not exhaustive of the circumstances in which death can be inferred. There may be cases in which death cannot be presumed under s. 108 of the Act, as for example, cases in which a person has not been heard of for less than seven years and yet the fact of death can be inferred from the circumstances of the case.

IBRAHIM v. MACKINNON MACKENZIE & Co. 67 Bom. L.R. 735.

—S. 114. See EVIDENCE ACT, 1872, S. 25. 67 Bom. L.R. 317.

EXPENDITURE on scientific research. See INCOME-TAX ACT, 1922, S. 10(2) (xi). 67 Bom. L.R. 792.

EXPENDITURE-TAX ACT (XXIX of 1957), S. 4(ii)—Asset obtained by coparcener at partial partition of joint Hindu family—Whether such asset source created by family within s. 4(ii).

What a coparcener in a joint Hindu family gets at the partition, even when the partition is partial, does not constitute a source created by the Hindu undivided family within the meaning of s. 4(ii) of the Expenditure-tax Act, 1957, before its amendment in 1959.

COMMR. EXPENDITURE TAX v. LALCHAND. 67 Bom. L.R. 664.

FACTORIES ACT (LXIII of 1948), S. 101—Whether either manager or occupier of factory entitled to prove that the other is guilty of offence under Act.

Under s. 101 of the Factories Act, 1948, it is open either to the manager or the occupier of a factory to allege and prove that it was the other who was guilty of an offence punishable under the Act.

STATE v. A. H. KHAN. 67 Bom. L.R. 566.

FOREIGN EXCHANGE REGULATION ACT (VII of 1947), S. 2(d)—Defence of India Rules. Rule 91(1)—Cheque drawn in Indian currency payable in Indian as well as foreign currency—Whether such cheque foreign exchange within s. 2(d)—Construction of statute—Two views reasonably possible of provisions of penal statute—Court should prefer which.

A cheque or a bill of exchange expressed or drawn in Indian currency, which is payable in Indian as well as in foreign currency, is not foreign exchange within the meaning of the Foreign Exchange Regulation Act, 1947.

FOREIGN EXCHANGE REGULATION ACT, S. 2—(Contd.)

Where two views are reasonably possible about the provisions of a penal statute, the Court must prefer the one which imposes a lesser restriction and a lesser obligation on a citizen and which does not make a citizen liable to a penalty in a doubtful case.

ABDUS SHUKOOR v. A. M. CHATTERJEE.

67 Bom. L.R. 532.

—S. 4(1). See FOREIGN EXCHANGE REGULATION ACT, 1947, S. 2(d).

67 Bom. L.R. 532.

—S. 5. See FOREIGN EXCHANGE REGULATION ACT, 1947, S. 2(d).

67 Bom. L.R. 532.

—S. 8(1).

There can be separate convictions for an offence under s. 167(81) of the Sea Customs Act, 1878, and an offence under s. 8(1) read with s. 23(1-A) of the foreign Exchange Regulation Act, 1947, in relation to the same article or thing.

JAGANNATH SONU v. STATE.

67 Bom. L.R. 38.

—S. 8(1)—Defence of India Rules 1962. Rule 141—*Mens rea whether an essential ingredient in respect of offence under s. 23(1-A)*—Publication of rules of statute, what constitutes—Whether necessary for Indian law to be published outside country to operate in Indian territory—"Cargo", term used in Reserve Bank notification of November 8, 1962, connotation of.

Under s. 8(1) read with s. 24(1) of the Foreign Exchange Regulation Act, 1947, there is no scope for the invocation of the rule (of *mens rea*) that besides the mere act of voluntarily bringing gold into India any further mental condition is postulated as necessary to constitute an offence of the contravention referred to in s. 23(1-A) of the Act.

The very concept of "bringing" or "sending" would exclude an involuntary bringing or an involuntary sending. Thus, if without the knowledge of a person a packet of gold is slipped into his pocket it is possible to accept the contention that such a person did not "bring" the gold into India within the meaning of s. 8(1) of the Act. Similar considerations would apply to a case where the aircraft on a through flight which did not include any landing in India has to make a forced landing in India—owing say to engine trouble.

Where there is a statutory requirement as to the mode or form of publication and they are such that, in the circumstances, the Court holds to be mandatory, a failure to comply with those requirements might result in there being no effective order the contravention of which could be the subject of prosecution but where there is no statutory requirement the rule is that it is necessary that it should be published in the usual form i.e., by publication within the country in such media as is generally adopted to notify to all the persons concerned the making of the rules.

FOREIGN EXCHANGE REGULATION ACT, S. 8(1)—(Contd.)

In most of the Indian statutes, including the Foreign Exchange Regulation Act, 1947, there is provision for the rules made being published in the Official Gazette. Therefore, publication in the Gazette of India is the ordinary mode of bringing a rule or subordinate legislation to the notice of the persons concerned.

For an Indian law to operate and be effective in the territory where it operates viz., the territory of India, it is not necessary that it should either be published or be made known outside the country.

The knowledge of the existence or content of a law by an individual will not always be relevant, save on the question of the sentence to be imposed for its violation.

The term "cargo" occurring in the notification of the Reserve Bank of India published on November 8, 1962, is used as contra-distinguished from personal luggage in the law relating to the carriage of goods, the latter meaning as whatever a passenger takes with him for his personal use or convenience, either with reference to his immediate necessities or for his personal needs at the ends of his journey.

Per Subba Rao J. It is a well settled principle of common law that *mens rea* is an essential ingredient of a criminal offence. A statute can exclude that element, but it is a sound rule of construction adopted in England and also accepted in India to construe a statutory provision creating an offence in conformity with the common law rather than against it unless the statute expressly or by necessary implication excludes *mens rea*. There is a presumption that *mens rea* is an essential ingredient of a statutory offence; but this may be rebutted by the express words of a statute creating the offence or by necessary implication. But the mere fact that the object of a statute is to protect welfare activities or to eradicate grave social evils is in itself not decisive of the question whether the element of guilty mind is excluded from the ingredients of the offence. It is also necessary to enquire whether a statute by putting a person under strict liability help him to assist the State in the enforcement of the law; can he do anything to promote the observance of the law? A person who does not know that gold cannot be brought into India without a licence or is not bringing into India any gold at all cannot possibly do anything to promote the observance of the law. *Mens rea* by necessary implication can be excluded from a statute only where it is absolutely clear that the implementation of the object of a statute would otherwise be defeated and its exclusion enables those put under strict liability by their act or omission to assist the promotion of the law. The nature of *mens rea* that will be implied in a statute creating an offence depends upon the object of the Act and the provisions thereof.

STATE v. MAYER HANS GEORGE.

67 Bom. L.R. (S.C.) 583.

FOREIGN EXCHANGE REGULATION ACT, S. 23(1-A). See FOREIGN EXCHANGE REGULATION ACT, 1947, S. 8(1).

67 Bom. L.R. (S.C.) 583.

———S. 24(1). See FOREIGN EXCHANGE REGULATION ACT, 1947, S. 8(1).

67 Bom. L.R. (S.C.) 583.

GENERAL CLAUSES ACT (X of 1897), S. 16. See CONSTITUTION OF INDIA, ART. 235.

67 Bom. L.R. 170.

———S. 24.

The expression "unless it is otherwise expressly provided" in s. 24 of the General Clauses Act, 1897, means that the notifications, rules etc. under the repealed Act shall continue in force provided they are not inconsistent with the re-enacted provision, unless there is an express provision in the re-enacted legislation to the effect that they shall not so continue.

POONA ELECTRIC SUPPLY v. STATE.

67 Bom. L.R. 534.

GIFT-TAX ACT (XVIII of 1958), S. 5—Indian Trusts Act (II of 1882), Sec. 3—Assessee executing deed of settlement under which his wife receiving income of trust fund during her life—Whether transfer of such interest in fund a gift—Assessee whether entitled to exemption under s. 5(1)(viii) of Gift-tax Act—Practice—Reference—Larger relief claimed by assessee before Tribunal—Whether assessee in reference to High Court precluded from claiming smaller relief on same provision of law.

Under a deed of settlement executed in 1958 the wife of the settlor-assessee acquired the beneficial interest to receive interest and income of the trust fund during her life-time. Thereafter the property was to go to his children and others as provided in the deed. On the question whether the assessee was entitled to exemption under s. 5(1)(viii) of the Gift-tax Act, 1958, to the extent of the value of the gift to his wife if any:—

Held, that by creating the settlement the assessee had transferred interest in the trust fund to his wife and as it was voluntary and without consideration it was a gift of an interest in the trust fund, and

that the assessee was entitled to the exemption under s. 5(1)(viii) of the Act to the extent of the value of the gift to his wife as ascertained in accordance with s. 6 of the Act and the rules framed under s. 6(3).

When a larger relief is claimed by the assessee before the Tribunal on the strength of a certain provision of law, he is not prevented from arguing in a reference that he is entitled to a lesser relief under the same provision of law on the ground that the claim for a smaller relief is not one arising out of the order of the Tribunal.

COMMR., GIFT-TAX v. G. G. MORARJI.

67 Bom. L.R. 406.

———S. 5(1)(v)—Initial gifts made for constituting fund for charitable purposes—Whether such gifts entitled to exemption—Indian Income-tax Act (XI of 1922), Sec. 12B.

GIFT-TAX ACT, S. 5(1)(v)—(Contd.)

Under s. 5(1)(v) of the Gift Tax Act, 1958, the initial gifts which are made for the purpose of starting or constituting a fund for the charitable purposes of the kinds specified in the section will be entitled of exemption under it in the same manner in which the subsequent gifts to the fund will be.

COMMR., GIFT-TAX v. YOGENDRA MAFATLAL.

67 Bom. L.R. 413.

———S. 5(1)(vi)—Indian Income-tax Act (XI of 1922), Sec. 4(3), 15B—Wealth-tax Act (XXVII of 1957), Sec. 5(1)—Expenditure-tax Act (XXIX of 1957), Sec. 5(m)—"Charitable purpose" in s. 5(1)(vi) of Gift-tax Act whether includes "religious purpose"—Construction of statute—Omission of words in later Act which were superfluous in earlier Act—Whether such omission indicative of change of intention.

The expression "charitable purpose" in s. 5(1)(vi) of the Gift Tax Act, 1958, includes "religious purpose".

Presumption as to the change of intention on the part of the Legislature on account of the variation in language between an earlier Act and a later Act is of the slightest weight especially when the omission of certain words in the later Act is of words, which were more or less superfluous in the earlier Act. In such cases the omission of words cannot necessarily be said to be indicative of a change of intention on the part of the Legislature. It is equally possible that a draftsman of a later Act may omit the unnecessary words.

COMMR., GIFT-TAX v. H.H. SIR SAHAJI.

67 Bom. L.R. 417.

———S. 6. See GIFT-TAX ACT, 1958, S. 5.
67 Bom. L.R. 406.

GOVERNMENT OF INDIA ACT, 1935 (25 & 26 Geo. 5, Ch. 42), S. 299.

The expression "compensation" in s. 299 of the Government of India Act, 1935, means a "just equivalent" of what the owner has been deprived of.

N. B. JEEJEEBHoy v. ASST. COLLECTOR.

67 Bom. L.R. (S.C.) 575.

———Provincial Legislative List, entry 48.

Transactions which are in substance sales or which contain to a predominant extent an element of sale in them can come within the expression "sale of goods" in entry 48 in the Provincial Legislative List in the Government of India Act, 1935, or entry 54 in the State List in the Constitution of India.

COMMERCIAL CREDIT CORPN. v. STATE.

67 Bom. L.R. 138.

GOVERNOR. See CONSTITUTION OF INDIA, ART. 235.
67 Bom. L.R. 170.

HIGH COURT—Disciplinary jurisdiction with regard to District Judge and Judges subordinate to them.

Under the Constitution of India the disciplinary jurisdiction over District Judges and

HIGH COURT—(Contd.)

Judges subordinate to them vests exclusively in the High Court except making an order of dismissal or removal. The decision in the matter of starting a departmental enquiry or action for misconduct against a District Judge or a Judge subordinate to a District Judge vests exclusively with the High Court. The power of dismissal and removal of District Judges and Judges subordinate to District Judges vests in the Governor. The exercise of the aforesaid power of dismissal and removal of District Judges by the Governor has to be in consultation with the High Court.

Where on preliminary investigation the High Court comes to the conclusion that the probable consequence of the charges against a judicial officer being proved would be one of dismissal or removal of the judicial officer, the course that should be adopted would be to refer the matter to the Governor recommending appointment of an enquiry officer which is the first stage of giving a reasonable opportunity to a public servant.

The observations of the High Court made on the report of the Enquiry Officer appointed by the Governor on the recommendation of the High Court to hold a departmental inquiry on a charge of corruption against a civil servant and also the observations of the High Court on the cause shown by the civil servant form part of the consultation provided for in art. 233, and the civil servant cannot make a grievance for non-disclosure of these observations to him. Such observations do not form part of the evidence which goes to establish his guilt or innocence.

The observations of the High Court would be a privileged document and, therefore, no complaint can be made of non-disclosure of that document.

SYED MOHAMMAD v. STATE.

67 Bom. L.R. 170.

jurisdiction.

In respect of an order passed by a Single Judge of the High Court in his judicial capacity no other Bench of the same Court has jurisdiction to issue any writ against him, in the exercise of its constitutional powers.

NARESH SHRIDHAR v. TARKUNDE J.

67 Bom. L.R. 214.

jurisdiction of, in Workmen's Compensation Cases.

Under the first proviso of s. 30(1) of the Workmen's Compensation Act, 1923, the High Court has no jurisdiction to interfere with the decisions of the Commissioner if the questions raised in appeal are pure questions of fact, or even if the appeal raises but a settled question of law.

IBRAHIM v. MACKINON MACKENZIE & Co.

67 Bom. L.R. 735.

power to let in fresh incidence.

Order XLI, r. 27(1)(b) of the Civil Procedure Code, 1908, does not entitle the High Court to let in fresh evidence at the appellate stage where even without such evidence it can

HIGH COURT—(Contd.)

pronounce judgment in a case. It does not entitle the appellate Court to let in fresh evidence only for the purpose of pronouncing judgment in a particular way. It is only for removing a lacuna in the evidence that the appellate Court is empowered to admit additional evidence.

MUNICIPAL CORPORATION v. LALA PANCHAM.

67 Bom. L.R. (S.C.) 782.

HINDU. See CONSTITUTION (SCHEDULED CASTES) ORDER, 1950, Cl. 3.

67 Bom. L.R. (S.C.) 812.

HINDU LAW.

1. **Adoption.** See HINDU ADOPTIONS AND MAINTENANCE ACT.
2. **Marriage.** See HINDU MARRIAGE ACT.
3. **Succession.** See HINDU SUCCESSION ACT.

HINDU ADOPTIONS AND MAINTENANCE ACT (LXXVIII of 1956), S. 11(vi)—Widow adopting a son—Whether adoptee adopted son of deceased husband.

Under ss. 11(vi) and 12 of the Hindu Adoptions and Maintenance Act, 1956, the necessary consequence of a widow adopting a son would be that the adoptee would be the adopted son of the deceased husband.

The true effect of these provisions of the Act is that, when either of the spouses adopts a child, all the ties of the child in the family of his or her birth become completely severed, and these are all replaced by those created by the adoption in the adoptive family. This would be so for each and all different purposes. Therefore, the result of adoption by either spouses is that the adoptive child becomes child of both spouses.

ANKUSH NARAYAN v. JANABAI.

67 Bom. L.R. 864.

—S. 12. See HINDU ADOPTIONS AND MAINTENANCE ACT, 1956, S. 11(vi).

67 Bom. L.R. 864.

HINDU MARRIAGE ACT (XXV of 1955), S. 10(1)(b)—Petition for judicial separation on ground of cruelty—Defence of insanity, availability of.

In a petition for judicial separation under the Hindu Marriage Act, 1955, on the ground of cruelty the defence of insanity is not available even if the offending spouse is not capable of knowing what he is doing if the conduct is held to be objectively cruel regardless of motive or intention.

The petitioner filed a petition under the Hindu Marriage Act, 1955, for judicial separation on the ground *inter alia* that the respondent, her husband, had treated her with such cruelty as to cause reasonable apprehension in her mind that it was harmful for her to live with the respondent. It was found at the trial that the respondent had to be sent on three different occasions to a mental hospital for treatment, the last of which was

HINDU MARRIAGE ACT, S. 10(1)(b)—
(Contd.)

necessitated as he had attempted to strangle his minor son and his brother-in-law. It was also established that he was suffering from schizophrenia and that he was not aware of the acts he was committing. The respondent's defence was that whatever he did, he did under fits of insanity:—

Held, that the schizophrenia from which the respondent had a predilection to suffer periodically was no defence to the plea of cruelty put forward by the petitioner;

that the question whether the respondent was capable of forming an intention to be cruel or actually intended to be cruel was a matter of no consequence in this case; and

that as there was no knowing when the respondent would relapse into a fit of schizophrenia, the apprehensions entertained by the petitioner were well-founded and she was, therefore, entitled to a decree for judicial separation.

TRIMBAK NARAYAN v. KUMUDINI TRIMBAK.
67 Bom. L.R. 837.

—S. 17—*Indian Penal Code (XLV of 1860), Secs. 494, 495—"Solemnized", meaning of word in s. 17.*

It is essential for the purpose of s. 17 of the Hindu Marriage Act, 1955, that the marriage to which s. 494 of the Indian Penal Code, 1860, applies on account of the provisions of the Act, should have been celebrated with proper ceremonies and in due form. Merely going through certain ceremonies with the intention that the parties be taken to be married, will not make the ceremonies prescribed by law or approved by any established custom.

BHAURAO v. STATE. 67 Bom. L.R. (S.C.) 423.

HINDU SUCCESSION ACT (XXX of 1956), S. 4(2). See HINDU SUCCESSION ACT, 1956, S. 14(1).
67 Bom. L.R. 612.

—S. 14(1)—*Madhya Pradesh Land Revenue Code (II of 1955), Secs. 151, 152—Central Provinces and Berar Hindu Women's Rights to Property (Extension to Agricultural Land) Act (C. P. & Berar Act No. VI of 1942)—"Possessed", meaning of word in s. 14(1) of Hindu Succession Act—Widow getting interest in joint family property on husband's death whether in possession of such property within s. 14(1)—Whether member of joint family loses rights in joint property on his going out for considerable time and not enjoying benefit of property—M. P. Land Revenue Code whether a tenancy legislation—"Subject to his personal law," meaning of expression in s. 151 of Code.*

In s. 14(1) of the Hindu Succession Act, 1956, the word "possessed" means the state of "owning and having a disposing power" i.e. a right in the property which is capable of enjoyment whenever the widow wills so to do.

A Hindu widow who has interest in the joint family property which she got on her husband's death can be said to have posses-

HINDU SUCCESSION ACT, S. 14(1)—
(Contd.)

sion of the property within the meaning of that phrase in s. 14(1) of the Hindu Succession Act, 1956. It is not necessary under that section that she should reduce her share to possession either by actual partition or even by asking for partition.

In the case of members of a joint family even if a member has gone out for a considerable length of time and has not enjoyed the benefit of the property his rights in the property are not lost. In order that adverse title can be prescribed ouster must be proved.

The Madhya Pradesh Land Revenue Code, 1954, is not a tenancy legislation and, therefore, the exception in s. 4(2) of the Hindu Succession Act, 1956, does not apply to it.

Under s. 151 of the Madhya Pradesh Land Revenue Code, 1954, the ordinary law of inheritance, survivorship or bequest operates. If a holder is governed by any special law, customary or statutory, then the devolution is intended to be governed by the same.

The words "subject to his personal law" in s. 151 of the Madhya Pradesh Land Revenue Code, 1954, mean personal law by which he was governed when the succession opened.

INDUBAI PANDHARI v. VYANKATI.

67 Bom. L.R. 612.

HIRE PURCHASE AND SALE.

The proper test to determine what the true nature of a hire-purchase agreement is, is to look at the substance of the transaction, the intention of the parties in entering into that transaction, and what it is really intended by them to be. An option to purchase given to the buyer may be indicative that no sale may have been intended by the parties. The mere circumstance that an option to the buyer has been given may not necessarily involve the conclusion that it is not a sale, nor intended to be a sale. What has got to be considered is to consider the terms of the contract including the option which may have been given to the buyer under the terms of the contract and consider what is the real nature of the transaction.

In determining the true nature of a transaction of hire-purchase the term of option given to the hirer and the term of liberty reserved to him to return the goods during the continuance of the contract are terms which have an important bearing in determining the nature of the transaction; but they are not in every case conclusive of the nature of the transaction. They are of great help in determining the true nature of the transaction, but it is on a consideration of the entire terms of the contract read in the light of the surrounding circumstances that the true nature of the transaction has to be determined, and it is possible that even in cases where the option to purchase and the liberty to return the goods are reserved in the contract, the contract in its true nature may still be a contract of sale and not merely a contract of hiring with an option to purchase. It is necessary to see what is the pur-

HIRE PURCHASE AND SALE—(Contd.)

pose of introducing the terms as to the option to purchase and liberty to return the goods during the subsistence of the contract. If on a consideration of all the terms of the agreement, it is found that these terms have been intended for the benefit of a buyer who has not made up his mind to buy at the time when he entered into the contract, to leave him free to make up his mind at any later stage and have an option of buying or not buying the article and return it to the owner at any time he liked, then the contract will not be an agreement of sale. If, on the other hand, it is clear that the parties to the contract have intended it to be a sale although they have introduced these terms in the working out of the contract for their mutual benefit and convenience, the mere presence of the terms will not destroy the character of the contract between the parties as an agreement to buy and to sell. What is necessary to consider is whether the transaction in substance is a transaction of sale although an element of bailment is added to it, or whether it is a contract of hiring with an added offer to the hirer to buy the hired article at his option.

COMMERCIAL CREDIT CORPN. v. STATE.

67 Bom. L.R. 138.

HUSBAND AND WIFE, maintenance. See CRIMINAL PROCEDURE CODE, 1898, S. 488.

67 Bom. L.R. 478.

HYDERABAD ABOLITION OF INAMS AND CASH GRANTS ACT (Hyd. VIII of 1955), S. 1(2)—Land granted as inam for performance of Kazat—Whether such inam excluded under s. 1(2).

Land granted as inam for the performance of services of Kazat i.e. the functions or office of a Kazi, is not a grant to any institution or for the benefit of any institution and is, therefore, not excluded from the application of s. 1(2) of the Hyderabad Abolition of Inams and Cash Grants Act, 1954.

KAZI FAIZUDDIN v. KASHINATH.

67 Bom. L.R. 892.

—Ss. 1, 2—*Lands granted as Inam to individuals for service of taking out Tazias during Mohurram—Whether such Inam abolished under Act.*

Certain lands were granted as Inam to some individuals on condition of service which was specified as Taziadari, i.e., for taking out Tazias during the period of Mohurram. On the question whether this Inam was abolished by the Hyderabad Abolition of Inams and Cash Grants Act, as amended in 1959:—

Held, that as the lands were granted as Inam not to any society or organization but to certain individuals, the Inam could not be said to have been held by or for the benefit of any charitable or religious institution within s. 1(2) of the Act,

that the service for rendering which the grant was made was a service to be rendered to a section of the Muslim community and,

HYDERABAD ABOLITION OF INAMS AND CASH GRANTS ACT, Ss. 1, 2—(Contd.)

therefore, the Inam was a community service Inam within the meaning of the Act, and

that such an Inam was abolished with effect from July 1, 1960, under s. 1(2A) of the Act.

SHAIKH OMAR v. MOHAMMADJI.

67 Bom. L.R. 815.

—Ss. 1, 2 & 3—*Hyderabad Tenancy and Agricultural Lands Act (Hyd. XXI of 1950), Secs. 44, 32, 19, 28—Hyderabad Tenancy and Agricultural Lands Rules, 1958, Rule 28—Inam abolished from July 20, 1955 under Act in respect of land leased to tenant before that date—Subsistence of relationship of landlord and tenant after such date—Tenancy under Hyderabad Tenancy Act when terminates—Conditions under which Inamdar or other person entitled to rights of occupant under s. 5 or 6 of Hyderabad Abolition of Inams and Cash Grants Act.*

In cases in which the inam was abolished with effect from July 20, 1955, under the Hyderabad Abolition of Inams and Cash Grants Act, 1954, and in which the inam land had been leased to a tenant before that date, the relationship of landlord and tenant continued to subsist between July 20, 1955 and July 1, 1960, and the provisions of the Hyderabad Tenancy and Agricultural Lands Act, 1950 applied thereto.

Under the provisions of the Hyderabad Tenancy and Agricultural Lands Act, 1950, the tenancy of a land terminates on the date on which the landholder makes an application for possession of the land to the Tehsildar as provided in s. 44(2) of the Act.

In order to be entitled to the rights of an occupant under s. 5 or 6 of the Hyderabad Abolition of Inams and Cash Grants Act, 1954, as the case may be, the inamdar or other person should have been in lawful possession of the land on July 1, 1960.

The inamdar is, entitled to the rights of an occupant under s. 5 or 6 of the Hyderabad Abolition of Inams and Cash Grants Act, 1954, as the case may be, if in the application for possession made by him under the Hyderabad Tenancy and Agricultural Lands Act, 1950, a final order for possession had been made in his favour before July 1, 1960. He would also be so entitled if an order for possession was made before July 1, 1960 and if such order is not set aside in appeal or revision or other proceeding by a superior Court. Where, however, no order for restoration of the possession to the landholder had been made before July 1, 1960, or if the order for possession was subsequently set aside, the tenant would become the occupant with effect from July 1, 1960.

DATTATRAYA SADASHIV v. GANPATI RAGHU.

67 Bom. L.R. (F.B.) 521.

—S. 5. See HYDERABAD ABOLITION OF INAMS AND CASH GRANTS ACT, 1955, Ss. 1-3.

67 Bom. L.R. (F.B.) 521.

HYDERABAD ABOLITION OF INAMS AND CASH GRANTS ACT, S. 6. See HYDERABAD ABOLITION OF INAMS AND CASH GRANTS ACT, 1955, Ss. 1-3.

67 Bom. L.R. (F.B.) 521.

HYDERABAD TENANCY AND AGRICULTURAL LANDS ACT, 1950 (*Hyd. Act XXI of 1950*), S. 38(6)—*Indian Registration Act (XVI of 1908)*, Secs. 17(1), 49—*Certificate issued under s. 38(6)(a) of Hyderabad Tenancy Act whether admissible in evidence—Whether such certificate requires registration.*

A certificate issued under s. 38(6)(a) of the Hyderabad Tenancy and Agricultural Lands Act, 1950, operates as a legal transfer and it does not require registration. It is, therefore, admissible in evidence.

SAHEBRAO ANNA v. DATTATRAYA.

67 Bom. L.R. 774.

———S. 38E. See HYDERABAD TENANCY AND AGRICULTURAL LANDS ACT, 1950, S. 38(6).

67 Bom. L.R. 774.

———S. 44.

Under the provisions of the Hyderabad Tenancy and Agricultural Lands Act, 1950, the tenancy of a land terminates on the date on which the landholder makes an application for possession of the land to the Tehsildar as provided in s. 44(2) of the Act.

DATTATRAYA SADASHIV v. GANPATI RAGHU.

67 Bom. L.R. (F.B.) 521.

HYDROMETER TEST. See BOMBAY PROHIBITION ACT, 1949.

67 Bom. L.R. 226.

INCOME-TAX ACT (XI of 1922), S. 10—Expenditure laid out on scientific research, what is—Amount paid by assessee to another merely to obtain knowledge whether allowable deduction—Whether necessary that research should be carried on by assessee.

In order to bring a case within s. 10(2)(xii) of the Indian Income-tax Act, 1922, it is incumbent on the assessee on whom the burden lies, to establish that the expenditure incurred by him was on a research carried on either by himself or on his behalf or at his instance for the purposes of his own business. The sum paid by an assessee to another merely to obtain the knowledge gained by him by carrying on research for himself cannot be said to be an expenditure incurred by the assessee on scientific research, because it is neither carried on by him, nor on his behalf, nor at his instance.

For an expenditure to be one laid out and expended on such scientific research, there must be some direct or at any rate proximate nexus or connection between the expenditure and the scientific research and the research and business of the assessee.

A company dealing in drugs, chemicals, pharmaceuticals etc. was in possession of very valuable technical knowledge and practical experience as a result of its long and extensive research in the pharmaceutical field. It had obtained patent rights in respect of certain products and had also registered its

INCOME-TAX ACT, S. 10—(Contd.)

trade marks. Under an agreement the company granted to the assessee, which was one of its subsidiaries, the user of the patents and trade marks and gave the assessee the technical "know-how" and assistance. The use of the knowledge or the practical experience was limited only for the purpose of the conduct of the business during the period of the agreement which was of a duration of five years. The assessee in return agreed to give to the company a certain percentage of the sale price of the pharmaceutical products manufactured by it. On the question whether the payment so made by the assessee to the company was an allowable deduction under s. 10(2)(xv) of the Indian Income-tax Act, 1922:—

Held, that in the transaction between the company and the assessee there was no transfer of any property or asset, nor any capital element was involved therein and, therefore, the transaction was not "capital in nature", that the payment was laid out or expended wholly and exclusively for the purposes of the assessee's business, and

that, therefore, the assessee was entitled to the deduction under s. 10(2)(xv) of the Act in respect of this payment.

COMMR. I.T. v. CIBA PHARMA

67 Bom. L.R. 792.

———S. 10(2)(xv)—*Loan secured by assessee by mortgage of land and building constructed for sale—Expenditure incurred over execution of mortgage—Whether such expenditure a deductible revenue expenditure.*

The assessee firm which was brought into existence solely for the purpose of constructing a building and selling it, not having sufficient funds for the construction of the building secured a loan from some persons. This loan was secured by executing mortgages of the land and the building under construction in favour of the creditors. The firm incurred a certain expenditure over the execution of the mortgages and in its assessment proceedings for the year 1956-57 it claimed this amount as an admissible deduction against the profits which it had made from the construction and sale of the building. The Tribunal disallowed the claim on the ground that the said expenditure was incurred solely for the purpose of raising capital and not for the purpose of the running of the assessee's business or for acquiring the stock-in-trade:—

Held, that the expenditure incurred by the assessee for executing the mortgage in favour of the mortgagee-creditors for obtaining monies for construction and completion of the building was an expenditure not of a capital nature but wholly laid out in the business of the assessee for obtaining profits and gains therefrom, and

that, therefore, the said sum could be claimed by the assessee as a deductible revenue expenditure under s. 10(2)(xv) of the Indian Income-tax Act, 1922.

S. F. ENGINEER v. COMMR. OF INC.-TAX.

67 Bom. L.R. 394.

INDIAN INCOME-TAX ACT, S. 26A—
Indian Stamp Act (II of 1899), Sec. 2(4)—
Requisites of instrument of partnership—
Whether such instrument must be in existence
in relevant account year—Mere record of some
terms of partnership whether sufficient to con-
stitute such instrument—Document coupled
with other evidence whether will constitute
such instrument—"Instrument," meaning of
word.

What is required under s. 26A of the Indian Income-tax Act, 1922, is a single document or a number of documents all existing in the relevant account year which will together form an instrument of partnership. If the documents by themselves do not have that effect, then there is no instrument of partnership as required under s. 26A of the Act.

Under s. 26A the instrument has to be an instrument not of any partnership, but of the partnership of certain specified individuals. A mere record of some terms of partnership will not make the document an instrument of partnership of certain specified individuals.

Under s. 26A it must be the document itself which must constitute the instrument of partnership and not the document coupled with certain other evidence.

The word "instrument" as used in s. 26A means a document of a legal nature, by which any right or liability is or purported to be created, transferred, limited, extended, extinguished or recorded.

A. PHIROZ & Co. v. COMM., INC.-TAX.

67 Bom. L.R. 403.

—S. 46(2). See BOMBAY LAND REVENUE CODE, 1879, S. 150.

67 Bom. L.R. 823.

—S. 49E—*Indian Companies Act (VII of 1913), Secs. 228, 229—Applicability of s. 49E vis-a-vis insolvency rules—Whether Department gets priority over other unsecured creditors where its claim proved in liquidation.*

Section 49E of the Indian Income-tax Act, 1922, applies when insolvency rules do not apply. Therefore, once the claim of the Department is proved in liquidation proceedings, the Department cannot by exercising the right under s. 49E of the Act get priority over the other unsecured creditors.

UNION OF INDIA v. INDIA FISHERIES.

67 Bom. L.R. (S.C.) 944.

INDUSTRIAL DISPUTES ACT (XIV of 1947).

Section 91 of the Maharashtra Co-operative Societies Act, 1960, does not operate as a bar to a dispute between a co-operative society and its employee in regard to a demand for a change in the terms of employment or for reinstatement of the employee, being decided under the C.P. & Berar Industrial Disputes Settlement Act, 1947, or the Industrial Disputes Act, 1947.

RAMBAU JAIRAM v. PRESIDENT, VINKAR CO-OP. SOC.

67 Bom. L.R. (F.B.) 877.

—S. 12.

Per Naik J. Section 12(4) of the Industrial Disputes Act, 1947, covers a situation

INDUSTRIAL DISPUTES ACT, S. 12—
(Contd.)

where no settlement has been reached as also a situation where a settlement has been reached between the parties, but that settlement is not regarded by the conciliation officer as a fair or just or reasonable settlement.

B. K. JOBANPUTRA v. B. S. KALELKAR.

67 Bom. L.R. 1.

—S. 25-H—*Retrenched workman re-employed—Whether such workman entitled to previous terms and conditions of service.*

Section 25-H of the Industrial Disputes Act, 1947, only gives a right to a worker to have preference in the matter of re-employment; it does not give him a right to secure employment on his previous terms and conditions of service.

INDIAN HUME PIPE CO. v. BHIMRAO.

67 Bom. L.R. 820.

INSANITY, how far a defence on a petition for judicial separation on ground of cruelty.

In a petition for judicial separation under the Hindu Marriage Act, 1955, on the ground of cruelty the defence of insanity is not available even if the offending spouse is not capable of knowing what he is doing if the conduct is held to be objectively cruel regardless of motive or intention.

TRIMBAK NARAYAN v. KUMUDINI TRIMBAK.

67 Bom. L.R. 837.

INSURANCE ACT (IV of 1938), S. 53(1).

The provisions in art. 1(iii) in Sch. II to the Bombay Court-fees Act, 1959, apply to a petition for winding up filed under s. 53(1) of the Insurance Act, 1938.

GOVERNMENT PLEADER v. JAIN.

67 Bom. L.R. 901.

KAZAT. See HYDERABAD ABOLITION OF INAMS AND CASH GRANTS ACT, 1955, S. 1(2).

67 Bom. L.R. 892.

LAND ACQUISITION ACT (I of 1894), S. 3. See LAND ACQUISITION ACT, 1894, S. 4.

67 Bom. L.R. 101.

—SECS. 4, 6, 9, 17—*Bombay Commissioners of Divisions Act (Bom. VIII of 1958), Sec. 3—Constitution of India, Arts. 14, 19, 31, 254(2)—Maharashtra Industrial Development Act (Maharashtra III of 1962), Secs. 14, 15, 21—Delegation of State Government's power to acquire land to Commissioners under Bom. Act VIII of 1958 whether in excess of powers of State Legislature—Whether amendments effected in Land Acquisition Act by State Government under s. 3(4) of Bom. Act valid—Sections 4 and 6 of Land Acquisition Act whether infringe art. 19 of Constitution—Whether purposes included in s. 3(f)(2) of Land Acquisition Act as amended by Bombay Amendment Act, 1953, public purpose within art. 31 of Constitution—Section 6 of Land Acquisition Act read with s. 3(f)(2) of Act whether infringes art. 14 of Constitution—Discretion under law whether can be equated with discrimination—Section 3(f)(2) whether intra vires of art. 31 of Constitution and s. 6 of*

LAND ACQUISITION ACT, Ss. 4, 6, 9, 17—
(Contd.)

Land Acquisition Act—Public purpose whether can be determined merely upon recitals in notification—Money advanced by State to Corporation for acquisition of land by Corporation whether compensation wholly or partly out of public revenues within proviso to s. 6 of Land Acquisition Act—Question whether land waste or arable under s. 17(1) of Land Acquisition Act justiciable—Agricultural land whether arable land within s. 17(1)—Construction of statute—Dictionaries differing in meaning of word used in statute—Importance of judicial interpretation in “persuasive” precedent.

The amendments effected in the Land Acquisition Act, 1894, by the State Government by virtue of s. 3(4) of the Bombay Commissioners of Divisions Act, 1957, empowering the Commissioner to acquire land under ss. 4, 6, 9 and 17 of the Land Acquisition Act, are valid amendments so far as the State is concerned.

Sections 4 and 6 of the Land Acquisition Act, 1894, do not infringe art. 19 of the Constitution of India.

Sub-clause (2) of s. 3(f) of the Land Acquisition Act, 1894, added by the Land Acquisition (Bombay Amendment) Act, 1953, which includes certain purposes within the definition of public purpose are within the connotation of that expression in art. 31 of the Constitution of India.

Section 6 of the Land Acquisition Act, 1894, read with s. 3(f)(2) of the Act as amended by the Land Acquisition (Bombay Amendment) Act, 1953, does not infringe art. 14 of the Constitution of India.

A discretion given under a law, however wide it may be, cannot necessarily be equated with discrimination, and in so far as there is a possibility of the misuse of a discretion the normal presumption of law is that the authority invested with a discretionary power will act fairly and honestly and not abuse it. If it does however abuse it in a given case, that is an indication of human frailty rather than the power being discriminatory.

The definition of “public purpose” in s. 3(f) of the Land Acquisition Act, 1894, as amended by the inclusion of cl. (2) therein by the Land Acquisition (Bombay Amendment) Act, 1953, is *intra vires* of art. 31 of the Constitution of India as well as s. 6 of the Land Acquisition Act.

The question whether there is a public purpose or not does not fall to be considered merely upon the recitals of the particular notification impugned, but must be gathered from the facts and circumstances before the Court.

When moneys are advanced by the State to a Corporation for the payment of compensation for lands acquired by the Corporation, the compensation to be awarded cannot be said to be paid “wholly or partly out of public revenues” within the meaning of that expression in the proviso to s. 6 of the Land Acquisition Act, 1894.

LAND ACQUISITION ACT, Ss. 4, 6, 9, 17—
(Contd.)

The conditions in s. 17(1) of the Land Acquisition Act, 1894, namely (1) the existence of urgency, (2) a direction from the appropriate Government or Commissioner, (3) waste or arable land, (4) need for a public purpose and (5) need for a company, are all conditions prescribed for the exercise of the power or jurisdiction of the Collector to take the citizens' property under those provisions. Upon the non-fulfilment or non-existence of any one of those conditions the exercise of the power must be interdicted. The conditions must be strictly fulfilled and are not left to the subjective satisfaction or opinion of the authority concerned.

Agricultural land cannot be said to be arable land within the meaning of s. 17(1) of the Land Acquisition Act, 1894.

In considering whether any land is “waste or arable” it is the nature of the land and its substantive use that one must have regard to and not what it is formally dubbed in archaic revenue records.

Where dictionaries differ as to the meaning of a word used in a statute, a judicial interpretation of the word even in a “persuasive” precedent will be of prime importance. **SADRUDDIN v. PATWARDHAN.**

67 Bom. L.R. 101.

LAND ACQUISITION (BOMBAY AMENDMENT) ACT (Bom. IV of 1948)—Constitution of India, Arts. 31-A, 31-B, 31—Government of India Act, 1935 [25 & 26 Geo. 5. Ch. 42], s. 299—Whether Bom. Act IV of 1948 void—Expression “compensation” in s. 299, Government of India Act, 1935, meaning of—Whether art. 31-B governed by art. 31-A.

The Land Acquisition (Bombay Amendment) Act, 1948, was void at its inception.

The expression “compensation” in s. 299 of the Government of India Act, 1935, means a “just equivalent” of what the owner has been deprived of.

Article 31-B of the Constitution of India is not governed by art. 31-A of the Constitution and art. 31-B is a constitutional device to place the specified statutes beyond any attack on the ground that they infringe Part III of the Constitution.

N. B. JEEJEEBHAY v. ASST. COLLECTOR.

67 Bom. L.R. (S.C.) 575.

LEASE. See TRANSFER OF PROPERTY ACT, 1882, S. 105.

67 Bom. L.R. 452.

LETTERS PATENT (BOMBAY), CL. 15—Constitution of India, Arts. 227, 367—General Clauses Act (X of 1897), Sec. 8—Whether appeal under cl. 15 of Letters Patent competent against order of Single Judge passed under art. 227 of Constitution.

An appeal does not lie under cl. 15 of the Letters Patent against the decision of a single Judge given in a special civil application filed under art. 227 of the Constitution of India. **JAGANNATH GANBAJI v. GULABRAO.**

67 Bom. L.R. 609.

LICENSEE, ejectment proceedings against, whether terminate on his death.

Ejectment proceedings against a licensee under s. 41 of the Presidency Small Cause Courts Act, 1882, do not expire with his death but are liable to be continued upon death of the licensee against his legal representatives.

The ejectment application proceedings against persons mentioned in s. 41 of the Act are proceedings relating to property rights and/or recovery of properties and are not proceedings which are relating to personal causes of action. Those proceedings do not die with the death of a party to the proceedings whether he may be applicant and/or opponent but are such as could be continued against legal representatives of a deceased party to the proceedings.

SAKINABAI v. SALEBHAI. 67 Bom. L.R. 571.

LICENSOR AND LICENSEE. See TRANSFER OF PROPERTY ACT, 1882, S. 105.

67 Bom. L.R. 452.

LIMITATION ACT (IX of 1908), ART. 85—Indian Partnership Act (IX of 1932), Secs. 46, 47—Mutual, open and current account between plaintiff and defendant firms—Suit for dissolution of plaintiff firm and appointment of Court Receiver—Suit by Receiver against defendant firm for balance due to plaintiff at foot of account—Applicability of art. 85.

There was a mutual, open and current account between the plaintiff firm and the defendant firms. One of the partners of the plaintiff firm filed a suit for dissolution of the firm on July 24, 1950. The Court Receiver was appointed to manage the property of the firm and to realise the assets. On November 3, 1953, the Receiver filed a suit against the defendant for recovery of the balance due to the plaintiff at the foot of the accounts. In the plaintiff's account relating to its transactions with the defendant the last debit entry was made on June 17, 1950, and as the accounting year ran from Divali to Divali, during the relevant year 1949-1950, November 9, 1950 was the closing date of the accounting year. On the question whether the suit filed by the Receiver was barred by limitation, the Receiver contended that the account continued to be mutual, open and current till the date of the suit and, therefore, art. 85 of the Indian Limitation Act, 1908, applied and the suit was within time. The defendant contended that the account had ceased to be so on the dissolution of the plaintiff firm on July 24, 1950, and that the suit was barred by limitation:—

Held, that as the plaintiff firm was dissolved on July 24, 1950, and it became incapable of continuing the dealings between the parties, the account had ceased to be mutual, open and current at the date of the suit, and

that, therefore, art. 85 of the Indian Limitation Act, 1908, was not applicable and the suit was barred by limitation.

M. W. PRADHAN v. PANCHAL ENGR. WORKS.

67 Bom. L.R. 18.

LIMITATION ACT, ART. 182(5)—Civil Procedure Code (Act V of 1908), O. XXI, rr. 6, 7—Application for rectification of name of one of judgment-debtors in decree sent to executing Court—Whether such application covered by art. 182(5) of Indian Limitation Act.

An application made by a decree-holder to the Court which passed the decree that the copy of the decree sent to the Court to which the decree was transferred for execution should be rectified so as to give the correct name of one of the judgment-debtors, is an application "to take some step in aid of execution of the decree" and is covered by art. 182(5) of the Indian Limitation Act, 1908.

In deciding whether an application was "to take some step in aid of execution", the relevant question is whether the Court was requested by that application to take some step in aid of execution, and not whether the decree-holder in filing the application had acted in furtherance of execution.

RAJMAL DAGADURAM v. KISAN.

67 Bom. L.R. 917.

MADHYA PRADESH LAND REVENUE CODE (II of 1955).

The Madhya Pradesh Land Revenue Code, 1954, is not a tenancy legislation and, therefore, the exception in s. 4(2) of the Hindu Succession Act, 1956, does not apply to it.

INDUBAI PANDHARI v. VYANKATI.

67 Bom. L.R. 612.

—S. 151.

Under s. 151 of the Madhya Pradesh Land Revenue Code, 1954, the ordinary law of inheritance, survivorship or bequest operates. If a holder is governed by any special law, customary or statutory, then the devolution is intended to be governed by the same.

The words "subject to his personal law" in s. 151 of the Madhya Pradesh Land Revenue Code, 1954, mean personal law by which he was governed when the succession opened.

INDUBAI PANDHARI v. VYANKATI.

67 Bom. L.R. 612.

MAHARASHTRA CO-OPERATIVE SOCIETIES ACT (Mah. XXIV of 1961), S. 2(13)—Maharashtra Cooperative Societies Rules, 1961. Rule 22—Board of directors of society, election of—Whether board of directors to be elected at general meeting of society—Applicability of r. 22 to election of directors.

There is no express provision in the Maharashtra Co-operative Societies Act, 1960, that the board of directors be elected by a society at its general meeting. In each case it will have to be seen whether by reason of the bye-law made by the society, right to elect directors is given to the general meeting or not. If the bye-laws give a right to the general meeting to elect its directors, rule 22 of the Maharashtra Co-operative Societies Rules, 1961, would govern the election of the board of directors. If, on the other hand, the bye-law does not give a right to the general meeting to elect its board of directors, but otherwise provides for the election

MAHARASHTRA CO-OPERATIVE SOCIETIES ACT, S. 2(13)—(Contd.)

of the directors, then rule 22 of the Rules will have no application to the election of directors.

DINKAR TUKARAM v. PREMCHAND.

67 Bom. L.R. 197.

———S. 75. See MAHARASHTRA CO-OPERATIVE SOCIETIES ACT, 1961, S. 2(13).

67 Bom. L.R. 197.

———S. 91—*Maharashtra Co-operative Societies Rules, 1961. Rule 75—Bombay Co-operative Societies Act (Bom. VIII of 1925), Sec. 54—Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), Sec. 68—Practice—Dispute when referred to Registrar under s. 91—“Claiming through a member”, meaning of words—Dispute relating to accommodation provided by society between member and person to whom member has given such accommodation—Whether such dispute touching business of society—Dispute between such parties relating to rent or compensation or for mesne profits and jurisdiction of Registrar or nominee.*

The correct practice when a dispute is referred to the Registrar under s. 91 of the Maharashtra Co-operative Societies Act, 1960, is for the Registrar to issue notices to both the parties and give them an opportunity of being heard on the question whether a dispute exists. It is only after the Registrar has heard the parties or given them an opportunity of being heard that he can decide or satisfy himself whether a dispute within the meaning of s. 91 of the Act exists. It is his decision so arrived at which will be final under s. 91(2) of the Act.

The question whether a dispute within the meaning of s. 91 of the Act exists so as to enable the Registrar or his Nominee to entertain a reference in respect of such dispute must be decided by reference to the averments made in the application for reference made under rule 75 of the Maharashtra Co-operative Societies Rules, 1961.

The words “claiming through a member” in s. 91(1) (b) of the Act mean deriving such title or rights through a member as the member possessed or had acquired by reason of his being a member or in his capacity as a member.

A dispute in regard to the occupation of accommodation provided by a Co-operative housing society between a member of the society and the person to whom he has given such accommodation is a dispute touching the business of the society within the meaning of s. 91 of the Act.

A dispute in regard to rent or compensation payable to a member of a co-operative housing society by a person to whom he has given his tenement for occupation will not ordinarily touch the business of the society. But a claim for mesne profits is consequential or incidental to a claim for possession and if the Registrar or Nominee is competent to entertain the application for possession made against such a person, he will also

MAHARASHTRA CO-OPERATIVE SOCIETIES ACT, S. 91—(Contd.)

have jurisdiction to decide the claim for past as well as future mesne profits made against him until possession is given.

I. R. HINGORANI v. PRAVINCHANDRA.

67 Bom. L.R. 306.

———S. 91—*Bombay Co-operative Societies Act (Bom. VII of 1925), Sec. 54—Industrial Disputes Act (XIV of 1947), Secs. 2(j)(s)(k), 18(3), 10—C. P. & Berar Industrial Disputes Settlement Act (XXIII of 1947), Secs. 22, 23, 54—Dispute between Co-operative society and its employee in regard to change in terms of employment or for reinstatement of employee—Whether such dispute could be decided by Registrar of Co-operative Societies—“Any dispute”, meaning of words in s. 91(1)—Non obstante clause in s. 91(1), effect of—Section 91(2) whether enlarges jurisdiction conferred on Registrar by s. 91(1).*

Section 91 of the Maharashtra Co-operative Societies Act, 1960, does not operate as a bar to a dispute between a co-operative society and its employee in regard to a demand for a change in the terms of employment or for reinstatement of the employee, being decided under the C. P. and Berar Industrial Disputes Settlement Act, 1947, or the Industrial Disputes Act, 1947.

The words “any dispute” in s. 91(1) of the Act must be given a limited meaning and mean any dispute which the Registrar is competent to try and decide.

The *non obstante* clause in s. 91(1) of the Act excludes the operation of other laws, which confer jurisdiction on some other Court, authority, or Tribunal to try the disputes mentioned therein. If there is any other law which lays down that a matter, which under s. 91 the Registrar has jurisdiction to decide, may be tried by some other Court, authority or Tribunal, then the application of that law is excluded by the *non obstante* clause. But this clause does not alter or modify the substantive rights of the parties, nor does it confer any additional powers on the Registrar.

Section 91(2) only empowers the Registrar to determine a jurisdictional issue; it does not enlarge the jurisdiction conferred on the Registrar by s. 91(1).

RAMBHAU JAIRAM v. PRESIDENT, VINKAR CO-OP. SOCIETY.

67 Bom. L.R. (F.B.) 877.

———S. 92. See MAHARASHTRA CO-OPERATIVE SOCIETIES ACT, 1961, S. 91.

67 Bom. L.R. (F.B.) 877.

———S. 93. See MAHARASHTRA CO-OPERATIVE SOCIETIES ACT, 1961, S. 91.

67 Bom. L.R. 306.

———S. 93. See MAHARASHTRA CO-OPERATIVE SOCIETIES ACT, 1961, S. 91.

67 Bom. L.R. (F.B.) 877.

———S. 146(m). See MAHARASHTRA CO-OPERATIVE SOCIETIES ACT, 1961, S. 91.

67 Bom. L.R. (F.B.) 877.

MAHARASHTRA CO-OPERATIVE SOCIETIES ACT, S. 163(1)(b). See **MAHARASHTRA CO-OPERATIVE SOCIETIES ACT, 1961, S. 91.**
67 Bom. L.R. (F.B.) 877.

MAHARASHTRA ZILLA PARISHADS AND PANCHAYAT SAMITIS ACT (Mah. V of 1962), S. 57(1). See **MAHARASHTRA ZILLA PARISHADS AND PANCHAYAT SAMITIS ACT, 1962, S. 72(7).** 67 Bom. L.R. 708.

—S. 59(c)—*Bombay Village Panchayats Act (Bom. I of 1959), Sec. 32—Maharashtra Zilla Parishads (President & Vice-President) and Panchayat Samitis (Chairman) (Current Administrative Duties) (after the Expiry of the Term of Office) Rules, 1963. Rule 2—Bombay Municipal Boroughs Act (Bom. XVIII of 1925), Sec. 19(2)—Whether Sarpanch carrying on current duties of his office after expiration of his term continues to be Sarpanch—Applicability of s. 66 of Mah. Act V of 1962—Chairman of Panchayat Samiti carrying on prescribed duties after expiration of his term whether entitled to convene meeting of Samiti.*

For the purposes of proviso (c) to s. 59 of the Maharashtra Zilla Parishads and Panchayat Samitis Act, 1961, where after the expiry of his term of office a Sarpanch carries on the current duties of his office, he does not during this period continue to be a Sarpanch.

Section 66 of the Maharashtra Zilla Parishads and Panchayat Samitis Act, 1961, comes into play only when the term of office of a Chairman has come to an end by reason of the expiration of his term and not when the term of office of a Chairman comes to an end on account of any other reason.

The Chairman of a Panchayat Samiti who carries on the prescribed current administrative duties of his office after the expiration of his term is not entitled to convene a meeting of the Panchayat Samiti.

PRALHAD v. CHIEF EXECUTIVE OFFICER.
67 Bom. L.R. 190.

—S. 66. See **MAHARASHTRA ZILLA PARISHADS AND PANCHAYAT SAMITIS ACT, 1962, S. 59(c).** 67 Bom. L.R. 190.

—S. 72(2) before its amendment by *Maharashtra Zilla Parishads and Panchayat Samitis (Second Amendment) Act (Mah. 43 of 1964)—Notice summoning meeting in respect of which requisition received under s. 72(1)—Whether necessary to hold meeting within ten days of receipt of notice of no-confidence motion—Construction of statute—Provision in Act to be so construed as to make it and other provisions workable—Draftsman using word in sense not ordinarily used and whether such user to be permitted to defeat intention of Legislature.*

Section 72(2) of the Maharashtra Zilla Parishads and Panchayat Samitis Act, 1961, [as it stood before its amendment by the Maharashtra Zilla Parishads and Panchayat Samitis (Second Amendment) Act, 1964] required that the notice summoning the meeting for consideration of the motion of no-

MAHARASHTRA ZILLA PARISHADS AND PANCHAYAT SAMITIS ACT, S. 72(2)—(Contd.)

confidence, in respect of which a requisition had been received under s. 72(1) of the Act, must be issued within ten days from the date of the receipt of the requisition and it was not necessary to hold the meeting within ten days of the receipt of the notice of no-confidence motion.

The word "convene" in s. 49(2) and subss. (2) and (4) of s. 72 of the Maharashtra Zilla Parishads and Panchayat Samitis Act before their amendment, meant call or summon.

The Court should, if possible, so construe a provision in an Act as will make it and the other provisions of the Act workable and as will not render any of them ineffective or incapable of being carried out. The intention of the Legislature must not be allowed to be defeated merely because the draftsman has used a word in a sense in which it is not ordinarily used.

CHAITRAM v. MALEGAON PANCHAYAT SAMITI.
67 Bom. L.R. (F.B.) 516.

—S. 72(7)—*"Total number of members of the Panchayat Samiti, meaning of expression—Whether mean total number of members actually present and voting at meeting of Panchayat Samiti."*

In s. 72(7) of the Maharashtra Zilla Parishads and Panchayat Samitis Act, 1961, the expression "the total number of members of the Panchayat Samiti" refers to the total number of the possible members of the Panchayat Samiti under s. 57(1) of the Act and not the total number of members present and voting at any meeting thereof.

VISHWASRAO v. VALLABHDAS.

67 Bom. L.R. 708.

MAINTENANCE. See **CRIMINAL PROCEDURE CODE, 1898, S. 488.** 67 Bom. L.R. 478.

MARRIAGE, Solemnisation of.

It is essential for the purposes of s. 17 of the Hindu Marriage Act, 1955, that the marriage to which s. 494 of the Indian Penal Code, 1860, applies on account of the provisions of the Act, should have been celebrated with proper ceremonies and in due form. Merely going through certain ceremonies with the intention that the parties be taken to be married, will not make the ceremonies prescribed by law or approved by any established custom.

BHAURAO v. STATE. 67 Bom. L.R. (S.C.) 423.

MENS REA in cases of Obscenity. See **PENAL CODE, S. 292.** 67 Bom. L.R. (S.C.) 506.

—in criminal offences—*Foreign Exchange Regulation Act (VII of 1947), Secs. 8(1), 24(1).*

(Per majority). Under s. 8(1) read with s. 24(1) of the Foreign Exchange Regulation Act, 1947, there is no scope for the invocation of the rule (of mens rea) that besides the mere act of voluntarily bringing gold into India any further mental condition

MENS REA—(Contd.)

is postulated as necessary to constitute an offence of the contravention referred to in s. 23(I-A) of the Act.

The knowledge of the existence or content of a law by an individual will not always be relevant, save on the question of the sentence to be imposed for its violation.

STATE V. MAYER HANS GEORGE.

67 Bom. L.R. (S.C.) 583.

—in Criminal offence.

(*Per Subba Rao J.*) It is a well-settled principle of common law that *mens rea* is an essential ingredient of a criminal offence. A statute can exclude that element but it is a sound rule of construction adopted in England and also accepted in India to construe a statutory provision creating an offence on conformity with the common law rather than against it unless the statute expressly or by necessary implication exclude *mens rea*. There is a presumption that *mens rea* is an essential ingredient of a statutory offence; but this may be rebutted by the express words of a statute creating the offence or by necessary implication. But the mere fact that the object of a statute is to protect welfare activities or to eradicate grave social evils is in itself not decisive of the question whether the element of guilty mind is excluded from the ingredients of the offence. It is also necessary to enquire whether a statute by putting a person under strict liability help him to assist the State in the enforcement of the law; can he do anything to promote the observance of the law? A person who does not know that gold cannot be brought into India without a licence or is not bringing into India any gold at all cannot possibly do anything to promote the observance of the law. *Mens rea* by necessary implication can be excluded from a statute only where it is absolutely clear that the implementation of the object of a statute would otherwise be defeated and its exclusion enables those put under strict liability by their act or omission to assist the promotion of the law. The nature of *mens rea* that will be implied in a statute creating an offence depends upon the object of the Act and the provisions thereof.

STATE V. MAYER HANS GEORGE.

67 Bom. L.R. (S.C.) 583.

MINIMUM WAGES (MAHARASHTRA AMENDMENT) ACT (Mah. Act III of 1963).

See CONSTITUTION OF INDIA, ART. 254(2).

67 Bom. L.R. 206.

MORTGAGOR AND MORTGAGEE, Mortgagor in possession, whether deemed to be a tenant.

A mortgagor in possession cannot be deemed to be a tenant under s. 2A of the Bombay Tenancy Act, 1939.

ISHWARA BHAI V. PANDURANG.

67 Bom. L.R. 558.

MOTOR VEHICLES ACT (IV of 1939), S. 2—Private motor car used for carrying passengers for hire or reward—Whether such**MOTOR VEHICLES ACT, S. 2—(Contd.)**

vehicle a "public service vehicle"—Length of user whether a relevant factor in determining whether vehicle a public service vehicle.

A private motor car used for carrying passengers for reward or hire is a "public service vehicle" within the meaning of s. 2(25) of the Motor Vehicles Act, 1939, and as such a "transport vehicle" as defined in s. 2(33) of the Act. Such user need not be habitual for if at a particular moment it is being used for carrying passengers on hire or reward then the vehicle becomes a public service vehicle and it cannot without any permit or licence for the purpose carry passengers.

STATE V. ISMAIL ALLISAHEB.

67 Bom. L.R. 569.

—S. 110.

The word "suit" in s. 527 of the Bombay Municipal Corporation Act, 1888, means a proceeding which is commenced by the presentation of a plaint and, therefore, an application under s. 110 of the Motor Vehicles Act, 1939, does not come within the ambit of s. 527 of the Bombay Municipal Corporation Act.

KHAIRUNNISSA V. MUNICIPAL CORPN.

67 Bom. L.R. 903.

MUNICIPAL ACT (BOROUGH) (Bom. XVIII of 1925), S. 73—Constitution of India, Arts. 246(3), 276, 14; Seventh Schedule. List II. Entries 60, 5—Municipality whether can levy tax on service—'Employments' in entry 60, List II, Sch. VII whether includes service—Delegation of power to municipalities to impose tax on professions, trades, callings and employments whether constitutional.

A municipality which is governed by the Bombay Municipal Boroughs Act, 1925, is competent to levy a tax on service in which a person is employed to work for another under s. 73 of the Act.

The word "employments" in entry 60 in List II, in Schedule VII to the Constitution of India includes service or occupation in which a person works for another and in which there is a relationship of employer and employee.

The delegation of the power to the municipalities governed by the Bombay Municipal Boroughs Act, 1925, to impose a tax on professions, trades, callings and employments, is not unconstitutional.

KISAN SUPDU V. BHUSAWAL MUNICIPALITY.

67 Bom. L.R. 286.

MUNICIPAL ACT (CORPORATION) (Bom. III of 1888), S. 68—Control envisaged in s. 68—Nature of.

The control envisaged in s. 68 of the Bombay Municipal Corporation Act, 1888, is not control over the decision as such of the delegate but over the administrative aspects of cases and their disposal. The administrative side of the delegate's duties are the subject of control and revision by the Commissioner (e.g. the kinds of cases in which the delegate could take action or the period or time

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—(Contd.)

during which the power might be exercised) but not the essential power of the delegate to decide whether to take action or not in a particular case.

BOMBAY MUNICIPAL CORPN V. DHONDU.

67 Bom. L.R. (S.C.) 427.

—S. 154—*Bombay Rents, Hotel and Lodging House Rates Control Act (Bom. LVII of 1947), Secs. 7, 5(10), 10-10AAA—Whether rateable value of property limited by Rent Act—Permitted increases under Rent Act whether can be added to rental for purposes of rateable value—Whether education cess can be added to rent for arriving at annual letting value.*

Under s. 154 of the Bombay Municipal Corporation Act, 1888, the annual letting value of property is only the standard rent provided by the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, and which alone the landlord can recover from his tenants. Permitted increases do not form part of the rent and therefore these cannot be allowed to be added to the rental for the purposes of rateable value.

An education cess imposed on property as an additional tax by the Municipal Corporation under s. 195E of the Bombay Municipal Corporation Act, 1888, cannot be added to the rent for the purposes of arriving at the annual letting value of the property.

LIFE INS. CORPN. V. BOM. MUNICPL. CORPN.

67 Bom. L.R. 202.

—S. 195E. See MUNICIPAL ACT (CORPORATION), S. 154.

67 Bom. L.R. 202.

—SECS. 354R, 354RA—*Constitution of India, Art. 19(1) (f) & (g)—Civil Procedure Code (Act V of 1906), O. XLI, r. 27—Sections 354R & 354RA whether constitutional—Person aggrieved by clearance order under s. 354RA not preferring appeal under cl. 2, Sch. GG or his appeal dismissed—Whether remedy by suit available to such person—Expression “any person aggrieved” in Sch. GG, cl. 2 whether includes tenant or occupant of building likely to be dishoused as result of clearance order—Whether open to such tenant to lodge objection to order under s. 354RA(4).*

The restrictions on the tenants' right to hold property enacted by ss. 354R and 354RA of the Bombay Municipal Corporation Act are not unreasonable and the provisions of the sections are valid.

Finality is given to a clearance order under s. 354RA of the Act after its confirmation by the Government and its publication in the manner prescribed in clause (1) of Schedule GG to the Act, subject only to the result of an appeal preferred under clause (2) of Schedule GG by a person aggrieved. If no such appeal is preferred or if such appeal is filed and dismissed no remedy by suit is available to a person like a tenant who contends that he is aggrieved.

The words “and specifying the time with-

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354R, 354RA—(Contd.)

in and the manner in which objections there-to can be made to the Commissioner” occurring at the end of clause (b) of s. 354RA(4) of the Bombay Municipal Corporation Act should be read as governing not only the rest of clause (b) of s. 354RA(4) but also clause (a) of s. 354RA(4).

The expression “any person aggrieved” in clause 2 of Schedule GG to the Bombay Municipal Corporation Act is sufficiently wide to include not only a tenant but also an occupant of a building who is likely to be dishoused as a result of the action taken under a clearance order.

It is open to a tenant of the building included in the area to which a clearance order made under s. 354RA of the Act relates, to lodge an objection to the proposed order under s. 354RA(4).

Order XLI, r. 27(1) (b) of the Civil Procedure Code, 1908, does not entitle the High Court to let in fresh evidence at the appellate stage where even without such evidence it can pronounce judgment in a case. It does not entitle the appellate Court to let in fresh evidence only for the purpose of pronouncing judgment in a particular way. It is only for removing a lacuna in the evidence that the appellate Court is empowered to admit additional evidence.

It is not open to a Court to compel a party to make a particular kind of pleading or to amend his pleading and it is also beyond its competence to virtually oblige a party to examine any particular witness.

MUNICIPAL CORPORATION V. LALA PANCHAM.

67 Bom. L.R. (S.C.) 782.

—S. 394—*Petroleum Act (XXX of 1934), Secs. 2(a) (b) (c), 7, 8, 31—Constitution of India. Arts. 246, 254, 19(1) (f) (g); Seventh Schedule, List I Entry 53, List II Entries 1, 5, 6, 23—Whether s. 394 of Bom. Act III of 1888 ultra vires—Entry 53 in List I of Constitution whether in conflict with entries 1, 5 & 6 in List II.*

Section 394 of the Bombay Municipal Corporation Act, 1888, is *intra vires* the State Legislature.

The provisions of Entry No. 53 in List I of the Seventh Schedule to the Constitution of India, and the provisions of Entries Nos. 1, 5 and 6 in List II of the Constitution do not stand in conflict with one another.

It will be clear from the object, scheme and design of the impugned legislation that the Legislature wanted to provide for topics which clearly fall in List II. The pith and substance of the impugned legislation, therefore, is not to deal with or dabble in petroleum and petroleum products as such, but to devise special measures for ensuring the protection and safety of the citizens of a crowded city like Bombay. In so far as the Parliament has passed a legislation which makes provision for these matters, it can, in a sense, be said that there is some amount of impingement or encroachment or trespass into the field of legislation reserved for the

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—(Contd.)

Parliament. But the extent of invasion is insignificant and the provisions made have no relation to the field which has already been occupied by the Central Legislation (the Petroleum Act, 1934), but they concern the field which has been left unoccupied by the Central Legislation.

Quære: Whether the provisions contained in clauses (a) and (b) of s. 31 of the Petroleum Act, 1934, are valid after the promulgation of the Constitution of India.

LALJI MULJI v. STATE.

67 Bom. L.R. 484.

———S. 527—*Motor Vehicles Act (IV of 1939), Sec. 110—Civil Procedure Code (Act V of 1908), Sec. 26—"Suit," meaning of word in s. 527, Bom. Act III of 1888—Whether application under s. 110, Motor Vehicles Act a suit within s. 527—Tribunal under Motor Vehicles Act whether a Court.*

The word "suit" in s. 527 of the Bombay Municipal Corporation Act, 1888, means a proceeding which is commenced by the presentation of a plaint and, therefore, an application under s. 110 of the Motor Vehicles Act, 1939, does not come within the ambit of s. 527 of the Bombay Municipal Corporation Act.

The Tribunal constituted under the Motor Vehicles Act, is not a Court.

KHAIRUNNISSA v. MUNICIPAL CORPN.

67 Bom. L.R. 903.

———SCH. GG. Cl. 2. See MUNICIPAL ACT (CORPORATION), 1888, Ss. 354R & 354RA.
67 Bom. L.R. (S.C.) 782.

MUNICIPAL ACT (DISTRICT) (Bom. III of 1901), S. 23(7)—Constitution of India, Part III—Order made by State Government under s. 23(7) whether a quasi-judicial order—President of municipality presiding at meeting passing resolution disallowing some members to sit in house—Order passed by State Government under s. 23(7) removing President from office—Validity of such order—Right of councillor to attend meeting of municipality whether a fundamental right.

An order made by the State Government under s. 23(7) of the Bombay District Municipal Act, 1901, removing the President of a municipality, governed by the Act, from the office of President, is a quasi-judicial order.

The President of the Bhor Municipality, governed by the Bombay District Municipal Act, 1901, presided at a meeting of the municipality which passed a resolution disallowing two of its members to sit in the house. The State Government made an order under s. 23(7) of the Act removing the President from the office of President for neglect and of incapacity to perform his duty as President on account of his failure or omission to disallow the said resolution:—

Held, that as under the Act or the Rules framed thereunder by the municipality there was no duty cast on the President to *suo motu*

MUNICIPAL ACT (DISTRICT), S. 23—
(Contd.)

disallow moving of a resolution, the failure on the part of the President to *suo motu* object to the moving of the resolution did not amount to negligence on his part to perform his duty or to his incapacity to perform his duty and, therefore, the order passed by the State Government was liable to be quashed.

A right of a member or councillor to attend the meeting of a municipality is not a fundamental right as enshrined in the Constitution of India.

TENDULKAR v. MATHIAS.

67 Bom. L.R. 11.

MUNICIPALITIES ACT (C.P. & BERAR) (C.P. & Berar II of 1922) S. 18(3)—Maharashtra Municipalities (Postponement of General Elections pending Unification of Municipal Laws) Act (Maharashtra XLII of 1964), Secs. 3, 7, 2(a)(c)—Term of office of members of municipality extended under Mah. Act XLII of 1964—Whether term of office of President of municipality also extended.

Upon extension of the term of office of Councillors or members of a municipality under the Maharashtra Municipalities (Postponement of General Elections pending Unification of Municipal Laws) Act, 1964, such an extension is not granted as would fulfil the requirements of the second proviso to s. 18(3) of the C.P. & Berar Municipalities Act, 1922. Therefore, where the term of life of the members of a municipality is extended under the Maharashtra Act XLII of 1964, the President of the municipality does not also get the advantage of having his term of office automatically extended.

KISAN BHAGUJI v. COLLECTOR, BULDANA.

67 Bom. L.R. 715.

———20-A(2)—Maharashtra Zilla Parishads and Panchayat Samitis Act (Mah. V of 1962), Sec. 16(1)(f)—C. P. & Berar Civil Courts Act (I of 1917)—Provincial Insolvency Act (Act V of 1920), Sec. 73—District Judge whether can entertain election petition under s. 20-A(2) of Act II of 1922 though not authorised in this behalf.

In s. 20-A(2) of the C.P. & Berar Municipalities Act, 1922, the expression "especially empowered by the Provincial Government in this behalf" qualifies only the words "a Civil Judge". Therefore, a District Judge or an Additional District Judge although he is not especially authorised in this behalf by the Provincial Government has the authority to entertain an election petition under s. 20-A of the Act and to dispose it of.

SK. AHMAD v. GIRDHAR.

67 Bom. L.R. 845.

MAHARASHTRA MUNICIPALITIES (POSTPONEMENT OF GENERAL ELECTIONS PENDING UNIFICATION OF MUNICIPAL LAWS) ACT (Maharashtra XLII of 1964)—Central Provinces and Berar Municipalities Act (C. P. Berar II of 1922), Secs. 18(3), 16(2), 16(2A)—Term of office of members of Municipality extended under Mah. Act XLII of 1964—Whether term of office of President of Municipality also extended.

MAHARASHTRA MUNICIPALITIES (POSTPONEMENT OF GENERAL ELECTIONS PENDING UNIFICATION OF MUNICIPAL LAWS) ACT—(Contd.)

Upon extension of the term of office of Councillors or members of a Municipality under the Maharashtra Municipalities (Postponement of General Elections pending Unification of Municipal Laws) Act, 1964, such an extension is not granted as would fulfil the requirements of the second proviso to s. 18(3) of the C.P. & Berar Municipalities Act, 1922. Therefore, where the term of life of the members of a Municipality is extended under Maharashtra Act XLII of 1964, the President of the Municipality does not also get the advantage of having his term of office automatically extended.

KISAN BHAGUJI v. COLLECTOR, BULDANA.

67 Bom. L.R. 715.

NEGLIGENCE AND RASHNESS, distinction between.

There is a distinction between rashness and negligence. When one does an act with utter indifference to the consequences of which the doer may be conscious and which he hopes may not take place, one is said to be rash, while criminal negligence is neglect to take that precaution which a reasonable and prudent person is expected to take under circumstances obtaining in a given case. In order to infer whether or not there is criminal rashness or negligence on the part of the accused, all relevant facts must be considered.

STATE v. BHALCHANDRA.

67 Bom. L.R. 472.

NOMINATION PAPER. See BOMBAY VIL-LAGE PANCHAYATS RULES, 1959, R. 8.

67 Bom. L.R. 378.

OBSCENITY. See PENAL CODE, S. 292.

67 Bom. L.R. (S.C.) 506.

OFFICIAL ASSIGNEE, POWER TO RECEIVE EVIDENCE AND ADMINISTER OATH.

Under rule 25 of the rules contained in the Second Schedule to the Presidency-towns Insolvency Act, 1909, the Official Assignee is entitled to hold an inquiry and for that purpose to receive evidence on oath to decide whether a debt is genuine and owing to the creditor.

The Official Assignee ought not to allow the creditors or the debtor—the latter except under special circumstances—to cross-examine the witnesses of the proving creditor and convert the process into a long drawn out proceeding. He must act as a “man of business” and consider the matter from a practical point of view.

Section 78 of the Presidency-towns Insolvency Act, 1909, must be read as enabling the Official Assignee to administer oath for the purpose of (1) affidavits for the proof of debts, (2) affidavits for petitions and (3) affidavits for legal proceedings.

Re. KHUSHALCHAND DAGA.

67 Bom. L.R. (O.C.J.) 896.

OFFICIAL ASSIGNEE—whether can claim amount in Employees' Provident Funds standing to the credit of member adjusted insolvent?

Under s. 10(1) of the Employees' Provident Funds Act, 1952, so long as an amount stands in the Fund to the credit of a member who is adjudicated insolvent and has not been paid to such member, the amount does not vest in the official assignee and he cannot lay claim to it. The immunity given by s. 10(1) of the Act will not continue after the amount has been paid to the insolvent member.

PEARLY ANDREW v. OFFICIAL ASSIGNEE.

67 Bom. L.R. (O.C.J.) 654.

PARTITION—Coparcener obtaining asset at partial partition of joint Hindu family—Whether such asset source created by family within s. 4(ii) of Expenditure-tax Act, 1957?

What a coparcener in a joint Hindu family gets at the partition, even when the partition is partial, does not constitute a source created by the Hindu undivided family within the meaning of s. 4(ii) of the Expenditure-tax Act, 1957, before its amendment in 1959.

COMMR., EXPENDITURE TAX v. LALCHAND.

67 Bom. L.R. 664.

PARTNER, criminal liability of, in using partnership asset for his own use.

A partner has undefined ownership along with the other partners over all the assets of the partnership and if he chooses to use any of them for his own purposes he may be accountable civilly to the other partners but he does not thereby commit any misappropriation within s. 403 of the Indian Penal Code.

VELJI RAGHAVJI v. THE STATE.

67 Bom. L.R. (S.C.) 443.

PARTNERSHIP ACT (IX of 1932), S. 46. See LIMITATION ACT, 1908, ART. 85.

67 Bom. L.R. 18.

—S. 47. See LIMITATION ACT, 1908, ART. 85.

67 Bom. L.R. 18.

S. 69—Suit for accounts of dissolved firm or realisation of property of such firm whether can be filed against partner under s. 69(3) (a)—Maintainability of suit by partner against another for damages for misconduct.

Under s. 69(3) (a) of the Indian Partnership Act, 1932, a suit for accounts of a dissolved firm or for realisation of the property of a dissolved firm can be filed against a person whether he be a partner or not.

A suit by one partner against another for damages for misconduct will fall within the exceptions contained in s. 69(3) of the Act.

NAVINCCHANDRA v. MOOLCHAND.

67 Bom. L.R. 357.

PASSPORT, citizen's right to obtain. See INDIAN PASSPORT ACT, 1920.

67 Bom. L.R. (O.C.J.) 544.

PASSPORT ACT (XXXIV of 1920)—Indian Passport Rules, 1950, Rule 3—Constitution of India, Arts. 14, 21, 19(1) (d) & (e), 73, 12; Seventh Schedule, List I, Item 19—Whether Government of India has absolute and unfettered discretion to grant or refuse passport to Indian citizen—Citizen of India whether has no right to get passport from Government of India—Right to go abroad whether part of "personal liberty" guaranteed to Indian citizen.

In the absence of any legislative provision to guide the exercise of the discretion in the matter of issuing passports, the Government of India must issue passports to all Indian citizens who apply for them.

Article 14 of the Constitution of India is expressly directed to the "State" (which includes the Government of India) and its effect is that, in the absence of any regulations in regard to the issue of passports, the Government of India must issue passports to all Indian citizens who ask for them, or to none at all.

Moreover, art. 21 of the Constitution recognises and protects the right of every person to "personal liberty" of which he cannot be deprived, "except according to procedure established by law." An Indian citizen has, therefore, the right, in the absence of any law to the contrary, to obtain a passport which is necessary for the exercise of his right to go abroad, which right is clearly a part of the "personal liberty" guaranteed to him. **CHOITHRAM v. A. G. KAZI.**

67 Bom. L.R. (O.C.J.) 544.

PAYMENT OF WAGES ACT (IV of 1936), S. 2(vi)—Industrial Disputes Act (XIV of 1947), Secs. 2(p), 12, 18—Indian Contract Act (IX of 1872), Sec. 10—Gratuity payable under settlement arrived at in course of conciliation proceedings—Whether such gratuity "wages" within s. 2(vi) of Payment of Wages Act.

Gratuity payable under a settlement arrived at during the course of conciliation proceedings is not "wages" within the meaning of that word in s. 2(vi) of the Payment of Wages Act, 1936.

Per Naik J. Section 12(4) of the Industrial Disputes Act, 1947, covers a situation where no settlement has been reached as also a situation where a settlement has been reached between the parties, but that settlement is not regarded by the conciliation officer as a fair or just or reasonable settlement.

B. K. JOBANPUTRA v. B. S. KALELKAR.

67 Bom. L.R. 1.

S. 15—Suit for recovery of wages filed after period of limitation under s. 15(2) for making application to Authority or Authority refusing to condone delay in making application—Maintainability of suit.

A civil Court has no jurisdiction to entertain a suit by an employee against his employer for recovery of wages, after the expiry of the period of limitation prescribed by s. 15(2) of the Payment of Wages Act, 1936 for making an application to the Au-

PAYMENT OF WAGES ACT, S. 15—(Contd.)

thority appointed under the Act, or after the Authority has refused to condone the delay in making such an application.

KEWALRAM v. RAM MANOHARDAS.

67 Bom. L.R. (F.B.) 45.

PEDESTRIAN CROSSING, motorist's duty at.

A person who is driving a motor car owes a duty to the members of the public to keep a look-out on the road and more so when approaching a pedestrian crossing where he would normally expect a pedestrian to cross the road. He should be able to stop the car when it reaches it, if necessary. In other words he must not continue the normally high speed when he is nearing a crossing.

STATE v. RAMCHANDRA. 67 Bom. L.R. 472.

PENAL CODE (XLV of 1860), S. 292—Constitution of India, Arts. 19(1) (a), 19(2)—Whether s. 292 void by reason of art. 19(1) (a)—Whether knowledge of obscenity ingredient of offence under s. 292(a)—Mens rea whether required before offence of selling or keeping for sale obscene object completed—Obscenity and pornography, difference between—Test of obscenity in India—Whether test laid down in Hicklin's case to be discarded—Obscenity and art.

Section 292 of the Indian Penal Code, 1860, is not invalid in view of art. 19(2) of the Constitution of India.

Section 292 of the Code embodies a reasonable restriction in the interest of the general public because the law against obscenity seeks no more than to promote public decency and morality.

Section 292(a) of the Code does not make knowledge of obscenity an ingredient of the offence but absence of such knowledge may be taken in mitigation.

Mens rea will be required before the offence of selling or keeping for sale of an obscene object can be said to be complete. The offender must have actually sold or kept for sale, the offending article. The circumstances of the case will then determine the criminal intent and it will be a matter of a proper inference from them.

There is some difference between obscenity and pornography in that the latter denotes writings, pictures etc. *intended* to arouse sexual desire while the former may include writings etc. not intended to do so but which have that *tendency*. Both offend against public decency and morals but pornography is obscenity in a more aggravated form.

The test of obscenity to adopt in India (regard being had to community *mores*) is that obscenity without a preponderating social purpose or profit cannot have the constitutional protection of free speech and expression and obscenity is treating sex in a manner appealing to the carnal side of human nature, or having that tendency. Such a treating with sex is offensive to modesty and decency but the extent of such appeal in a particular book etc. are matters for consideration in each individual case.

PENAL CODE, S. 292—(Contd.)

The test of obscenity laid down by Cockburn C.J. in *The Queen v. Hicklin*, (1868) L.R. 3 Q.B. 360, should not be discarded. It makes the Court the judge of obscenity in relation to an impugned book etc. and lays emphasis on the potentiality of the impugned object to deprave and corrupt by immoral influences. It will always remain a question to decide in each case and it does not compel an adverse decision in all cases.

An overall view of the obscene matter in the setting of the whole work would be necessary, but the obscene matter must be considered by itself and separately to find out whether it is so gross and its obscenity so decided that it is likely to deprave and corrupt those whose minds are open to influences of this sort and into whose hands the book is likely to fall. In this connection the interests of our contemporary society and particularly the influence of the book, etc. on it must not be overlooked.

Where obscenity and art are mixed, art must be so preponderating as to throw the obscenity into a shadow or the obscenity so trivial and insignificant that it can have no effect and may be overlooked. In other words, treating with sex in a manner offensive to public decency and morality, judged of by the national standards and considered likely to pander to lascivious, prurient or sexually precocious minds, must determine the result. A balance should be maintained between freedom of speech and expression and public decency and morality but when the latter is substantially transgressed the former must give way.

RANJIT UDESHI v. STATE.

67 Bom. L.R. (S.C.) 506.

—S. 304-A—*Rash or negligent act under s. 304-A, nature of.*

In order that a person may be guilty under s. 304-A of the Indian Penal Code, 1860, the rash or negligent act must be the direct or proximate cause of the death.

KURBAN HUSSEIN v. THE STATE.

67 Bom. L.R. (S.C.) 447.

—S. 304-A—*Rules for Regulating Traffic in streets by surface markings, 1963. Rule 4—Charge of negligence—Burden of proof—Distinction between rashness and negligence—Motorist's duty to public at pedestrian crossing—Sentence—Whether limits to it could be fixed by judicial precedents.*

In order to establish a charge of negligence under s. 304A of the Indian Penal Code, 1860, it must be shown that the accident was the direct cause of the negligence or rashness of the accused. The guilt of the accused must be proved beyond reasonable doubt.

There is a distinction between rashness and negligence. When one does an act with utter indifference to the consequences of which the doer may be conscious and which he hopes may not take place, one is said to be rash, while criminal negligence is neglect to take that precaution which a reasonable and pru-

PENAL CODE, S. 304-A—(Contd.)

dent person is expected to take under the circumstances obtaining in a given case. In order to infer whether or not there is criminal rashness or negligence on the part of the accused, all relevant facts must be considered.

A person who is driving a motor car owes a duty to the members of the public to keep a look-out on the road and more so when approaching a pedestrian crossing where he would normally expect a pedestrian to cross the road. He should be able to stop the car when it reaches it, if necessary. In other words he must not continue the normally high speed when he is nearing a crossing.

Sentence is a matter of discretion and the limits cannot be fixed by judicial precedents for all time in the future.

STATE v. BHALCHANDRA. 67 Bom. L.R. 472.

—S. 336—*Act committed with intention of causing injury—Whether such act a rash or negligent act—Intentional pelting of stone whether covered by s. 336.*

If a person commits an act with the intention of causing an injury to somebody else, it is an intentional act done with consideration and cannot, therefore, be a rash or negligent act within the meaning of that expression in s. 336 of the Indian Penal Code, 1860.

Where the accused pelts a stone at the complainant with a view to assault him a charge under s. 336 of the Indian Penal Code cannot be sustained against him.

KALA BHIKA v. STATE. 67 Bom. L.R. 223.

—S. 403. See PENAL CODE, 1860, S. 405. 67 Bom. L.R. (S.C.) 443.

—S. 405—*"Entrustment of dominion" over property, what constitutes under s. 405—Whether mere existence of dominion over property enough—Partner whether can be convicted under s. 406 for failure to account for monies belonging to his firm—Whether partner criminally liable under s. 403 for using partnership money for his own purposes.*

Under s. 405 of the Indian Penal Code, 1860, in order to establish "entrustment of dominion" over property to an accused person the mere existence of that person's dominion over property is not enough. It must be further shown that his dominion was the result of entrustment.

Therefore, in a prosecution against a partner for an offence under s. 406 of the Code on the ground that his failure to account for monies belonging to the firm in which he is a partner amounts to criminal breach of trust, the prosecution must establish that dominion over the assets or a particular asset of the partnership was, by a special agreement between the parties, entrusted to the accused partner. If in the absence of such a special agreement a partner receives money belonging to the partnership he cannot be said to have received it in a fiduciary capacity or cannot be held to have been "entrusted" with dominion over partnership properties.

PENAL CODE, S. 405—(Contd.)

A partner has undefined ownership along with the other partners over all the assets of the partnership and if he chooses to use any of them for his own purposes he may be accountable civilly to the other partners but he does not thereby commit any misappropriation within s. 403 of the Indian Penal Code.

VELJI RAGHAVJI v. THE STATE.

67 Bom. L.R. (S.C.) 443.

—S. 494. See HINDU MARRIAGE ACT, 1955, S. 17.

67 Bom. L.R. (S.C.) 423.

PLEADING, particular kind of, or amendment to.

It is not open to a Court to compel a party to make a particular kind of pleading or to amend his pleading and it is also beyond its competence to virtually oblige a party to examine any particular witness.

MUNICIPAL CORPORATION v. LALA PANCHAM.

67 Bom. L.R. (S.C.) 782.

POLICE DEPARTMENTAL ENQUIRY, powers of State Government to order fresh.

There is no bar under the Bombay Police Act, 1951, or the Rules made thereunder preventing the State Government from ordering a fresh departmental enquiry in connection with charges of misconduct against a police officer in respect whereof he has been exonerated in a prior departmental enquiry.

STATE v. GANPAT DHONDIBA.

67 Bom. L.R. 852.

PRACTICE (CIVIL)—Appeal in Rent Act matters.

The Court hearing an appeal under s. 29 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, must follow the rule of practice framed by the High Court under Civil Circular 51 of 1890, and therefore, while summarily rejecting the appeal under O. XLI, r. 11 of the Civil Procedure Code, 1908, must give reasons in short for rejecting it.

GANGABAI v. GOURISHANKAR.

67 Bom. L.R. 231.

—Official Assignee, whether should allow cross-examination of witnesses of proving creditors.

The Official Assignee ought not to allow the creditors or the debtor—the latter except under special circumstances—to cross-examine the witnesses of the proving creditor and convert the process into a long drawn out proceeding. He must act as a "man of business" and consider the matter from a practical point of view.

RE. KHUSHALCHAND DAGA.

67 Bom. L.R. (O.C.J.) 986.

Registrar of Co-operative Societies acting under s. 91 of the Maharashtra Co-operative Societies Act.

The correct practice when a dispute is referred to the Registrar under s. 91 of the Maharashtra Co-operative Societies Act, 1960,

PRACTICE (CIVIL)—(Contd.)

is for the Registrar to issue notices to both the parties and give them an opportunity of being heard on the question whether a dispute exists. It is only after the Registrar has heard the parties or given them an opportunity of being heard that he can decide or satisfy himself whether a dispute within the meaning of s. 91 of the Act exists. It is his decision so arrived at which will be final under s. 91(2) of the Act.

The question whether a dispute within the meaning of s. 91 of the Act exists so as to enable the Registrar or his Nominee to entertain a reference in respect of such dispute must be decided by reference to the averments made in the application for reference made under rule 75 of the Maharashtra Co-operative Societies Rules, 1961.

I. R. HINGORANI v. PRAVINCHANDRA.

67 Bom. L.R. 306.

PRACTICE (Criminal)—Copies of statements or documents, when to be made available to the accused in warrant case upon private complaint. See CRIMINAL PROCEDURE CODE, 1898, S. 173(4).

67 Bom. L.R. 748.

Magistrate when to issue process under s. 204, Criminal Procedure Code.

When an accused is forwarded to a Magistrate, and the Magistrate had taken cognizance of an offence, it is not obligatory on the Magistrate to issue process against each and every person, shown to be accused, and forward him for trial. But, on the other hand, under the provisions of s. 204, Criminal Procedure Code, the Magistrate has, at that stage, before issuing process, to apply his mind, and it is only if in his opinion there is sufficient ground for proceeding against the person on the material placed before him, he has to issue a process.

LAKSHMIPAT CHORARIA v. STATE.

67 Bom. L.R. 618.

Summary, grant of, by magistrate.

On a report made to a Magistrate under s. 173 of the Criminal Procedure Code, 1898, requesting the grant of a summary, it is not obligatory on the Magistrate to hear the accused before he decides which summary he should grant.

KRISHNA GUNDU v. STATE.

67 Bom. L.R. 822.

PRESIDENCY SMALL CAUSE COURTS ACT (XV of 1882), S. 41—Civil Procedure Code (Act V of 1908), O. XXII, rr. 1, 4—Indian Succession Act (XXXIX of 1925), Secs. 305, 306—Ejectment proceedings against licensee under s. 41, Presidency Small Cause Courts Act—Whether such proceedings can be continued after licensee's death against his legal representatives.

Ejectment proceedings against a licensee under s. 41 of the Presidency Small Cause Courts Act, 1882, do not expire with his death but are liable to be continued upon

PRESIDENCY SMALL CAUSE COURTS ACT, S. 41—(Contd.)

death of the licensee against his legal representatives.

The ejectment application proceedings against persons mentioned in s. 41 of the Act are proceedings relating to property rights and/or recovery of properties and are not proceedings which are relating to personal causes of action. These proceedings do not die with the death of a party to the proceedings whether he may be applicant and/or opponent but are such as could be continued against legal representatives of a deceased party to the proceedings.

SAKINABAI v. SALEBHAI. 67 Bom. L.R. 571.

PRESIDENCY-TOWNS INSOLVENCY ACT (III of 1909), S. 17—Employees' Provident Funds Act (XIX of 1952), Sec. 10(1)—Amount in Fund standing to the credit of member adjudicated insolvent and not paid to him—Whether Official Assignee can claim it.

Under s. 10(1) of the Employees' Provident Funds Act, 1952, so long as an amount stands in the Fund to the credit of a member who is adjudicated insolvent and has not been paid to such member, the amount does not vest in the official assignee and he cannot lay claim to it. The immunity given by s. 10(1) of the Act will not continue after the amount has been paid to the insolvent member.

PEARLY ANDREW v. OFFICIAL ASSIGNEE.
67 Bom. L.R. (O.C.J.) 654.

—S. 78—Whether Official Assignee in inquiry before him entitled to receive evidence on oath—Practice—Creditors or debtors whether should be allowed at such inquiry to cross-examine witness of proving creditors—Construction of s. 78.

Under rule 25 of the rules contained in the Second Schedule to the Presidency-towns Insolvency Act, 1909, the Official Assignee is entitled to hold an inquiry and for that purpose receive evidence on oath to decide whether the debt is genuine and owing to the creditor.

The Official Assignee ought not to allow the creditors or the debtor—the latter except under special circumstances—to cross-examine the witnesses of the proving creditor and convert the process into a long drawn out proceeding. He must act as a "man of business" and consider the matter from a practical point of view.

Section 78 of the Presidency-towns Insolvency Act, 1909, must be read as enabling the Official Assignee to administer oath for the purpose of (1) affidavits for the proof of debts, (2) affidavits for petitions and (3) affidavits for legal proceedings.

RE. KHUSHALCHAND DAGA.
67 Bom. L.R. (O.C.J.) 896.

—SCH. II, RULE 25. See PRESIDENCY TOWNS INSOLVENCY ACT, 1909, S. 78.

67 Bom. L.R. (O.C.J.) 896.

PUBLIC PURPOSE, meaning of.

The definition of "public purpose" in s. 3 (f) of the Land Acquisition Act, 1894, as amended by the inclusion of cl. (2) therein by the Land Acquisition (Bombay Amendment) Act, 1953, is *intra vires* of art. 31 of the Constitution of India as well as s. 6 of the Land Acquisition Act.

The question whether there is a public purpose or not does not fall to be considered merely upon the recitals of the particular notification impugned, but must be gathered from the facts and circumstances before the Court.

SADRUDDIN v. J. H. PATWARDHAN.

67 Bom. L.R. 101.

PUBLICATION OF RULES, made under Statute. See PUBLICATION OF STATUTE.

67 Bom. L.R. (S.C.) 583.

PUBLICATION OF STATUTE.

Where there is a statutory requirement as to the mode or form of publication and they are such that, in the circumstances, the Court holds to be mandatory a failure to comply with those requirements might result in there being no effective order the contravention of which could be the subject of prosecution but where there is no statutory requirement the rule is that it should be published in the usual form, i.e., by publication in the country in such media as is generally adopted to notify to all the persons concerned the making of the rules.

In most Indian statutes, including the Foreign Exchange Regulation Act, 1947, there is a provision for the rules made being published in the Official Gazette. Therefore, publication in the Gazette of India is the ordinary mode of bringing a rule or subordinate legislation to the notice of the person concerned.

For an Indian law to operate and be effective in the territory where it operates, viz., the territory of India, it is not necessary that it should either be published or be made known outside the country.

STATE v. MAYER HANS GEORGE.

67 Bom. L.R. (S.C.) 583.

QUASI-JUDICIAL AUTHORITY, duty to disclose material in nature of evidence to the person charged.

The authority which is enjoined with a duty to act in a quasi judicial manner must disclose to the person against whom action has been taken material which is in the nature of evidence on the acceptance or rejection of which turns the decision as to the guilt or innocence of the person against whom an enquiry is held or against whom an action is being taken. Evidence tendered to establish a case must not be received behind the back of the person inasmuch as that would result in denial of an opportunity to that person of rebutting that evidence.

SYED MOHAMMAD v. STATE.

67 Bom. L.R. 170.

RAPE. See EVIDENCE ACT, 1872, S. 8, EXPL. I.
67 Bom. L.R. 16.

RE-EMPLOYMENT. See INDUSTRIAL DISPUTES ACT, 1947, S. 25-A.

67 Bom. L.R. 820.

REGISTRATION ACT (XVI of 1908), S. 17(1).

A certificate issued under s. 38(6)(a) of the Hyderabad Tenancy and Agricultural Lands Act, 1950, operates as a legal transfer and it does not require registration. It is, therefore, admissible in evidence.

SAHEBRAO ANNA V. DATTATRAYA.

67 Bom. L.R. 774.

—S. 49. See HYDERABAD TENANCY AND AGRICULTURAL LANDS ACT, 1950, S. 38(6).

67 Bom. L.R. 774.

REPRESENTATION OF THE PEOPLE ACT (XLIII of 1951), S. 100(1)(d). See REPRESENTATION OF THE PEOPLE ACT, 1951, S. 123.

67 Bom. L.R. 702.

—S. 123—"Statement in relation to candidature," meaning of expression in s. 123(4)—Whether expression means "statement in relation to the candidate"—Construction of statute—Circumstances under which words in statute have wider or narrower meaning.

In order that a statement "in relation to the candidature, or withdrawal" of a candidate should amount to corrupt practices within s. 123(4) of the Representation of the People Act, 1951, it should be in connection with the continued candidature of a candidate or his withdrawal from the candidature. It must be a statement of a fact connected with the candidature of a candidate and which affects his continued candidature during the election.

It is necessary in every case to examine the statements alleged to have been made and find out whether they are made in relation to the public and political character of the candidate or otherwise. It is possible that in some cases the criticism of a candidate's political and public activity may contain aspersions on his character or fitness to be elected. In that case the statements would be covered by the first part of s. 123(4) of the Act. But if that is not so, then merely because his party or his political and public activities or character is attacked by the statements, they are not "statements in relation to his candidature."

While construing a statutory provision the Court must give the words used their ordinary grammatical meaning. A word may take colour from the context, and, in the setting in which it is used it may have a wider or a narrower meaning. The words must be construed, therefore, with due regard to the context, the circumstances under which the same came to be enacted and the mischief that was intended to be prevented.

In order that an election should be set aside under s. 100(1)(d) of the Representation of the People Act, 1951, it is incumbent on the petitioner to produce sufficient number of witnesses and evidence to show that all the votes wasted would have been acquired by the defeated candidate.

SHALIGRAM HIRALAL V. GOVINDRAO.

67 Bom. L.R. 702.

REQUISITIONING AND ACQUISITION OF IMMOVABLE PROPERTY ACT (XXX of 1952), S. 8(3)(b)—Constitution of India, Arts. 31, 226—Whether s. 8(3)(b) ultra vires art. 31—Petition under art. 226 raising constitutional validity of legislation—Delay in presenting such petition whether affects its maintainability.

Clause (b) including the words "which-ever is less" of sub-s. (3) of s. 8 of the Requisitioning and Acquisition of Immovable Property Act, 1952, is ultra vires of art. 31 of the Constitution of India (as it stood prior to its amendment in 1955), and is, therefore, void.

Where a constitutional objection to the validity of a legislation is in question, question of mere delay will not affect the maintainability of a petition under art. 226 of the Constitution of India.

KAMALABAI V. T. B. DESAI.

67 Bom. L.R. (O.C.J.) 85.

RES JUDICATA. See CIVIL PROCEDURE CODE, 1908, S. 11. 67 Bom. L.R. (S.C.) 673.

—Constructive. See CIVIL PROCEDURE CODE, 1908, S. 11. 67 Bom. L.R. (S.C.) 673.

SEA CUSTOMS ACT (VIII of 1878), S. 6.

Under s. 6 of the Sea Customs Act, 1878, it is open to the Central Government to adopt any mode of appointment of officers of customs. It may make a general order of appointment by issuing a notification, or it may make appointment by issuing an order individually appointing any individual person named in the order to be an officer.

LAXMAN PADMA V. STATE.

67 Bom. L.R. 317.

—S. 167(81)—Foreign Exchange Regulation Act (VII of 1947), Secs. 8(1), 23(1-A)—General Clauses Act (X of 1897), Secs. 8, 26—Offence under s. 167(81) of Sea Customs Act and under s. 8(1) of Foreign Exchange Regulation Act in relation to same article—Whether separate convictions for offence under each Act permissible.

There can be separate convictions for an offence under s. 167(81) of the Sea Customs Act, 1878, and an offence under s. 8(1) read with s. 23(1-A) of the Foreign Exchange Regulation Act, 1947, in relation to the same article or thing.

JAGANNATH SONU V. STATE.

67 Bom. L.R. 38.

—S. 167(81).

When a complaint is made by a Customs Officer under s. 167(81) of the Sea Customs Act, 1878, it is open to the Magistrate before whom the complaint is lodged, to proceed against a person against whom in his opinion there is sufficient material on record, even if his name is not mentioned as an accused in the complaint filed by the Customs Officer.

LAKSHMIPAT CHORARIA V. STATE.

67 Bom. L.R. 618.

SEA CUSTOMS ACT, S. 171A.

Section 24 of the Indian Evidence Act, 1872, contemplates that the threat referred to therein must emanate from the person in authority. Therefore, where a person in authority before recording the confession of an accused merely explains to him the provisions of s. 171A of the Sea Customs Act, 1878, the confession is not hit by the provisions of s. 24 of the Indian Evidence Act, as it cannot be said to have been obtained by a threat within the meaning of s. 24. Further, in merely explaining the provisions of s. 171A of the Sea Customs Act to the accused making the confession there is no threat given by the person in authority recording the confession which could have raised any hope in the mind of the accused or led him to suppose that he was to gain any advantage in reference to the proceeding against him relating to the offence of smuggling.

Section 171A of the Sea Customs Act, 1878, does not contemplate the service of a summons as a condition precedent enabling the Customs Officer to record the statement under s. 171A of the Act.

LAXMAN PADMA v. STATE. 67 Bom. L.R. 317.

SEAMAN, risks in the nature of employment. See WORKMEN'S COMPENSATION ACT, 1923, S. 3. 67 Bom. L.R. 735.

SENTENCE, whether can be fixed by judicial precedent.

Sentence is a matter of discretion and the limits cannot be fixed by judicial precedents for all time in the future.

STATE v. BHALCHANDRA. 67 Bom. L.R. 472.

STANDARD RENT, fixation of. See BOMBAY RENTS, HOTEL AND LODGING HOUSE RATES CONTROL ACT, 1947, S. 5.

67 Bom. L.R. 692.

—fixation of.

Standard rent of a part of a building cannot exceed the standard rent of the whole building and the standard rent of the whole building cannot be more than the total of the standard rents of the different parts. Any investments made by the landlord must be considered and a fair return on such investments must be given to the landlord. If the property is wholly changed then apportionment of rent for different portions becomes a difficult problem. If it has not so changed the Court considers such apportioned rent and all such other circumstances as are brought to the notice of the Court. If no other circumstances are proved before the Court then such apportioned rent is the standard rent.

NARAYANLAL v. VENKATRAO.

67 Bom. L.R. 352.

STATUTE, how published. See PUBLICATION OF STATUTE. 67 Bom. L.R. (S.C.) 583.

SUCCESSION CERTIFICATE. See CIVIL PROCEDURE CODE, 1908, O. XLI, R. 33.

67 Bom. L.R. 926.

TAZIADARI. See HYDERABAD ABOLITION OF INAMS AND CASH GRANTS ACT, 1956, S. 1. 67 Bom. L.R. 815.

TRADE MARK. See TRADE AND MERCHANDISE MARKS ACT, 1958, Ss. 11 & 12. 67 Bom. L.R. (O.C.J.) 729.

SOVEREIGN POWERS OF STATE—Immunity of State in respect of acts of its subordinates.

The immunity of the State in respect of the acts of its subordinates in the exercise of its sovereign powers cannot be treated as a dogma or a *mantra* and will have to be considered on the facts of each case. Immunity cannot be claimed for acts which are either illegal or unconstitutional.

LASALGAON CO-OP. BANK v. PRABHUDAS.

67 Bom. L.R. 823.

TRADE AND MERCHANDISE MARKS ACT (XLIII of 1958), Ss. 11, 12—Burden of proof under ss. 11(a) & 12(1)—Construction of 12(1)—Where marks identical whether permissible to consider manner of intended user of mark applied for registration for limited class of goods—Where marks not identical whether enquiry limited to comparison of two marks—Nature of such enquiry—Tests for determining what is likely to deceive or cause confusion.

Under ss. 11(a) and 12(1) of the Trade and Merchandise Marks Act, 1958, the onus is upon the applicant to establish to the satisfaction of the Court that there is no real and tangible danger of confusion. On the other hand, the objections put forward by the opponents must equally be real and not fanciful. It is not for the Court to consider imaginary and unlikely cases in order to bring s. 12(1) of the Act into operation. Even though the burden is on the applicant their case is not to be defeated by constructing rather fantastic or far-fetched imaginary cases involving a combination of circumstances which, however possible it may be, has no reasonable probability in any business sense. The Court is not concerned with hypothetical possibilities but with the ordinary practical business probabilities having regard to the circumstances of the case. If at the conclusion of the enquiry, the answer to the question: Is deception or confusion likely to occur? is "yes" or if the matter remains in dubio, registration must be refused.

Section 12(1) of the Act deals with two types of cases. The first type of cases deals with two identical trade marks. If the mark of which registration is sought and the mark which is already registered are identical, the registration must be refused. It is not then permissible to proceed to consider whether notwithstanding the circumstances that the marks are identical, the manner of intended user of the mark applied for would justify allowing the registration in respect of some limited class of goods. The second type of cases are those in which it is necessarily postulated that the two marks under consideration are not identical. Here the enquiry is

TRADE AND MERCHANDISE MARKS ACT, S. 11, 12—(Contd.)

not limited to the comparison of two marks but involves a comparison of the two marks in relation, as regards the existing mark, to the goods in respect of which the marks are registered and in relation as regards the proposed mark, the goods in respect of which registration is applied for. In the conduct of this enquiry, the surrounding circumstances properly to be taken into account must be considered. When the marks have been considered in relation to the goods, in the light of the surrounding circumstances, the question must be answered: "Is there likely to be confusion or deception if the application is granted?" When the question is answered, the enquiry under the section is concluded for all purposes and if the answer to the question is either in the affirmative or that the matter remains in dubio, it is incompetent to the tribunal to take into account any further matter in order to consider whether, in the light of those matters, the probability of confusion would be removed and thus the answer already given might be otherwise.

The Act does not lay down any criterion for determining what is likely to deceive or cause confusion. Every case must depend on its own particular facts and the value of authorities lies not so much in the actual decision as in the tests applied for determining what is likely to deceive or cause confusion. A trade mark is likely to deceive or cause confusion by its resemblance to another already on the register, if it is likely to do so in the course of its legitimate use in a market where the two marks are assumed to be in use by the traders in that market. In considering the matter, all the circumstances of the case must be considered. *F. HOFFMAN ETC. CO. v. SANITEX CHEMICAL*.

67 Bom. L.R. (O.C.J.) 729.

TRANSFER OF PROPERTY ACT (IV of 1882), S. 53A.

A suit filed under O.XXI, r. 103 of the Civil Procedure Code, 1908, by a person who has obtained possession of the property on the basis of a contract of sale for protecting that possession is maintainable on the basis of the doctrine of part performance under s. 53A of the Transfer of Property Act, 1882, inasmuch as such a suit is essentially of a defensive character.

Such a suit, however, is not maintainable against an auction-purchaser of the same property, as the latter is not a person claiming under the transferor within the meaning of s. 53A of the Transfer of Property Act. *MARUTI GURAPPA v. KRISHNA BALA*.

67 Bom. L.R. 767.

—S. 105—*Indian Easements Act (V of 1882) Secs. 52, 56, 60—Bombay Court-fees Act (Bom. XXXVI of 1959), Secs. 8, 10—Bombay Rents, Hotel and Lodging House Rates Control Act (Bom. LVII of 1947)—Landlord engaging broker and inserting newspaper advertisement offering premises on leave and licence basis—Agreement between landlord and person given exclusive possession of premises*

TRANSFER FOR PROPERTY ACT, S. 105—(Contd.)

—*Agreement stating that licensee to use and occupy premises for eleven months renewable at licensee's option and to pay monthly compensation—Agreement also stating that licence would stand revoked on failure by licensee to observe its terms and licensee not to allow any other person use and occupation of premises—Whether such agreement created relationship of landlord and tenant between parties—Construction of document—Whether Court can refuse to give effect to term of document on ground that it is placed at one place and not at other—Sections 8 and 10 of Bombay Court-fees Act whether lay down any special procedure for inquiry.*

The plaintiff who owned a flat in Bombay employed the services of a broker for the purpose of giving the premises on the basis of leave and licence. The broker inserted an advertisement in a newspaper that a licence was intended to be granted in respect of the premises. The defendant approached the broker in pursuance of the advertisement and paid a certain amount to the latter by way of deposit and also a substantial sum by way of brokerage. Subsequently an agreement was entered into between the plaintiff and the defendant whereby the plaintiff "agreed to grant leave and licence to use and occupy the flat, furniture and fittings for eleven months renewable at the option of the Licensee every eleven months...on the following terms...1. that the Licensee shall pay monthly compensation for use and occupation; 2. that the premises shall be used for residence and business... 5. that if the Licensee fails to observe the terms of the agreement or if she commits nuisance, the licence shall stand revoked and the Licensor shall have the right to eject the Licensee forcibly; 6. that the Licensee shall not allow any other person to use and occupy the premises...7. that the Licensee shall not claim any right as a tenant...". The premises were given in the exclusive possession of the defendant. On the question whether the agreement between the parties created a relationship of landlord and tenant:

He'd, that on the terms of the agreement and the circumstances of the case, the relationship between the parties was that of landlord and tenant.

While construing a document, the Court has to consider the whole document and cannot refuse to give effect to a term of the document on the ground that it is placed at one place and not at the other. Therefore, as long as the agreement between the parties is clear, the place where a term of the document is found cannot matter much.

Section 8 or s. 10 of the Bombay Court-fees Act, 1959, does not lay down any special procedure for the inquiry. Section 8 of the Act only gives discretion to the Court to hold "such inquiry as it deems proper" and s. 10 only confers powers of a Court upon the Court or the Commissioner holding the inquiry.

ANINHA D'COSTA v. PARVATIBAI.

67 Bom. L.R. 452.

TRIBUNAL, constituted under Motor Vehicles Act, whether a Court.

The Tribunal constituted under the Motor Vehicles Act, 1939, is not a Court.

KHAIRUNNISSA v. MUNICIPAL CORPN.

67 Bom. L.R. 903.

TRUSTEE—Trust fund—Applicability of rule of Damdupat to interest payable by trustee on breach of trust in respect to trust fund.

The rule of Damdupat does not apply with respect to the interest adjudged payable by a trustee on his committing breach of trust with respect to the trust funds in his hands.

When a trustee in breach of his duty retains the trust money in his own hands uninvested or mixes it up with his own money or property he is liable to pay interest on it. There is no fixed rate of interest which a trustee is liable to pay but in general he is to be charged simple interest at the rate of 4 per cent per annum.

HUKUMCHAND v. FULCHAND.

67 Bom. L.R. (S.C.) 807.

TRUSTEES, group of, whether can be assessed to wealth-tax? See WEALTH-TAX ACT, 1957, S. 3.

67 Bom. L.R. 671.

ULTRA VIRES—Bombay Commissioners of Divisions Act (Bom. VIII of 1958), S. 3.

The amendments effected in the Land Acquisition Act, 1894, by the State Government by virtue of s. 3(4) of the Bombay Commissioners of Divisions Act, 1957, empowering the Commissioner to acquire land under ss. 4, 6, 9 and 17 of the Land Acquisition Act, are valid amendments so far as the State is concerned.

SADRUDDIN v. PATWARDHAN.

67 Bom. L.R. 101.

Bombay High Court Appellate Side Rules, 1960, Chap. XVII, Rs. 15-A.

Rule 15-A in Chapter XVII of the Bombay High Court Appellate Side Rules, 1960, is valid and therefore all matters such as are specified in it are liable to be heard and disposed of by a single Judge on or after July 15, 1964.

SALUBHAI RAMCHANDRA v. CHANDU.

67 Bom. L.R. 69.

Bombay Rents, Hotel and Lodging House Rates Control Rules, 1948, R. 8.

Rule 8 of the Bombay Rents, Hotel and Lodging House Rates Control Rules, 1948, is not *ultra vires*.

RAMKARANDAS v. BHAGWANDAS.

67 Bom. L.R. (S.C.) 779.

Defence of India Rules, RR. 126A-126-Z.

Rules 126A to 126Z of the Defence of India Rules, 1962, are not *ultra vires* the rule making power of the Central Government and are not a colourable piece of legislation in the sense that they have been framed for some purpose other than the prescribed purposes in s. 3(1) of the Defence of India Act, 1962.

AMICHAND VAIANJI v. G. B. KOTAK.

67 Bom. L.R. (O.C.J.) 234.

ULTRA VIRES—Delegation of power to the municipality to impose tax.

The delegation of the power to the municipalities governed by the Bombay Municipal Boroughs Act, 1925, to impose a tax on professions, trades, callings and employments, is not unconstitutional.

KISAN SUPDU v. BHUSAWAL MUNICIPALITY.

67 Bom. L.R. 286.

Land Acquisition Act, 1894, S. 3(f)(2).

Sub-clause (2) of s. 3(f) of the Land Acquisition Act, 1894, added by the Land Acquisition (Bombay Amendment) Act, 1953, which includes certain purposes within the definition of public purpose are within the connotation of that expression in art. 31 of the Constitution of India.

SADRUDDIN v. J. H. PATWARDHAN.

67 Bom. L.R. 101.

Land Acquisition Act, 1894, Ss. 4, 6.

Sections 4 and 6 of the Land Acquisition Act, 1894, do not infringe art. 19 of the Constitution of India.

SADRUDDIN v. J. H. PATWARDHAN.

67 Bom. L.R. 101.

Land Acquisition Act, 1894, S. 6.

Section 6 of the Land Acquisition Act, 1894, read with s. 3(f)(2) of the Act as amended by the Land Acquisition (Bombay Amendment) Act, 1953, does not infringe art. 14 of the Constitution of India.

SADRUDDIN v. J. H. PATWARDHAN.

67 Bom. L.R. 101.

amendments to Land Acquisition Act, 1894.

The amendments effected in the Land Acquisition Act, 1894, by the State Government by virtue of s. 3(4) of the Bombay Commissioners of Divisions Act, 1957, empowering the Commissioner to acquire land under ss. 4, 6, 9 and 17 of the Land Acquisition Act, are valid amendments so far as the State is concerned.

SADRUDDIN v. J. H. PATWARDHAN.

67 Bom. L.R. 101.

Land Acquisition (Bombay Amendment) Act, 1948.

The Land Acquisition (Bombay Amendment) Act, 1948, was void at its inception.

N. B. JEEJEEBHAY v. ASST. COLLECTOR.

67 Bom. L.R. (S.C.) 575.

Minimum wages (Maharashtra Amendment) Act, 1962.

The Minimum Wages (Maharashtra Amendment) Act, 1962, is not *ultra vires* of the powers of the State Legislature.

NAGPUR HOTEL OWNERS ASSOC. v. STATE.

67 Bom. L.R. 206.

Municipal Act (Corporation), (Bom. III of 1888), S. 394.

Section 394 of the Bombay Municipal Corporation Act, 1888, is *intra vires* the State Legislature.

LALJI MULJI v. STATE.

67 Bom. L.R. 484.

ULTRA VIRES, BOMBAY MUNICIPAL CORPORATION ACT, 1888, S. 354R & S. 354RA.

The restrictions on the tenants' right to hold property enacted by ss. 354R and 354RA of the Bombay Municipal Corporation Act, 1888, are not unreasonable and the provisions of the sections are valid.

MUNICIPAL CORPORATION *v.* LALA PANCHAM.
67 Bom. L.R. (S.C.) 782.

Penal Code, S. 292.

Section 292 of the Indian Penal Code, 1860, is not invalid in view of art. 19(2) of the Constitution of India.

Section 292 of the Code embodies a reasonable restriction in the interest of the general public because the law against obscenity seeks no more than to promote public decency and morality.

RANJIT UDESHI *v.* STATE.

67 Bom. L.R. (S.C.) 506.

Requisitioning and Acquisition of Immovable Property Act, S. 8(3)(b).

Clause (b) including the words "which-ever is less" of sub-s. (3) of s. 8 of the Requisitioning and Acquisition of Immovable Property Act, 1952, is *ultra vires* of art. 31 of the Constitution of India (as it stood prior to its amendment in 1955), and is, therefore, void.

KAMALABAI *v.* T. B. DESAI.

67 Bom. L.R. (O.C.J.) 85.

WEALTH-TAX ACT (XXVII of 1957), S. 3—Whether valuation date is date for attraction of tax.

Under s. 3 of the Wealth-tax Act, 1957, the unit of period for which the tax is levied is the unit of the financial year.

The provisions of the Act which determine the tax liability are not the provisions which existed on the date which is the date with reference to which the net wealth is to be computed, but the provisions which are applicable during the period of assessment for which the tax is levied.

PRAMOD KUMAR *v.* COMM'R., WEALTH TAX.

67 Bom. L.R. 659.

S. 3—Indian Income-tax Act (XI of 1922), Sec. 3—Group of trustees holding wealth as trustees—Whether such trustees can be assessed to wealth-tax.

A group of trustees can be assessed to wealth-tax under the Wealth-tax Act, 1957, in respect of the wealth held by them as trustees.

ABHAY KHATAU *v.* COMM'R., WEALTH TAX.

67 Bom. L.R. 671.

S. 5—Furniture in s. 5(1)(viii) whether includes what is contained in it—Household utensils whether means what is merely, in shape of such utensils and not intended to be used as such—Personal use, what constitutes.

Under s. 5(1)(viii) of the Wealth-tax Act, 1957, exemption in respect of furniture does not include what is placed or contained in the article of furniture. Therefore, articles

WEALTH-TAX ACT, S. 5—(Contd.)

contained in show cases exhibited in drawing-rooms do not form part of the show cases as items of furniture and where they are intended to be excluded, a specific provision is made for their exclusion, e.g. in clauses (xii) and (xiii) of s. 5(1) of the Act. Gold caskets although contained in a show case which is part of the drawing-room furniture, are not entitled to exemption under s. 5(1)(viii).

The expression "household utensils" in s. 5(1)(viii) of the Act means utensils which are in fact household utensils i.e. articles which are normally and commonly used by the assessee for his personal or household use and not something which is merely in the shape of household utensils but never intended to be used as such. The use must be according to the ordinary ideas, habits, customs and notions of the class of society to which the assessee belongs or according to the well established habits, customs and traditions of the family of the assessee. The mere possibility that the articles are capable of being put to a personal or household use will not be sufficient to treat them as intended for a personal or household use. The question whether the articles are intended for personal or household use has to be considered with reference to the facts and circumstances as they exist at the time when the question has to be determined.

The personal use contemplated in s. 5(1)(viii) of the Act is the use of a like nature as the use of other items mentioned in the section, namely, furniture, household utensils, wearing apparel and provisions. The use as a decoration in the drawing-room in the house, which is only calculated to give the person making the use a pride of possession is not contemplated in the section. The articles which are intended to give pride of possession and not intended for sale by the assessee are provided for in the other clauses of the section, for instance, cls. (xii) and (xiii). Souvenirs or mementoes which are articles not intended for sale but are only possessed to give the possessor a pride of possession are, however, not exempted under any of the clauses of s. 5 of the Act.

PODDAR *v.* COMM'R., WEALTH TAX.

67 Bom. L.R. 666.

WINDING-UP. See COMPANIES (COURT) RULES, R. 96.

67 Bom. L.R. (O.C.J.) 376.

WORDS AND PHRASES :

"Accident arising out of employment". See WORKMEN'S COMPENSATION ACT, 1923, S. 3.

67 Bom. L.R. 735.

"Any dispute". See MAHARASHTRA CO-OPERATIVE SOCIETIES ACT, 1961, S. 91.

67 Bom. L.R. (F.B.) 877.

"Any person aggrieved". See MUNICIPAL ACT (CORPORATION), S. 354R.

67 Bom. L.R. (S.C.) 782.

WORDS AND PHRASES—(Contd.)

"Bringing". See FOREIGN EXCHANGE REGULATION ACT, 1947 S. 8(1).

67 Bom. L.R. (S.C.) 583.

"Cargo". See FOREIGN EXCHANGE REGULATION ACT, 1947, S. 8(1).

67 Bom. L.R. (S.C.) 583.

"Charitable purpose". See GIFT-TAX ACT, 1958, S. 5(1)(vi).

67 Bom. L.R. 417.

"Claiming through a member". See MAHARASHTRA CO-OPERATIVE SOCIETIES ACT, 1961, S. 91.

67 Bom. L.R. 306.

"Compensation". See LAND ACQUISITION (BOMBAY AMENDMENT) ACT, 1948.

67 Bom. L.R. (S.C.) 575.

"Convene". See MAHARASHTRA ZILLA PARISHADS AND PANCHAYAT SAMITIS ACT, 1962, S. 72.

67 Bom. L.R. (F.B.) 516.

"Entrustment of dominion". See PENAL CODE, S. 405.

67 Bom. L.R. (S.C.) 443.

"Especially entrusted by the Provincial Government in this behalf". See MUNICIPALITIES ACT (C.P. & BERAR), 1922, S. 20A(2).

67 Bom. L.R. 845.

"Household utensils". See WEALTH-TAX ACT, 1957, S. 5(1)(vii).

67 Bom. L.R. 666.

"In relation to the candidature, or withdrawal". See REPRESENTATION OF THE PEOPLE ACT, 1951, S. 123.

67 Bom. L.R. 702.

"Instrument". See INCOME-TAX ACT, 1922, S. 26A.

67 Bom. L.R. 403.

"Landlord". See BOMBAY TENANCY AND AGRICULTURAL LANDS (VIDARBHA REGION AND KUTCH AREA) ACT, 1958, S. 52.

67 Bom. L.R. 931.

"Out of employment". See WORKMEN'S COMPENSATION ACT, 1923, S. 3.

67 Bom. L.R. 735.

"Personal liberty". See PASSPORT ACT, 1920.

67 Bom. L.R. (O.C.J.) 544.

"Possessed". See HINDU SUCCESSION ACT, 1956, S. 14.

67 Bom. L.R. 612.

"Premises". See BOMBAY RENTS, HOTEL AND LODGING HOUSE RATES CONTROL ACT, 1947, S. 11.

67 Bom. L.R. 352.

"Public Purpose". See LAND ACQUISITION ACT, 1894, S. 4.

67 Bom. L.R. 101.

"Public service vehicle". See MOTOR VEHICLES ACT, 1939, S. 2.

67 Bom. L.R. 569.

"Sale of goods". See C.P. & BERAR SALES TAX ACT, 1947, S. 10.

67 Bom. L.R. 138.

"Sending". See FOREIGN EXCHANGE REGULATION ACT, 1947, S. 8(1).

67 Bom. L.R. (S.C.) 583.

WORDS AND PHRASES—(Contd.)

"Subject to his personal law". See HINDU SUCCESSION ACT, 1956, S. 14.

67 Bom. L.R. 612.

"Suit". See MUNICIPAL ACT (CORPORATION), S. 527.

67 Bom. L.R. 903.

"Suitable residence". See BOMBAY RENTS, HOTEL AND LODGING HOUSE RATES CONTROL ACT, 1947, S. 13(1)(1).

67 Bom. L.R. 690.

"Tenancy". See BOMBAY COURT-FEES ACT, 1959, S. 6.

67 Bom. L.R. 210.

"To take some step in aid of execution". See LIMITATION ACT, 1908, Art. 182(5).

67 Bom. L.R. 917.

"Total number of members of Panchayat Samiti". See MAHARASHTRA ZILLA PARISHADS AND PANCHAYAT SAMITIS ACT, 1962, S. 72(7).

67 Bom. L.R. 708.

"Transport vehicle". See MOTOR VEHICLES ACT, 1939, S. 2.

67 Bom. L.R. 569.

"Unless it is otherwise expressly provided". See ELECTRICITY ACT, 1910, S. 33.

67 Bom. L.R. 534.

"Wages". See PAYMENT OF WAGES ACT, 1936, S. 2(vi).

67 Bom. L.R. 1.

"Wages". See WORKMEN'S COMPENSATION ACT, 1923, S. 2(m).

67 Bom. L.R. 893.

"Waste or arable". See LAND ACQUISITION ACT, 1894, S. 4.

67 Bom. L.R. 101.

"Wholly". See LAND ACQUISITION ACT, 1894, S. 4.

67 Bom. L.R. 101.

WORKMEN'S COMPENSATION ACT (VIII of 1923), S. 2(m)—Industrial Disputes Act (XIV of 1947), Sec. 2(rr)—Bonus whether included in 'wages' in s. 2(m) of Act VIII of 1923.

Bonus forms part of "wages" as defined in s. 2(m) of the Workmen's Compensation Act, 1923.

MAHARASHTRA SUGAR MILLS v. ASHRU.

67 Bom. L.R. 893.

—S. 3—Merchant Shipping Act (XLIV of 1958), Sec. 101—Indian Evidence Act (I of 1872), Sec. 108—"Accident arising out of employment", meaning of expression in s. 3, Workmen's Compensation Act—Tests to determine whether accident arose out of employment—Balance of probabilities as to whether death caused by accident or design—Presumption to be drawn in such case—Inference of accidental death whether can be drawn in absence of evidence of eye-witness—Whether s. 108, Indian Evidence Act exhaustive of circumstances in which death can be inferred.

The words "accident arising out of employment" in s. 3 of the Workmen's Compensation Act, 1923, mean that there should be a direct connection between the accident

WORKMEN'S COMPENSATION ACT, S. 3
—(Contd.)

and the employment. If the accident has occurred on account of a risk which is an incident of the employment, the claim for compensation must succeed, unless the workman has exposed himself to an added peril by his own imprudent act.

It is open to a Court to find on an inference that the accident arose out of employment though no human being was present who could give direct evidence how and when the accident happened.

The expression "out of employment" is not confined to the nature of the employment, but applies to the employment as such—to its nature, its conditions, its obligations and its incidents. If by reason of any of these, the workman is brought within the zone of special danger or is injured or killed, the accident would be one arising out of employment. If the employment brings the workman within or allows him to be within proximity of the peril to which the injury or death can properly be ascribed, the accident can be said to have arisen out of employment.

If the workman is properly in a place to which some risk attaches and an accident occurs which is capable of being attributed to a risk which is ordinarily inherent in the discharge of his duties, it is legitimate, notwithstanding the absence of evidence as regards the immediate circumstances of the accident, to attribute the accident to the risk and to hold that it arose out of employment.

It is not necessary to prove that the workman was engaged in a particular duty in the discharge of which he was at a particular spot where the accident happened. By the place of danger is meant not a particular spot of danger but the entire place, as for example, the ship or the train.

A seaman's employment puts him in a dangerous position, the ship on high seas or in deep waters being a place to which some risk is incidental. There are perils, surrounding the seaman's life and duty, which are inherent in his employment.

As the employment of a seaman, by the very nature of it, exposes him to certain dangers, whether at work or not, as for example, the danger of falling overboard or

WORKMEN'S COMPENSATION ACT, S. 3
—(Contd.)

being swept overboard, there is a *prima facie* presumption, if death by drowning be proved, that the death was caused by an accident which arose out of employment.

The presumption thus arising can be rebutted by the employer by leading evidence of facts and circumstances showing that the workman had at or about the time of his death departed from the controlling incidents of his employment or that he had added to the peril by his own imprudent act.

Where there is a balance of probabilities as to whether death is caused by accident or by design and there is no clear evidence as to the cause of death, death must be presumed to be accidental. An innocent cause of death must be preferred to a cause which, if accepted, would lead to an inference of crime.

Whether an inference of accidental death can properly arise must necessarily depend upon the circumstances of each individual case. But the view that one cannot hold a death to be accidental unless there is an eyewitness to the accident is a rigorous view of the rules of evidence and will defeat the protection afforded to the workers in a large number of cases, especially in cases of seamen whose death is caused by drowning.

Section 108 of the Indian Evidence Act, 1872, is not exhaustive of the circumstances in which death can be inferred. There may be cases in which death cannot be presumed under s. 108 of the Act, as for example, cases in which a person has not been heard of for less than seven years and yet the fact of death can be inferred from the circumstances of the case.

Under the first proviso of s. 30(1) of the Workmen's Compensation Act, 1923, the High Court has no jurisdiction to interfere with the decision of the Commissioner if the questions raised in appeal are pure questions of fact, or even if the appeal raises but a settled question of law.

IBRAHIM v. MACKINNON MACKENZIE & Co.
67 Bom. L.R. 735.

—S. 30(1). See WORKMEN'S COMPENSATION ACT, S. 3.
67 Bom. L.R. 735.

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PRESUMPTION OF INNOCENCE TO-DAY.*

WHAT is the presumption of innocence? What is the historical background of this great principle? What is its scope? Is it subjected to any modification? If so, is there any further scope for modifying the presumption of innocence? And if so, to what extent in the context of to-day? These are some of the salient questions which I propose to discuss here.

In the words of Lord Sankey L.C.

'throughout the web of the English Criminal Law one golden thread is always to be seen; that it is the duty of the prosecution to prove the prisoner's guilt subject to the matters of defence of insanity and subject also to any statutory exception.'¹

'It is an essential principle of our criminal law that a criminal charge has to be established by the prosecution beyond reasonable doubt.'²

The principle underlying the rule is the oft-quoted maxim that it is better that ten guilty persons should escape than one innocent person suffer.

This great principle of presumption of innocence is a matter of the law of evidence. It is immediately connected with the questions of burden of proof, proof beyond reasonable doubt and benefit of doubt. That is why I treat these aspects of proof as part and parcel of the connotation of the expression presumption of innocence. It is also mediately linked up with the questions of raising false defence, making false denials, the failure to explain circumstances adverse to the accused, testimonial compulsion, extorted confessions, quantum of onus on the accused, double standard of proofs for civil and criminal cases, *mens rea*, circumstantial evidence and the strict construction of criminal statute, and the like. These latter problems, it is submitted, fall within the scope of the presumption of innocence.

The effective force of this vital presumption can hardly be exaggerated considering the range of significant legal concepts and consequences associated with it. The presumption of innocence is in truth merely another form of expression for a part of the accepted rule for the burden of proof in criminal cases, i.e. the rule that it is for the prosecution to adduce evidence and to produce persuasion beyond a reasonable doubt. As to the measure of persuasion the presumption says nothing. As to the burden of proof the presumption implies that the accused may remain inactive and secure, until the prosecution has taken up its burden and produced evidence and effected persuasion.³ A necessary corollary to this presumption is that a Court should consider nothing but the evidence on record and hence extraneous considerations are ruled out. Thus in the words of Wigmore 'the presumption of innocence is particularly a warning not to treat certain things improperly as evidence'⁴. In practice, the presumption stimulates the search for independent evidence.

Stephen says that this is one of the most characteristic features of English criminal procedure, and it presents a marked contrast to that which is common

*By H. S. Ursekar, M.A., LL.B., Presidency Magistrate, Bombay. [1933] A.C. at p. 699 (P.C.).

¹ *Woolmington v. Director of P.P.*, [1935] A.C. 462. ³ Wigmore on Evidence. (1940, Vol. IX, 407).

² Per Lord Atkin, in *Lawrence v. The King*, ⁴ *Ibid.*, p. 409.

to all continental countries.⁵ The presumption of innocence may be contrasted with the presumption of guilt of the prisoner. The latter presumption gives rise to a number of inhuman practices like torture to extort confessions. Under the Roman law torture formed an essential part of the procedure. However, evidence obtained by torture was to be used with caution.⁶ Under the ancient Indian law the institution of ordeal seems to be based more or less on the presumption of guilt e.g. a person accused of theft was subjected to the ordeal of oil and was asked to pick up by hand a piece of metal from boiling oil. If his hands emerged unscathed he was deemed to be innocent, otherwise guilty.⁷ In the *Mrichhakatikam* the hero is warned by the Judge to tell the truth on pain of being flogged.⁸ In marked contrast we find that the presumption of innocence is a healthy salient feature of the common law of England.

Bombay was the first province in India in which a Penal Code was enacted by the Regulation of 1827, replacing the traditional Indian Law. That Code was applicable only to the Courts of the East India Company and continued till it was substituted by the Indian Penal Code in 1860.⁹ The presumption of innocence was given effect to by the British in India from early times. It was held in the case of *Nobokisto* that the golden rule of criminal jurisprudence is that an accused is presumed to be innocent till he is proved to be guilty; hence the law requires the accuser to prove all facts compatible with his guilt and incompatible with his innocence.¹⁰ And in this respect law does not weigh in golden scales the conflicting testimony offered by each side, but taking its stand on the side of the accused, it examines all facts and circumstances with care and circumspection so that it may not abuse the liberties of those who are placed under its protection.¹¹ The presumption of innocence is given effect to in s. 101 of the Indian Evidence Act. See Illustration (a) to it. Section 342 of the Criminal Procedure Code, 1898, also gives effect to this presumption.

The presumption of innocence is immediately connected with the questions of burden of proof, proof beyond reasonable doubt and benefit of doubt. No doubt the burden of proof of establishing the guilt of the accused is cast by s. 101 of the Evidence Act on the prosecution because he who asserts must prove. The expression 'burden of proof' has a two-fold meaning viz., the burden of proof and the onus of proof. The Supreme Court of India has recently observed in the case of *Raghavamma v. Chenchamma*,¹² that there is an essential distinction between burden of proof and onus of proof. Burden of proof lies upon the person who has to prove a fact and it never shifts but the onus of proof shifts. Circumstances may shift onus of proof. Such a shifting of onus is a continuous process in the evaluation of evidence. Lord Denning calls the former a legal burden¹³ while the latter type of burden is called the provisional or tactical burden.¹⁴ The burden of proof or the legal burden i.e. the duty of the prosecution to prove the guilt of the accused does not shift to the accused and continues upon the prosecution till the end of the trial. But the onus i.e. the duty of going forward with the evidence may shift to the accused as in case of a person accused of being in possession of stolen property by reason of s. 114, ill. (a) of the Evidence Act. In that event it will be for the accused to rebut the presumption of the guilt by explaining his possession. It is true that the burden of proof does not shift on the accused, but it is equally true that under certain circumstances as illustrated above the onus shifts on to him. This way lies the breach in the castle of the presumption of innocence. We may call it a modification of the presumption of innocence.

The legal burden continues to be on the prosecution till the end of the trial. In case of acquittal the presumption of innocence is strengthened and is some-

5 Stephen, Criminal Law, Vol. I, 441.

6 *Ibid.*, pp. 47, 48.

7 Yajnyavalkya II, 113.

8 *Mrichhakatikam*, IX, 36.

9 Stephen, Criminal Law, Vol. III, p. 295.

10 *Queen v. Nobokisto*, (1867) 8 W.R. (Cr.). 87.

11 *Queen v. Beharee*, (1865) 8 W.R. (Cr.) 23, 26.

12 [1964] A.I.R. S.C. 136, 143.

13 Lord Denning, Presumptions and Burdens, in (1945) 61 L.Q.R. 379.

14 *Essays on Evidence*, Cowen and Carter, 242.

times called a double presumption. This has given rise to the well-known doctrine of 'very substantial and compelling reasons' which an appellate Court is to keep in mind while upsetting an order of acquittal.¹⁵

The scope of the burden of proof gives rise to the question of proof beyond a reasonable doubt. Woodroffe observes that the doctrine of presumption of innocence depends upon the doctrine of proof beyond a reasonable doubt.¹⁶ It is indeed difficult to define the phrase reasonable doubt. Chief Justice Shaw in *Webster's* case laid down that

"It is not mere possible doubt, because everything relating to human affairs and depending upon moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge."¹⁷

A reasonable doubt is a doubt for which a reason can be given.¹⁸ The doctrine of the proof beyond reasonable doubt brings in its wake the difference in the quantum of proof between the civil and criminal cases. This difference is maintained despite the fact that the definition of 'proved' in s. 3 of the Evidence Act does not make such a distinction in terms.

The quantum of proof as traditionally known to the law have been two and have been regarded as distinct. The higher standard (conveniently, if inaccurately, called the criminal standard) is defined as "proof beyond reasonable doubt". The lower standard (conveniently, if inadequately, called the civil standard) is defined as 'proof upon the balance of probabilities'. Lord Denning in *Miller v. Minister of Pensions*¹⁹ has observed thus about the criminal standard:

"That degree is well-settled. It need not reach certainty, but must carry a high degree of probability. Proof beyond reasonable doubt does not mean the proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence 'of course it is possible but not in the least probable' the case is proved beyond reasonable doubt but nothing short of that will suffice."

In the same case he contrasted the position as obtained in civil cases thus

"That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say, 'we think it more probable than not', the burden is discharged, but if the probabilities are equal it is not".

Thus the criminal standard of proof is more strict than its civil counterpart. In the former all the points of doubt must be eliminated before a judgment can be recorded for the prosecution, while in the latter on a mere preponderance of evidence or probabilities a judgment can be given for the plaintiff. The moment a criminal Court is convinced that there are some points of doubt or suspicion militating against the guilt of the accused the benefit of doubt must go to the accused. Hence the Supreme Court has held that suspicion, however grave, cannot take the place of proof²⁰ and, therefore in such cases the accused is given the benefit of doubt.

The presumption of innocence confers valuable privileges on the accused which fall within the scope of the presumption of innocence. The accused is not bound to answer any questions and can keep his lips sealed and rely on the presumption of innocence as was held in *Ajmer Singh's* case. He need not lead any evidence in defence. No oath can be administered to him (s. 342(4), Criminal

15 See *Ajmer Singh v. The State of Punjab*, [1953] S.C.R. 418.

16 Woodroffe, *Evidence*, (1963 edn.) Vol. II, 1687.

17 *Com v. Webster*, 5 Cush. (Mass, U.S.A.) 295.

18 *U.S. v. Butler* (C.C.), 1 Hughes 457, Fed Case No. 14700.

19 [1947] 2 All E.R. 372, 373, 374.

20 *Palvinder Kaur v. State of Punjab*, [1953] Cr L.J. 154, S.C.

Procedure Code). The accused shall not render himself liable to punishment by refusing to answer questions by the Court nor by giving false answers to them, though the Court in that event may draw inference from such refusal or answers as it thinks fit (s. 342(2), Criminal Procedure Code). Questions in the nature of cross-examination are to be avoided by the Court while examining the accused. The accused cannot be compelled to give evidence on oath in his defence except at his request in writing (s. 342-A, Criminal Procedure Code). The accused cannot be compelled to be a witness against himself (art. 20(3), Constitution of India). The scope of this privilege against self-incrimination was explained by the Supreme Court of India in *M. P. Sharma v. Satish Chandra*.²¹ Subsequently, the Supreme Court has reviewed its own decision in the case of *Kathi Kalu v. State of Bombay*.²² The accused cannot be convicted on his involuntary confession and hence torture is eliminated to a certain degree. The safeguards to be observed by the Court recording a confession as provided in s. 164 read with s. 364, Criminal Procedure Code, also tend to secure the accused from coercion, threat or inducement.

In this connection, we may consider the question of quantum of proof to be led by the accused to rebut the onus cast on him under certain circumstances. It is well-settled that the burden of proof on the accused is less rigorous than on the prosecution.²³ The Supreme Court of India has held in the case of *C. I. Emden*²⁴ that it is enough proof if explanation offered by the accused is reasonably probable. This judicial interpretation of the definition of 'proved' as contained in s. 3 of the Evidence Act in making a concession in favour of the accused in the matter of the standard of proof the defence is to lead is, it is submitted, also rooted in the principle of the presumption of innocence of the accused.

The well-known canons of construction of statutes are also in favour of the strict construction of criminal statutes. If the words used in a criminal statute are reasonably capable of two constructions, the construction which is favourable to the accused should be preferred; in construing the relevant words it is obviously necessary to have due regard to the context in which they have been used.²⁵

Kenny has pointed out that the scope of the presumption of innocence extends also in every civil case where any allegation is made that a criminal act has been committed. Thus, in an action on a life-insurance policy the presumption is against suicide.²⁶

Mayne has brought out the difference between the French, the British and the Indian Law on the subject. Thus there are two well-known systems of dealing with prisoners, which are directly opposed to each other. In France, the accused is the first and principal witness for the prosecution. Naturally he is an unwilling witness, and accordingly the presiding Judge, who conducts his interrogation, cross-examines him, brow-beats him, puts every sort of criminating statement into his mouth, and assumes his guilt throughout in a manner which, to our ideas, is far from edifying. In England, no question can be put to a prisoner, for fear his answer might prejudice his case. The result is that, if in his own interest it is desirable to clear up any difficulty, it is impossible to apply for information to the only person in Court who can give it. No doubt he is told at one time that he may cross-examine the witnesses; at another time, that he may say anything he wishes to the Court or jury; but in general this is a mere farce. It hardly ever happens that a prisoner, however innocent, understands the real difficulty of his case, and the mode in which it might be cleared up. If he does show any such perception, he is generally a hardened and habitual offender. The Indian system aims at avoiding the evils of each system, and simply tries to assist justice, which is equally desirous to convict the guilty and to acquit the innocent. This is

21 [1954] S.C.R. 1077.

22 [1963] 1 S.C.J. 195.

23 *George Gfeller v. The King*, [1943] A.I.R. P.C. 221.

24 *C.I. Emden v. State of U.P.*, [1960] A.I.R. S.C. 585.

25 *Alamgir v. Bihar*, [1959] A.I.R. S.C. 436.

26 Kenny, Criminal Law, 365.

effected by s. 342 of the Criminal Procedure Code.²⁷ Stephen points out that

"The British system effectively avoids the appearance of harshness not to say cruelty, which often shocks an English spectator in a French court of justice, and I think that the fact that the prisoner cannot be questioned stimulates the search for independent evidence. The evidence in an English trial is, I think, usually much fuller and more satisfactory than the evidence in such French trials as I have been able to study."²⁸

It may be mentioned that recently in February 1964 the New Judges' Rules were published in England. Lord Shawcross in his address to the West Riding Magistrates at Leeds last year suggested that it might be an advantage for a magistrate to have the power to interrogate potential witnesses and suspects, with a view to the discovery of the absolute truth; he referred to the provisions of the Indian Evidence Act, 1872.

The next question for inquiry is whether there are any existing modifications of the presumption of innocence. The answer is, Yes. These modifications can be grouped under three heads: (A) Legislative; (B) Procedural; and (C) Judicial.

(A) There is a well-worn saying current in International Politics viz. a war to end the war. On those lines we find presumptions enacted by statutes to whittle down or end the presumption of innocence. There are a number of such presumptions which shift the onus to the accused, to the prejudice of the presumption of innocence, for example, the presumptions under ss. 66(2) and 85(2) of the Bombay Prohibition Act, s. 124 of the Bombay Police Act, s. 114(a) of the Indian Evidence Act, s. 3 of the Railway Stores (Unlawful Possession) Act, 1955, and also under s. 5(3) of the Prevention of Corruption Act, 1955. See also s. 106 of the Evidence Act. These are only illustrative and not exhaustive presumptions.

(B) There are some features of the Criminal Procedure which militate against the sanctity of the presumption of innocence; however the people have taken them for granted. The secrecy with which the first information report is lodged with the Police, the publicity of the arrest, the commitment to lock up while under trial, the demand of bail, refusal of bail and the like. Judge Wiglittle of the U.S.A. has remarked that they are so many steps and strokes to blacken the accused before he is permitted to open his mouth.²⁹

(C) The last but not the least inroad in the presumption of innocence is constituted by the judicial modifications thereof i.e. the modifications effected by case law. The point may be illustrated as follows:

False Denials: Formerly it was loosely believed that an accused has a privilege to tell lies and to take up false defences. However, in the case of *Pershad v. U.P. State*³⁰ in construing s. 114 of the Evidence Act the Supreme Court held that

"where in a murder charge the accused falsely denied several relevant facts which have been conclusively established, the Court would be justified in drawing an adverse inference from this against the accused."

Failure to Explain: It was formerly axiomatic that it was also the privilege of the accused not to open his mouth. But take the case of *Deonandan v. State of Bihar*.³¹ The charge was of murder and the evidence was circumstantial. The Supreme Court held that in a case where the various links have been satisfactorily made out and the circumstances point to the accused as the probable assailant with reasonable definiteness and in proximity to the deceased as regards time and situation and the accused offers no explanation, which if accepted, though not proved, would afford a reasonable basis for a conclusion on the entire case consistent with his innocence, such absence of explanation or false explanations would itself be an additional link which completes the chain of circumstances against the accused.

²⁷ Mayne's Criminal Law (1901), 998, 999.

²⁸ Stephen's Criminal Law, Vol. I, 441, 442.

²⁹ Wigmore on Evidence Vol, 9, 408.

³⁰ [1957] A.I.R. S.O. 211.

³¹ [1955] Cr. L.J. 1647.

Mens Rea: In his monograph on *Mens Rea* in Statutory Offences, Dr. Edwards has only pointed that the rules of *mens rea* are embedded in the principle that no man shall be punished for committing a crime unless a guilty mind can be imputed to him.³² It is, however submitted that *mens rea* is also a safeguard flowing from the presumption of innocence. Proof of the mental state of the accused while committing an offence casts an additional burden on the prosecution in order to rule out any chance of convicting an innocent person. We find a tendency to dispense with the proof of *mens rea* in social welfare offences. In *Sarjoo Prasad v. State of U.P.*³³ the Supreme Court held that no *mens rea* was necessary under s. 7 read with s. 16 of the Prevention of Food Adulteration Act, 1954, for sale of food by a servant in the shop, as it is not necessary in the case of his master.

Circumstantial Evidence: An unmistakable tendency is discerned to base a conviction on circumstantial evidence alone even in capital cases. In the case of *State of U.P. v. Deoman*³⁴ a death sentence was passed on circumstantial evidence. In the recent case of *M.G. Agarwal v. State of Maharashtra*³⁵ the Supreme Court of India has held that

"It was settled law that a conviction can be reasonably founded on circumstantial evidence if it is wholly inconsistent with the innocence of the accused and consistent only with his guilt. If the circumstances proved are consistent either with innocence or guilt, the accused person is entitled to the benefit of doubt. But in applying this principle a distinction must be made between primary facts which have to be proved in the ordinary way and the inference of guilt to be drawn therefrom. It is in connection with the latter aspect of the problem that the doctrine of benefit of doubt can apply and an inference of guilt can be drawn only if the proved facts are wholly inconsistent with innocence, and consistent only with guilt."

It will be seen that the Supreme Court has now made a distinction between primary facts in the evidence and the inference of guilt to be drawn from them for the purposes of giving benefit of doubt to the accused.

In view of the multitude of modifications question arises, is there further scope for modification of the presumption of innocence? Let us consider the purpose of this presumption.

This great presumption of innocence crystallizes the sanity and security of law. Law is sane as it provides for the prevention of punishment of the innocent by reason of this presumption. Law is secure as people feel safe under the wings of this presumption. Further, this presumption affords protection against the possibilities of arbitrary State action. In the words of Stephen 'it contributes greatly to the dignity and apparent humanity of a criminal trial.'³⁶ Most people accused of crime are poor, stupid and helpless and many go undefended. The presumption of innocence ensures a fair trial and helps justice. The right to fair trial is a fundamental right. It is at once a natural right of man as well as a constitutional right being enshrined collectively in arts. 20, 21 and 22 of the Indian Constitution. These articles are appropriately grouped under the heading right to freedom. The denial of the right to fair trial is a denial of the right to freedom, as in that event a person may be deprived of freedom, except according to procedure established by law (art. 21). Prof. Hall of Harvard has analysed the various rights which collectively guarantee a fair trial thus: the trial must be speedy, it must be public, as the judges, prosecutors and witnesses usually behave better in public. The trial must be by an impartial tribunal. At the trial the burden is on the prosecution to prove the accused guilty beyond reasonable doubt. Finally, the primary duty of the prosecution is not to convict but to see that justice is done.³⁷

A fair trial is the best guarantee of the Rule of Law. This is the reason of the rule of presumption of innocence.

32 Preface, p. 1.

33 [1961] 1 S.C.J. 484.

34 [1960] Cr. L.J. 1504.

35 [1963] 2 S.C.R. 405, s.c. 64 Bom.

L. R. 773.

36 Stephen, Criminal Law, Vol. I, 441.

37 Prof. Hall, Rights of the Accused in Criminal cases, pp. 4, 5.

Now this reasoning considers only the protection of individual liberty. The problem of the modern democratic States is to hold the scales evenly between individual liberty and social good. The preamble to the Constitution of India mentions *inter alia* the individual liberty and social good as the objects of the sovereign democratic Republic of India. Time is knocking at our doors like the Porter in Macbeth. Experience is the life-blood of law. Law in a welfare State has to play a dynamic role as an instrument of building up a socialistic pattern of society. Hence in this context a fifth fresh dimension is added to the traditional, deterrent, preventive, reformative and retributive purposes of punishment viz. punishment as a means to deliver the goods of social good. The purpose of law is not only to protect the citizen but its frontiers are now enlarged so as to include, what I may call, a constructive bias of law. Law is now at once a sentinel of liberty and a social engineer.

In view of this consideration I would submit that the presumption of innocence may be reconsidered in its application to social welfare offences.³⁸

Finally, it is submitted that the true scope of s. 106 of the Evidence Act which throws the burden of proving the facts especially within the knowledge of the accused upon the accused may be reconsidered. Reference is invited to the cases of *Woolmington* and *Shambhu Nath v. State of Ajmer*.³⁹

PARLIAMENTARY PRIVILEGE AND JUDICIAL POWERS.*

THE opinion of the Supreme Court of India in Reference No. 1 of 1964 is not a judgment in the strict sense of the term but nevertheless merits no less respect. It is possible that to many, including legislators, the opinion has come as a jolt; but giving it its due weight, and after an objective consideration of the matter, it will be seen that the opinion offers an easy solution to a situation which can well nigh become insoluble.

Since the establishment of superior Courts in India, over a hundred and fifty years ago, like the Recorders' and Supreme Courts and empowering them to grant the high prerogative writs such as *Habeas Corpus*, *Mandamus* etc., the relations between the Judiciary and the Executive occasionally got bedeviled. In the early days there were the two famous cases of *Moro Raghunath* and *Bapu Gunnesb* in which the exercise of this jurisdiction by the Supreme Court was stoutly resisted by the executive headed by Sir John Malcolm in Bombay. On one of these occasions the Judges of the Supreme Court kept the Court closed for one month in protest against the government's refusal to obey the High Court's writ, and the matter was ultimately referred to the Privy Council for its opinion. The Judicial Committee of the Privy Council, which had just been brought into existence by an Act of Lord Brougham, heard the arguments in the matter for several days and held ultimately against the Judges' view that they could issue writs outside the town and island of Bombay.

The Supreme Courts which had been established in the early years of the nineteenth century in the three Presidency towns were replaced by High Courts under Letters Patent issued under an Act of 1862 of the British Parliament. Under these Letters Patent the High Courts succeeded to the same jurisdiction which previously the Supreme Courts possessed to grant the high prerogative writs such as *Habeas Corpus* but by the subsequent Letters Patent of 1865 these Courts were made subject to the legislative powers of the Governor-General-in-Council. By virtue of this power, certain sections of the Codes of Criminal Procedure of 1872 and 1875 placed limitations on the High Court's power to grant writs of *Habeas Corpus*. In the Code of Criminal Procedure of 1898,

³⁸ See article by the present author: *Mens Rea and Social Welfare offences*, in 3 Bom. L.R. Journal p 166.

³⁹ [1956] Cr. L. J. 794.

*By A. G. Mulgaokar, Bar-at-law.

s. 491 with some changes was placed in a separate chapter headed "Directions of the Nature of Habeas Corpus". There was for years a difference of views among the different High Courts in India whether the enactment of s. 491 in the Criminal Procedure Code in effect had taken away the High Courts' right to issue writs of *Habeas Corpus*. This point was finally set at rest by the judgment of the Privy Council in *Matthen v. District Magistrate, Trivandrum*.¹ A similar position has once more arisen after the introduction of the Constitution: Whether s. 491 of the Criminal Procedure Code remains independently operative after the inclusion of the fundamental rights in the Constitution.

The Supreme Court in two cases, *Makhan Singh Tarsikka v. The State of Punjab*² and *Godavari Shamrao v. The State*,³ has held that the right and the remedy given by s. 491(I)(b), Criminal Procedure Code, is the same as in the fundamental right to *Habeas Corpus* in the Constitution and, therefore, whenever the latter is suspended by law the former is also affected. The difference in the reasoning adopted by the Privy Council in *Matthen's* case which accepted the decision in the earlier Calcutta case^{3a} and that by the Supreme Court in the two above cases is obvious. The Letters Patent of the High Courts of 1865 having made the High Courts subject to the legislative powers of the Governor-General-in-Council, after the Criminal Procedure Code was enacted, the High Courts could no longer issue the writ of *Habeas Corpus* outside the Code. The Supreme Court, on the other hand, holds that the relief under s. 491, Criminal Procedure Code, after the enactment of the Constitution, in effect, was merged in the wider relief given therein. It is respectfully submitted that a substantial right given by an important and time-honoured piece of legislation cannot be taken away by implication but that a definite piece of legislation is necessary for that purpose.

In England the position is slightly different. There the right exists at common law independently of any statute, though statutes have been passed to confirm and regulate its exercise. Its purpose is to secure speedy release from unlawful custody or unjustifiable detention. If the detention or custody complained against is purported to be for an offence which is bailable, bail could be granted but this is never done in *Habeas Corpus* proceedings as a separate statute exists for the purpose. Following this English practice, in India petitions for *Habeas Corpus* never prayed for interim bail but as in the Madras case only asked for an interim order prohibiting removal out of jurisdiction. In England, the Courts refuse *Habeas Corpus* to admit to or to discharge out of custody where a person has been committed for contempt by the House of Lords or the House of Commons (*R. v. Flower*).⁴

One preliminary remark is, however, necessary before discussing the merits of the question. It was unfortunate that in the proceedings before the two judges, Beg and Sehgal JJ., in the *Habeas Corpus* petition, the usual procedure was not followed. In a *Habeas Corpus* petition there never is a question of granting bail; only whether the custody is legal and if the custody be held not to be legal then the person in custody is set at liberty. As the matter concerns a man's liberty (sometimes minors are involved) the petition on presentation is set down for hearing at the earliest date with notice to the party, in whose custody the person is, to produce him in Court. At this or any subsequent stage bail is not granted. At the hearing, the first issue to be decided is the Court's jurisdiction or competence to hear and decide the petition and grant the relief asked for. The merits of the matter i.e. of the legality of the custody can only be gone into if the Court holds it has jurisdiction. (See *District Magistrate, Trivandrum v. Mammen Mappillai*⁵). Obviously, if this, the usual procedure, had been followed the learned Judges would doubtless have

1 [1939] Mad. 744, P.O.

2 (1963) Criminal Appeal No. 80 of 1963, decided on September 2, 1963 (Supreme Court).

3 (1964) 66 Bom. L.R. 453, S.C.

3a *Girindra Nath Banarjee v. Birendra Nath Pal*, (1927) I.L.R. 54 Cal. 727.

4 (1799) 8 Term Rep. 314.

5 [1939] Mad. 708, at p. 711, line 33.

come to the conclusion that the U.P. Vidhan Sabha had acted within its rights and if so that they had no jurisdiction. Clearly, the further unhappy events that took place, including the action against the Judges, would never have happened. It is to be hoped that this matter will receive attention both from the Supreme Court and the Parliament.

The Supreme Court judgment holding that the High Courts under art. 226 and itself under art. 32 had both the duty and the right to entertain petitions for enforcement of fundamental rights, even against Legislatures, is a right one. Considering all the rights, fundamental rights to the citizen and privileges to the Legislatures flow from one source, the Constitution, can the Legislatures claim that they will exercise their privileges but deny the fundamental rights to the citizen? Surely, it is well known that a donee or beneficiary cannot accept a gift, without also accepting the condition, if one is attached to it.

There is also a supreme reason why the superior Courts should have jurisdiction in matters of freedom and liberty of the citizen. Representative assemblies, even the British Parliament, can also become as tyrannical as any monarch or tyrant on occasions. As Charles I said at his trial: "For if power without law may make laws, may alter the fundamental laws of the Kingdom, I know not what subject he is in England that can be sure of his life or anything that he calls his own." Indeed this parliamentary tyranny became so great at one time (during Charles II's reign) that a constitutional historian has recorded: "Every action of the Executive, however reasonable or necessary, was regarded with jealousy and suspicion, and the very judges, though appointed by the Crown, preferred to flout it openly rather than give an angry House of Commons the least reason to suppose that they favoured the cause of authority". As the Supreme Court points out "the supremacy of the Constitution is fundamental to the existence of a federal state". The Indian Constitution (that it is written, necessarily introduces into it a rigidity from which unwritten ones tend to be free) distributes functions of the State between its three arms; executive, legislative, and judicial, and while they are co-ordinate and independent of each other, clashes are bound occasionally to arise between one and any of the other two. On such unhappy and rare occasions it is necessary that there should be an authority in which power is vested to resolve the differences calmly and harmoniously. It is best that this authority should be the Supreme Court. Should public opinion on any particular occasion of controversy not be behind the judicial decision, the Legislature would be justified in effecting a change by its legislative powers. This necessarily arms the judiciary with great authority, and it behoves all the more those who exercise high judicial functions to keep aloof from all matters of public controversy.

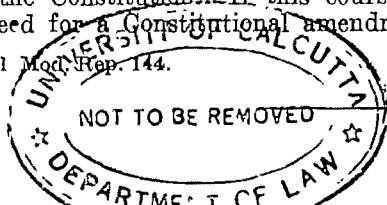
Another reason, why it is necessary that the Superior Courts in India should have jurisdiction in matters pertaining to the privileges of Legislatures has not received that attention in the country which it deserves. Of course, it was not relevant to the issues before the Supreme Court, hence it did not find reference in its judgment. The Constitution has given each of the States a legislature either consisting of one House or two. Legislatures naturally tend to become jealous of their powers and privileges and it is conceivable that from time to time conflicts over privileges between the two Houses of a State Legislature or the Legislatures of different States, may arise. How are these conflicts to be resolved peacefully and harmoniously excepting through the detached agency of the Courts? That the Legislatures can be on occasion capricious or even tyrannical in the matters of their privileges or dignity can best be illustrated by two instances. That they concern the British Parliament will surprise many but adds to the force of the argument. The first occasion was when in 1676 Shaftsbury and a few other members, pointing to an old Act of Edward III's sought to prove that a Parliament that had not sat for over a year was *ipso facto* dissolved. This they did in order to embarrass the King, which most members were desirous of doing.

But instead of winning support for this interesting constitutional thesis the Lords found themselves violently attacked for outraging parliamentary dignity and privilege. They were called upon to apologise or withdraw and on their refusing, their fellow peers ordered them to the Tower. The end of this matter is very interesting. After remaining a prisoner in the Tower for a year Shaftsbury offered in 1677 his most humble apology for his ill-advised action (in endeavouring to maintain that the Parliament was dissolved), the House felt that satisfaction had been received and petitioned the King to order his discharge. What is even more astounding, the House of Lords in 1680 passed this motion: "That the said order and proceedings (of 1676 committing the Lords to the Tower) concerning the said Lords were unparliamentary, from the beginning, and in the whole progress thereof; and therefore are all ordered to be vacated (by virtue of this judgment) in the Journal book of this House, that the same, or any of them, may never be drawn into precedent for the future". (The Shaftsbury case⁶ referred to by the U.P. Vidhan Sabha Counsel at the King's Bench was the outcome of this, when the Court refused to interfere). The other case is known to constitutional historians as *Sherley v. Fagg*.⁷ The first was a physician to the King and Fagg a member of the House of Commons. Sherley had filed an appeal in the House of Lords (from a lower Court), while the Commons were in session which the Commons held to be a serious breach of their privilege. This brought on a head-on collision between the two Houses. After most of the counsel had been "committed to custody by the angry participants, and the Lords had accused the Commons of 'transcendant misbehaviour, breach of privilege, Magna Carta, subversion of government, and other high provoking and diminishing expressions', the King, after a vain effort to restore peace prorogued Parliament", causing the controversy thereby to lapse.

It will, therefore, be seen what extravagant claims have been or can be made in the name of parliamentary privilege. British Judges have held that because power can be abused is no reason why that power should be denied. But Lord Coleridge C.J. in the same judgment on which so much reliance was placed on behalf of the U.P. Vidhan Sabha also points out: "That, when a question is raised before the Court, the Court must give judgment on it according to its notions of the law, and not according to a resolution of either House of Parliament... Such cases might by possibility, occasion unseemly conflicts between the Courts and the Houses."

In India where there will exist at one time so many Legislatures, it is easy to see what difficulties can arise and the argument of British Judges that possible abuse is no bar to the recognition of power, cannot work in India. It is necessary here, in our special circumstances, in order to prevent Constitutional deadlocks or even to prevent abuse of power by any of the three arms of the State, Legislative, Executive and Judicial, that Constitutional curbs should exist. It follows therefore that the powers and privileges of Legislature should be, without delay, defined as provided for in art. 193 and not be left vague to be ascertained by reference to those of the House of Commons.

Since the Opinion of the Supreme Court was delivered, public opinion, by and large, has shown itself to be clearly behind it. There is, however, a certain section which feels that the opinion has considerably limited parliamentary privilege and that matters should be set right by means of a Constitutional amendment. It is difficult to understand the logic of this demand in view of the clear terms of the earlier part of art. 194(3). "The powers, privileges and immunities of a House of Legislature shall be such as may from time to time be defined by the Legislature by law...". Clearly if the position is to be clarified, it should be in the direction indicated by the relevant article in the Constitution... If this course is followed there will not be the slightest need for a Constitutional amendment.



GLEANINGS.

LEGAL CRUELTY AND CRUELTY

IN the case of *Le Brocq v. Le Brocq* [1964] 1 W.L.R. 1085, each of the learned lords justices approved the expression "cruel means cruel." If they meant that legal cruelty and "ordinary" cruelty are one and the same thing, it can be demonstrated that they were wrong. If they meant something else, then what they said was confusing.

It has been said many times by judges that it is impossible and undesirable to define legal cruelty, since it can manifest itself in an infinite variety of ways. For instance, Channell, B., said in *Kelly v. Kelly* (1870), L.R. 2 P. & D. 59, at p. 60:—

"It would be difficult to frame a definition of legal cruelty which should be applicable to all cases which may arise ... It is obvious that the modes by which one of two married persons may make the life or the health of the other insecure are infinitely various, but as often as perverse ingenuity may invent a new manner of producing the result, the court must supply the remedy by separating the parties."

and Lord Tucker in *Jamieson v. Jamieson* [1952] A.C. 525, at p. 550, said:—

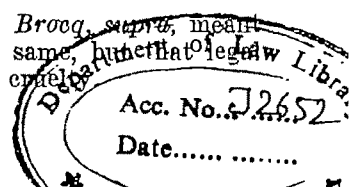
"... judges have always carefully refrained from attempting a comprehensive definition of cruelty for the purposes of matrimonial suits, and experience has shown the wisdom of this course. It is in my view equally undesirable—if not impossible—by judicial pronouncement to create certain categories of acts or conduct as having or lacking the nature or quality which render them capable or incapable in all circumstances of amounting to cruelty in cases where no physical violence is averred."

In spite of this, from time to time judges have sought some formula, or touchstone, whereby cruelty in law can be distinguished from conduct not amounting to such cruelty. We had the test of malignity. Hardly had this been suppressed, when it was supplanted by the test of "aimed at," which, to the discerning, was clearly malignity expressed in another form. The House of Lords, in *Gollins v. Gollins* [1964] A.C. 644, unanimously rejected this test; but the dust had hardly settled from this contest, when a new test appeared, in the tautological expression, "cruel means cruel." It is not hard to imagine that some courts will find this a substitute for malignity or "aimed at," since cruel conduct is generally malignant, and generally aimed at the other spouse.

That legal cruelty differs from ordinary cruelty (whatever that may mean) is easily demonstrated. Lord Merriman in *Jamieson v. Jamieson*, *supra*, at pp. 544-5, said:—

"... it is important to bear in mind that in determining 'what elements were treated as essential to the constitution of *saevitia*, or cruelty, which entitled to a divorce,' Lord Herschell was careful to point out that judges had not infrequently when speaking of acts as 'cruel,' used the word in its popular sense, and not as indicating that the acts were cruel in the legal acceptance of the term—that is to say, such as would entitle to a divorce' [1897] A.C. 395, (at p. 449), and he quoted pronouncements both of Lord Stowell and of Sir John Nicholl in that sense to illustrate the risk of confusion arising from the use of the words 'cruelty' and 'cruel' in the popular sense. Therefore, when the legal conception of cruelty is described as being conduct of such a character as to cause danger to life, limb or health, bodily or mental, or to give rise to a reasonable apprehension of such danger, it is vital to bear in mind that it comprises two distinct elements: first, the ill-treatment complained of, and, secondly, the resultant danger or the apprehension thereof. Thus it is inaccurate, and liable to lead to confusion, if the word 'cruelty' is used as descriptive only of the conduct complained of, apart from its effect on the victim."

Presumably, what the lords justices in *Le Brocq v. Le Brocq*, *supra*, meant was not that legal cruelty and ordinary cruelty are the same, but that legal cruelty contains an essential element, namely, ordinary cruelty.



Hitherto, only two things could be said with certainty about legal cruelty. These were summarised by Scarman, J., in *Noble v. Noble and Ellis* (No. 2) [1964] 2 W.L.R. 349, at p. 351:—

“There are two tests of cruelty as I understand the law now to be. The first is this: is the conduct complained of sufficiently grave and weighty to warrant the description of being cruel? ... The second test, equally important, is: has the conduct complained of caused injury to health or reasonable apprehension of such injury.”

It is more than probable that the lords justices in *Le Brocq, supra*, when they said that “cruel means cruel,” meant that the conduct had to be grave and weighty. Indeed Harman, L.J., said as much when he remarked (at p. 1092):—

“‘Cruelty’ is what it always was—some grave and weighty misconduct on the part of the offending spouse which causes injury to health of the other spouse.”

The danger is that the insistence on the words “cruel means cruel” will induce courts to believe that this is an additional requirement to conduct which is grave and weighty. This has already been said by Sir Jocelyn Simon, P., in *Mulhouse v. Mulhouse* [1964] 2 All E.R. 50, where he lists four requirements to prove cruelty, namely: (1) grave and weighty conduct; (2) injury to health, etc.; (3) causation of (2) by (1); and (4) (at pp. 56-7) “it must be proved beyond reasonable doubt that the whole conduct of the respondent, taking into account its repercussion on the health of the complainant, can properly be described as cruelty in the ordinary sense of that term.”

The writer submits that (4) is not an additional requirement, in legal cruelty, and that at best, it is only admissible as a repetition of (1).

If “cruel means cruel” is a test of legal cruelty, then it is a pretty poor and unreliable one, as the *Gollins* case, *supra*, shows. On this test five of the judges concerned in that case would have found no cruelty. In the Divisional Court ([1964] P. 32, at p.46 (D.C. and C.A.)) Sir Jocelyn Simon, P., and Cairns, J., ended their judgment with these words:—

“Above all, we do not consider that the husband’s conduct however reprehensible, can properly be stigmatised by the word ‘cruelty’ in its ordinary acceptation.”

In the Court of Appeal, Harman, L.J., said (*ibid.*, at p. 57):—

“Whatever opprobrious names one may give to this husband, I do not think ‘cruel’ is one of them.”

Lord Morris of Borth-y-Gest and Lord Hodson used similar expressions in the House of Lords.

What is meant by “cruelty in its ordinary acceptation”? It is not enough to say cruelty means what a jury would describe as cruel if the story were fully told, as suggested by Harman, L.J., in *Le Brocq, supra*, since a jury would have to be properly directed.

Dr. Johnson’s dictionary defines “cruel” of persons, as “pleased with hurting others; inhuman; hard-hearted; barbarous.”

Murray defines “cruel” of persons, and says it is also used in a transferred sense and figuratively of things as “disposed to inflict suffering; indifferent to or taking pleasure in another’s pain or distress; destitute of kindness or compassion; merciless; pitiless; hard-hearted.”

Webster, in its latest edition, defines it as disposed to inflict pain especially in a wanton, insensate or vindictive manner; pleased by hurting others; sadistic; devoid of kindness.”

It will be seen that Dr. Johnson and Murray distinguish between “cruel” as applied to persons, and “cruel” as applied to things or abstractions. When we say a judge is cruel, we mean he is sadistic, that he takes pleasure in punishing, that he does it intentionally, or deliberately. When we say a law is cruel, we mean that it has painful consequences.

As the above definitions show, in its ordinary sense, "cruel" usually means inflicting pain intentionally. It can mean wanton indifference but a jury would usually understand it to mean intentional. Now, since *Gollins, supra*, and *Williams v. Williams* [1964] A.C. 698, legal cruelty is to be understood by its consequences, rather than the state of mind of the cruel person.

The judges who said that the conduct of Mr. Gollins was not cruel as ordinarily understood were probably right, but nevertheless his conduct was held to constitute legal cruelty.

The majority judges in the Court of Appeal and House of Lords dealt with the subject as follows. Willmer, L.J., in a very careful judgment, had nothing to say about cruelty as ordinarily understood, but Davies, L.J., referring to words quoted above by the Divisional Court said:—

"This seems, with all respect, to be a dangerous test."

Lord Reid said, in *Williams, supra*, that "cruelty" in its ordinary or popular meaning was too vague, and in any event he took the view that cruel conduct need not be necessarily "blameworthy." Lord Pearce, in *Gollins*, says nothing directly on the point, but his view is expressed as follows (at p. 695):—

"I agree with Lord Merriman whose practice in cases of mental cruelty was always to make his mind first whether there was injury or apprehended injury to health. In the light of that vital fact the court has then to decide whether the sum total of the reprehensible conduct was cruel. That depends on whether the cumulative conduct was sufficiently weighty to say that from a reasonable person's point of view after a consideration of any excuse which this respondent might have in the circumstances, the conduct is such that this petitioner ought not to be called on to endure it."

Harman, L.J., in *Le Brocq, supra*, referred to this view as "a slippery slope." It is suggested that this slope is less slippery than the meaningless "cruel is cruel" slope.

Lord Evershed said in *Gollins supra*, (at p. 670):—

"The question in all such cases is, to my mind, whether the acts or conduct of the party charged were 'cruel' according to the ordinary sense of that word, rather than whether the party charged was himself or herself a cruel man or woman."

In its context, however, this only means that the test is an objective one, and does not depend on intention.

How, then, should a jury (or magistrates) be directed as to what is legal cruelty in cases not involving physical violence. It is submitted that the direction should be on the following lines.

There can be legal cruelty only if it is first proved that the respondent has caused injury to health, either physical or mental or that there is a reasonable apprehension that he is likely to do so. The conduct must be such that it can be described as grave and weighty. Cruel conduct can take an infinite variety of forms, and it is impossible to say that a particular type of conduct by itself is either cruel or not cruel. The conduct must be looked at as a whole and be related to the parties concerned. The object of the law is not to punish a wrongdoer but to protect the complaining party from injury to health. The test, therefore, is an objective one, namely, how the individual concerned is affected by the conduct complained of. It is no excuse to say that the conduct proceeds from selfishness or defect of character or even insanity. The conduct need not be intentional either in the sense that the respondent intended to hurt, or intended the acts which did hurt but intention is important because some conduct may be quite innocuous without intention to hurt.

There is no need in this direction to say anything about "cruelty" in its normal acceptation. At best, to do so would be redundant; at worst confusing, because it would mean defining that term and showing how it differs from legal cruelty.—*L.R.* in *S.J.*

LIABILITY: CONTRACT OR TORT?

IN *Clark v. Kirby-Smith* ((1964) 2 All E.R. 835) Plowman J. held that the *Hedley Byrne* principle did not apply as between solicitor and client, since the claim by the latter against the former must be founded on the contractual relationship between the two and did not arise in tort. A similar conclusion was reached by Diplock L.J., sitting as an additional judge of the Queen's Bench Division, in *Bagot v. Stevens Scanlan and Company* (*The Times*, 14 July) with reference to the relationship between architect and client. The defendant architects in this case denied negligence but the matter came before his lordship on a preliminary point of law, namely, whether the six year period prescribed by the Limitation Act 1939 ran from the time when the supervision of the architects ceased or from the time when damage due to their alleged failure to exercise reasonable care became manifest. If the former were the test, the action was statute barred; if the latter, it was not.

In holding that the duty created by the relationship of exercising reasonable skill and care arose out of a contract and not otherwise, his lordship pointed out that the complaint was of a failure to do the very thing which the defendants had contracted to do. There might be cases where a similar duty was owed under a contract but were independent of contract. All those cases would turn out to be cases where the law, in the old days, recognised either a status, such as a public calling or that of master and servant, and in such cases it could properly be said that the relationship was independent of contract; or it recognised a relationship which gave rise to a duty of care which was not dependent upon the contractual relationship of the parties. But that did not apply to the present case. There did not appear to be anything in the relationship which could be said to give rise to a kind of status obligation which originated in the common law status relationship such as bailee, common carrier, or innkeeper. Accordingly, the plea that the claim was statute barred was a good defence, and the action was dismissed with costs.—*L.T.*

NEGLIGENCE

IN *Haley v. London Electricity Board* ((1963) 3 All E.R. 1003) the Court of Appeal (Lord Denning M.R., Donovan and Danckwerts L.JJ.), affirming Marshall J., held that the defendants, who had protected an excavation in the highway, lawfully made in pursuance of a statutory duty, by a punner hammer set at an angle, were not liable for injuries sustained by a blind man, whose white stick passed over it, since the guard was an adequate and reasonable one for the protection of ordinary members of the public. There was nothing here to fix the defendants with direct notice that a blind man would be coming along the pavement during the course of the work. This decision was reversed by the House of Lords (Lords Reid, Morton, Evershed, Hodson and Guest) ((1964) 3 All E.R. 185), which held that the board's duties extended to blind persons. The punner hammer was a dangerous obstacle to such and it could not be said to be not reasonably foreseeable that a blind person might pass that way.

The plaintiff in *Dunne v. North Western Gas Board* ((1963) 3 All E.R. 916) sustained injuries from a street explosion due to the escape of gas below the highway. Gas, sewer and water pipes had been laid at various times and were in close proximity. A cracked water pipe led to a leak, which caused the collapse of the sewer, and that led to a fracture of the gas pipe. The trial judge found that the gas and sewer pipes were at the outset in a proper condition, that the gas board's system of inspection and maintenance was adequate, and that there was no negligence on the part of the board or the corporation. The Court of Appeal (Sellers, Danckwerts and Davies L.JJ.), reversing the Liverpool Court of Passage, held that *Rylands v. Fletcher* (1868, 19 L.T. 220; 3 H.L. 330) did not apply to the situation and that the position was governed by the principle enunciated by Lord Blackburn in *Geddis v. Bann Reservoir Proprietors* (1878, 3 App. Cas. 430) in these terms: "I take it, without citing

cases, that it is now well established that no action will lie for doing that which the legislature has authorised, if it be done without negligence, although it does occasion damage . . . " Hence the plaintiff could not recover.—*L.T.*

OCCUPIER'S LIABILITY

THE principle of the liability of an occupier to a trespasser in *Latham v. Richard Johnson and Nephew Limited* (108 L.T. 4; (1913) 1 K.B. 398), approved in *Robert Addie and Sons (Collieries) Limited v. Dumbreck* (140 L.T. 650; (1929) A.C. 358) and *Edwards v. Railway Executive* ((1952) 2 All E.R. 430), was applied by the Judicial Committee of the Privy Council (Lords Radcliffe, Evershed, Guest, Upjohn and Donovan) in *Commissioner for Railways v. Quinlan* ((1964) 1 All E.R. 897)—a principle which had not been extended, it was held, by *Donoghue v. Stevenson* (147 L.T. 281; (1932) A.C. 562). In the result one who was a trespasser on a railway crossing, whose presence there was not proved to have been known to the occupier or known to have been likely or probable, was not entitled to damages for injuries sustained as the result of being struck by a passing train.—*L.T.*

PRIVILEGE (CROWN)

A minister's certificate to the effect that the minutes on an official metropolitan police file ought not to be produced because they belonged "to a class of official documents which it is necessary in the public interest for the proper functioning of the public service to withhold from production" was held by the Court of Appeal (Lord Denning M.R., Harman and Salmon L.J.J.) to be insufficient to support a claim for Crown privilege in *Merrick v. Nott-Bower* ((1964) 1 All E.R. 717), in which the plaintiffs, serving police officers, claimed damages for libel alleged to be contained in a report from an Assistant Commissioner to the Commissioner. The passage from Lord Simon's speech in *Duncan v. Cammell Laird* ((1942) 1 All E.R. 587) from which the above-quoted words are taken was obiter and did not bind the court.

In affirming the decision of Ungood-Thomas J. ((1964) 2 All E.R. 674) in *In re Grosvenor Hotel Limited (No. 2)* to the effect that a further affidavit of the Minister of Transport afforded support for his claim that certain letters were privileged because their production would be contrary to the public interest, the Court of Appeal (Lord Denning M.R. and Salmon L.J., Harman L.J. reserving his opinion) (*The Times*, 31 July) indicated that in relation to documents in a particular class the court had a residual power to override the executive's veto on production where Crown privilege was claimed unreasonably.—*L.T.*

REVIEWS.

An Introduction to Islamic Law. By JOSEPH SCHACHT. LONDON E.C.4: Oxford University Press, Amen House. 1964. Demi 8vo. Pages 304. Price 48s. net.

In the words of the author of this learned thesis this book is concerned with the unique historical phenomenon of Islamic law as such, and not with the contemporary laws of those countries in the Near East and elsewhere where Muslims live. It is in two sections, one containing an account of the present knowledge of the history of Islamic law and the other dealing with the system of Islamic law. In the historical section the author has restricted himself to the Sunni community and in the other section he has chosen the doctrine of the Hanafi school of law for exposition. The author traces the development of Islamic law against a varied political and administrative background from its pre-Islamic origins, on to the Koranic legislation and the periods of the Caliphs of Medina and Umayyads, the latter being the first dynasty in Islam under which the Islamic law came into being. This leads to the modern period with

the rise of the two great Islamic States, the Ottoman and Moghul empires in which Islamic law attained its zenith. In the second section of the book the author has dealt with the Hanafi school of law because of its historical importance and wide distribution. After considering some of the fundamental concepts of Islamic law various topics like legal capacity and responsibility of persons, ownership and possession of property, obligation and contracts, marriage, divorce, inheritance and the penalties envisaged by Islamic law are dealt with. The book ends with an interesting chapter on the nature of Islamic law. A notable feature of this book is a very imposing bibliography which indicates publications useful or indispensable for further study of the subjects in question. This scholarly investigation of Islamic law which is the first of its kind in English and which is primarily addressed to students of history, social sciences and comparative law is a definite contribution to an important branch of Islamic studies.

Cases on Criminal Law. By J. W. CECIL TURNER, M.C. M.A., LL.D., and ARMITAGE, M.A., LL.B. LONDON: Cambridge University Press. BOMBAY: Macmillan & Co., Ltd., 276, Dr. Dadabhai Naoroji Road. Third Edition. 1964. Demi 8vo. Pages 664. Price Rs. 24; 30s. net.

THIS publication which is the first in the series of Cambridge Legal Case Books, is a well-established book on the substantive English Criminal Law and burden of proof. It is a compendium of cases arranged to follow the order of the subject-matter in the 18th edition of Kenny's classic "Outlines of Criminal Law." The paragraph numbers given at the head of each case correspond to those of the paragraphs in the "Outlines" which contain references to the principles which the case illustrates. The case law is brought down to October 1963. In the summary of cases the law is stated in the *ipsissima verba* of the Judges who decided them. This excellent handbook on English Criminal law which in its present edition is issued in paper cover so as to be within the reach of the student, will commend itself as an up to date, concise and authoritative statement of the law on the subject.

The Maharashtra Ownership Flats Act, 1963. By A. E. KARMALLI, B.A., LL.B., Advocate, High Court. BOMBAY 2: Kothari Mc-Duneil & Co., "A" Aidun Building, Dhobi Talao, 1st Lane. Demi 8vo. Pages 132. Price Rs. 8.50.

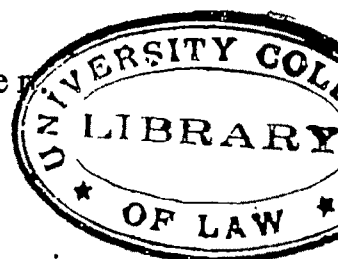
THE construction and sale of flats on ownership basis which began in 1948 led to a number of malpractices and irregularities among builders and contractors. The Maharashtra Ownership Flats (Regulation of the promotion of construction, sale, management and transfer) Act was passed in 1963 as a result of the recommendations made by the Commission appointed by the Government of Maharashtra to enquire into and report on the various aspects of the business of construction and sale of flats on ownership basis. The author has critically and lucidly explained the provisions of this short but unique piece of legislation in the light of some decided cases. Much useful material is included in the appendices e.g. the Rules made under the Act, standard agreements for sale of flats where the land is freehold and leasehold, information required for the purposes of formation of a co-operative housing society and the standard by-laws of a co-operative society. This book will be useful not only to the lawyers but also to ownership flat promoters and flat owners as a guide to their rights and liabilities under the Act.

Law Diary 1965. POONA 2: Law Book House, 543/2 Sadashiv Peth (New), Laxmi Road. Price Rs. 3.50.

THIS diary which has proved useful to the profession contains such information as fees for registration of documents, Court-fees under different statutes, stamp duty on instruments, rules for computing advocates' fees and a brief survey of some notable case law of 1964. It gives a page to a day and has a pleasing format.

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PUBLIC PURPOSE AND PRIVATE ENTERPRISE.*

THE decision of the Supreme Court in *Somavanti v. State of Punjab*¹ is an important decision on the concept of public purpose. The majority of the Supreme Court upheld the acquisition of land by the State of Punjab for the construction of a factory for the manufacture of refrigeration machinery by a private limited company. The State Government had without resorting to Part VII of the Land Acquisition Act, 1894, acquired the petitioner's lands for a public purpose by contributing Rs. 100 from the public funds towards a total cost of acquisition which was roughly estimated at over Rs. 4 lakhs. The majority held that the declaration made by the Government in the notification under s. 6(1) of the Act that the land was required for a public purpose was made conclusive by sub-s. (3) of s. 6 of the Act and that it was not open to the Court to go behind it and try to satisfy itself whether in fact the acquisition was for a public purpose, subject however to the exception that such a declaration could be challenged if there was a colourable exercise of power.

It was, therefore, unnecessary for the Court to pronounce on the nature of the purpose to be served by the proposed factory. However, the Court in meeting the argument that there was on Government's part a colourable exercise of power held that on the face of it the facts stated in the affidavits of the respondents showed that establishing the factory would be a purpose beneficial to the public even though it was a private venture. The decision, therefore, established a proposition of far-reaching importance in the law of compulsory acquisition of property viz. that a non-governmental commercial enterprise whose *raison d'être* one must assume is to make profit may serve a public purpose in marketing its produce.

That public purposes may be served by agencies which are neither controlled by government nor are charitable or philanthropic bodies is a proposition which is well-established in India. The Land Acquisition Act, 1894, itself permits acquisition of land for companies for the erection of dwelling houses for its workmen or for a work which the public have a right to use, which purposes the Supreme Court has stated are in substance public purposes² or public purposes in the restricted sense³. It has also been held in cases where lands have been acquired for co-operative housing societies that such housing societies subserve a public purpose⁴. These, and other cases under requisition and acquisition Acts also establish the proposition that to constitute a public purpose it is not essential that the use or benefit of the land or service should be available to the entire community or even to a considerable section of it. Provided that the persons using the land or service are benefited not as individuals but in furtherance of the general welfare of the community the test of numbers is generally irrelevant⁵.

*By Tehmtan R. Andhyarujina, Advocate.

1 [1968] 2 S.C.R. 774.

2 *Babu Barkalya Thakur v. State of Bombay*, [1961] 1 S.C.R. 128, at p. 187.

3 *R. L. Arora v. State of Uttar Pradesh*, [1962] A.I.R. S.C. 764, at p. 771.

4 *Padayachi v. State of Madras*, [1952] A.I.R. Mad. 756; *Teja Ram v. Union of India*,

[1959] A.I.R. Punj. 478; *Radha Raman v. State of U. P.*, [1954] A.I.R. All. 700.

5 *The State of Bombay v. R. S. Nanji*, [1956] S.C.R. 18, at page 25, and cases on public purpose cited therein in support of this proposition. *Fallbrook Irrigation District v. Bradley*, 164 U.S. 112, 41 L. ed. 369, at p. 389.

The application of these principles becomes difficult when the service rendered to the public by the agency is by way of the products of an industry conducted in ordinary commerce. First, it is obvious that a mere production of the commodity for public use would not constitute a public purpose for if that were the test the production of any commodity from bread to vintage wines, would be a public purpose. Secondly, even where the nature of the produce or service is such that its availability would obviously enhance the welfare of the community like the manufacture of life saving drugs or the generation of electricity, important considerations like prices, profits, supply and distribution may negative the public purpose served by its production. On the other hand State regulation and control of the industry may ensure that its product would be so produced and distributed as best to subserve the public good.

It is well-settled in the United States that the power of eminent domain will not be exercised to enable individuals or private corporations to carry on their business even if the prosperity of the community will be enhanced by their success. In the United States, except in cases in which on account of the peculiar local conditions the acquisition of land for use of private individuals or corporations is justified, a private corporation must to be a beneficiary of the power of eminent domain be a public service corporation or a public utility concern. Such public utilities in the U.S. function either under legislative control or under special franchises and have the legal obligation to serve the public adequately without discrimination and at reasonable rates laid down by administrative agencies and also the duty to ensure continued service to the public.⁶ The compulsory acquisition of land to benefit a private company producing any commodity—even equipment for a public utility—would be inconceivable in the United States.

But, as has been repeatedly stressed in India and also in the United States, what constitutes public purpose is a matter of times, conditions and circumstances of the place where the power is sought to be used⁷. Totally different conditions prevail and political and economic theories hold sway in the United States from those in India. In the United States economic and political theory sharply distinguish the proper roles of the State and private enterprise and, in theory at least, restrict State interference to the minimum necessity in commerce and industry. In India as in many other developing countries the State has assumed a larger function in the economic development of the country and the functioning of a vast number of industries is considered as vitally tied up with the country's economic advancement and well being. Consequently, the State regulates by licensing and controls a vast sector of industry and commerce. Finally, the Constitution and the dominant public feeling approve the restriction or curtailment of individual property rights in the interest of economic advancement of the country. For all these reasons, the establishment of a commercial venture not necessarily of the public utility type may conceivably serve a public purpose and the importance of *Somavanti's* case lies in the fact that it foreshadows in the field of compulsory acquisition of property what is a fact of economic and political life of the country—that under regulated conditions there can be as much public benefit from the establishment of profit making enterprises by private bodies as from State enterprises.

In *Somavanti's* case the majority decision held that on the face of it the establishment of a factory for the manufacture of refrigeration parts would constitute a purpose beneficial to the public because of the importance of the undertaking to a State such as Punjab which has a surplus of fruit and dairy products, the general effect of the establishment of this factory on foreign ex-

⁶ For a good discussion on what constitutes public utility concerns and their regulation see *Encyclopaedia Britannica*, Vol. 18 p. 745.

⁷ *The State of Bihar v. Maharajadhiraja Sir Kameshwar Singh of Darbhanga*, [1962] S.C.R. 889, at p. 995.

change resources, spread of education, relieving pressure on unemployment⁸. Apparently, the majority do not make any reference to any regulation or control of the industry. It is submitted that the silence of the majority of the Court on this aspect is however not conclusive and does not lead to the inference that in the consideration of public purpose the Court will only look to the purported public benefit from the manufacture of the product. This is so because of two reasons.

First, the affidavit of the respondents stated that the Government of India accepting the recommendations made by the Licensing Committee under the Industries (Development and Regulation) Act, 1951, issued a licence in favour of the company, and the majority stated that they had no hesitation in acting upon these affidavits⁹. The latter Act it is well-known contains the most detailed provisions for the establishment, development, regulation, control and investigation of a large sector of industries. No such industry can be established without a licence from the Central Government and only on such terms in the licence as the Government deems fit. The Central Government has the power under the Act to regulate the supply, distribution and trade in any article relating to such an industry in the interest of securing its equitable distribution and availability at fair prices. The Central Government has further the power to assume direct management or control of an industrial undertaking in case the undertaking failed to carry out the directions of the Central Government. Therefore, though this aspect of the case does not find specific reference in the judgment of the majority it is clear that the operation of the Act on the industry would ensure that its products were not to be produced or marketed as to negative the public benefit from its manufacture.

Secondly, decided cases have stressed the regulation of a company or corporation in deciding the question of whether an acquisition or requisitioning for it is a public purpose. Thus, in *Nanji's* case where premises had been requisitioned on behalf of the State Transport Corporation the Supreme Court observed that the Corporation was a public utility concern and was under the effective control of the State Government¹⁰. In a Madras case,¹¹ Venkatarama Aiyer in meeting the objection that the Co-operative Housing Society for which lands had been acquired would benefit its members only and the profits of the society would go to them, referred to the control of the Society under the provisions of the Madras Co-operative Societies Act, 1932, by which profits of the Society were limited. Finally, in a recent case from Andhra Pradesh¹² the control of a company for the manufacture of sewing machines, for which lands had been acquired, under the provisions of a licence issued under the Industries (Development and Regulation) Act, 1951, was referred to in upholding the acquisition for a public purpose.

In *R. L. Arora v. State of U.P.*¹³ (The "second Arora" case) the Supreme Court repelled the petitioner's contention that it was not necessary for an agreement between the company and the Government under s. 41 of the Land Acquisition Act, 1894, to regulate or control the products of the company. Does this mean that the test of availability to the public of a product useful to the public is the only test for determining whether a public purpose is served by

8 The majority also referred to the settled American law that the power of eminent domain could be exercised in favour of public utilities and that facilities for providing refrigeration were regarded in modern times as public utilities. "All the greater reason that a factory which manufactures essential public utilities must be regarded as an undertaking carrying out a public purpose" (page 819). With respect, it is difficult to follow the argument. An undertaking is a public utility not merely because it serves the public but because it is regulated to ensure and achieve

that result. The regulatory aspect of one public utility—the State Transport Corporation—is set out in *State of Bombay v. R. S. Nanji*, [1956] S.C.R. 18, at p. 22.

9 At pp. 783, 819.

10 *State of Bombay v. R. S. Nanji*, [1956] S.C.R. 18, at p. 22.

11 *Padayachi v. State of Madras*, [1952] A.I.R. Mad. 756.

12 *Mrs. R. D. Chand v. State*, [1963] A.I.R. A.P. 383, at p. 388.

13 [1964] A.I.R. S.C. 1230.

a company? It is submitted not. In the "second *Arora*" case the petitioner did not dispute that the purpose of the company for which land was being acquired was a public purpose, but merely contended that the agreement between the company and the Government for the use of land under s. 41 of the Land Acquisition Act, 1894, should regulate and control the product of the company, a contention which as the Supreme Court rightly observed, was difficult to understand.

The precise outlines of the circumstances under which private enterprises can serve a public purpose have yet to be developed. To use the celebrated language of Justice Holmes "the lines are to be picked out by gradual approach and contact of decisions on either side".

SPOTLIGHT ON EMERGENCY.*

THE emergency provisions in the Constitution have, of late, been the subject of considerable controversy. In what follows it is proposed to discuss the well-known judgment of the Supreme Court regarding this subject, the proposal for the eighteenth amendment and the emergency provision generally and comparatively.

In September, 1962, the Chinese attacked India and in accordance with the Constitution, in October 1962 the President issued a Proclamation of Emergency. By the middle of November resort to Courts to enforce rights to personal liberty¹, fair trial² and equality before law³ was stopped. Under the extraordinary powers thus assumed Parliament passed the Defence of India Act. Under that act the Central Government was empowered to make such rules as appeared to it necessary for the defence of India, public order etc. and for the detention in custody of any person whom the authority empowered suspected on grounds appearing to that authority to be reasonable, of being of hostile origin or having acted or being likely to act in manner prejudicial to the defence of India, public order etc.⁴

The rules framed under this Act completely exhaust the above powers. The detainee has no right to know the grounds of his detention, no right to make any representation and the period of his detention can be indefinite.⁵

The decision under present discussion concerned a group of 26 appeals placed for hearing and disposal before a Special Constitutional Bench of the Supreme Court and may for the sake of convenience be referred to as the decision in *Makhan Singh v. State of Punjab*⁶.

As is to be expected personal liberty was the first victim of these powers. The appellants were detained under the above Act and rules and they sought an order under s. 491 of the Criminal Procedure Code for their release on the ground that the above Act and rules were constitutionally invalid and hence they had been improperly and illegally detained.

What is the scope of judicial review under these circumstances? What shall be the powers of the legislature and the executive when there is an emergency and when there is not such an emergency after all? In this connection what does the term emergency mean? Are there various shades of its meaning; is it susceptible of definition? These are the issues which ultimately arise here for a constitutional lawyer.

As can be seen it would be open to the detainees to apply for a writ of *habeas corpus* under arts. 32 and 226, but since that procedure was denied to them by the exercise of powers under art. 359 they sought to make use of the ordinary law of the land. The majority of the Court held that even in applying under

*By K. R. Dixit, Reader in Law, Nagpur University.

1 Constitution of India, art. 21.

2 *Ibid*, art. 22—see post note 30.

3 *Ibid*, art. 14.

4 Defence of India Act, 1962, s. 3, cl. (2) sub-cl. (i).

5 Defence of India Rules, Rule 30 (1) (b).

6 [1964] A.I.R. S.C. 381.

s. 491⁷ of the Code of Criminal Procedure the appellants were trying to enforce their fundamental right to personal liberty and this was not open to them after the President had exercised his powers under art. 359. The minority view contrary to the above was expressed by Subba Rao J. According to him s. 491 was not a right to move a Court for the enforcement of a fundamental right. It was already there before the Constitution (and hence before the fundamental rights) came into existence. It postulated the existence of the rule of law. Under that no person could be deprived of his liberty except in the manner prescribed by the law of the land. A petition under s. 491 was, therefore, for the enforcement of a right based on the principle of rule of law and not for the enforcement of a fundamental right.

During the course of the hearing it was also argued on behalf of the appellants that what could be suspended under the Presidential order under art. 359 was the operation of art. 32 and not of art. 226. According to them in applying art. 359 two conditions must be complied with, namely (i) the party shall have a right to move any Court and (ii) only for the enforcement of the rights conferred by Part III. Such a right to move for such relief is expressly conferred by the Constitution under art. 32. Therefore, the President's order under art. 359 could only apply to art. 32 and not to art. 226.

For a consideration of this argument interpretation of arts. 359 and 226 became necessary. Various authorities were consulted for this: *Liversidge v. Anderson*⁸, *Rex v. Halliday*⁹ and *Gibbons v. Ogden*,¹⁰ were summoned in aid and even the opinions of academic lawyers (seldom, if ever, treated with deference in this country) were referred to.¹¹ After a thorough investigation of this all important point of interpretation their Lordships finally opined that the words "right to move", "any court" and "for the enforcement of the rights conferred by Part III" in art. 359 indicated that not only art. 32 but also art. 226 was embraced by art. 359.

But what about the very object of these interpretations? Did it not, (one wonders) concern something called judicial review to check arbitrary executive action for protection of a thing called individual liberty? Was *Liversidge v. Anderson* merely about the question of interpretation?

Before going into these somewhat feeble if relevant queries the merits of this decision regarding interpretation might be examined.

First of all the type of right under art. 226 is not the same as in art. 32(I). Quite apart from the fact that it is not a guaranteed right it is also not a right so clearly spelt out. On a plain reading of it art. 226 is intended to and only confers power on the State High Courts. The fact that this power is used to vindicate fundamental rights cannot convert that power into a right. Both the majority and the minority judgments admit that under art. 226(I) the High Courts' have a discretion vested in them but they only infer it as a kind of right because the High Courts cannot capriciously or unreasonably refuse to entertain the said applications. Indeed, the minority judgment admits¹² that the Supreme Court under art. 32 cannot say that it will not decide on merits but the High Courts in the exercise of jurisdiction can do so.¹³ Has no meaning to be given to the word 'power'? Is it to be construed as a synonym for a corresponding right? The fact that the discretion cannot be exercised capriciously or unreasonably only means that the Court has to lay down principles on which the discretion would be exercised.

Secondly, see art. cl. (4) of art. 32. It shows that art. 32(I) cannot be suspended except under art. 359. There is no such provision in art. 226. Does it mean that while art. 32(I) can be suspended under art. 359 after proclaiming

7 Section 491 of the Criminal Procedure Code—relevant part—runs.

(i) Any High Court may, whenever it thinks fit, direct...

(b) that a person illegally or improperly detained in public or private custody within such limits (i.e. the appellate criminal juris-

diction of the court) be set at liberty.

8 [1941] 3 All E.R. 338.

9 [1917] A.C. 260.

10 (1824) 6 Law ed. 23.

11 At pp. 395 and 409.

12 At p. 409.

13 At p. 392.

emergency under art. 352, art. 226 can be suspended under any other circumstances and in any other manner? No such circumstances or method exist under the Constitution. By implication it means that art. 226 cannot be suspended; but there is no question of suspending it because it is not a right. It is only in so far as art. 226 affords a right in the sense that the Courts cannot act capriciously or unreasonably that a right is suspended but the discretion of the High Courts is not taken away. This is the interpretation which gives meaning to the words "any courts" meaning other Courts apart from the Supreme Court. It is only because the citizen under art. 32 can come to the Court as a matter of right and enforce his fundamental rights that the operation of art. 32 needs to be suspended. This is to prevent the citizen from forcing the hands of the Court where for example in an emergency the decision is purely administrative or all facts cannot be disclosed to a Court.

Take a look at arts. 358 and 359. Article 358 suspends the fundamental rights under art. 19, whereas under art. 359 only the right to enforce the rights mentioned in the President's order is suspended. What could be the purpose of this? If the jurisdiction of the Courts under art. 226 was also suspended what could be the purpose of keeping the rights alive?

Again notice the last words of art. 358, viz. "except as respect... ceases to have effect". Such a clause is absent in art. 359. Why should this be so? Was this done in order that the Central and State Government may at the termination of the order under art. 359 be saddled with huge bills of damages for violation of rights kept alive?¹⁴ Indeed, while framing the Constitution a suggestion was made by one of the members that there should be a provision for enabling Parliament to pass an Act indemnifying any person or a authority from the consequence of any act done bona fide during the period of emergency.¹⁵ This was rejected¹⁶. Now, if the jurisdiction of the Courts under art. 226 is not suspended a citizen who after approaching a High Court fails in enforcing his rights, because the Court after considering his application refuses to grant him relief, cannot sue the State in damages.

It has been said above that *Liversidge v. Anderson* was considered here as a guide to decide the question of interpretation. Now what was *Liversidge v. Anderson* about? What did it decide? The first thing that strikes one is that it was a wartime decision, when actual fighting was going on. The words which fell for construction were "if the Secretary of State has reasonable cause to believe". The real question which the Court was deciding was whether the Court would interfere with an executive decision in the interest of the personal liberty of an individual. It was fully conscious of the circumstances in which the statute in question was passed¹⁷, its object and provisions.¹⁸ The decision of the majority turned on the following considerations—

1. The decision for detention by the Secretary of State required political or administrative considerations.¹⁹

2. Fact on which detention order was based could not be disclosed in Court.²⁰

3. A high officer i.e. Secretary of State was entrusted with the power of detention.²¹

4. Under the Emergency Powers (Defence) Act, 1939, and Defence (General Regulation) 1939:

(a) The person detained could make a representation in writing to an Advisory Committee.²²

(b) The Chairman of the Committee was to inform him of the grounds on which the order had been made and furnish him with such particulars as were in the opinion of the Chairman sufficient to enable him to present his case.²³

14 At p. 393.

15 Constituent Assembly Debates, 1949, Vol. 9, p. 539.

16 *Ibid.*, 547.

17 Per Lord Macmillan, at p. 386.

18 At pp. 372, 376-7, 387.

19 At pp. 345, 367, 376, 386.

20 At pp. 346, 367, 376, 385.

21 At pp. 346, 387.

22 Regulation 18B, Cl. (3).

23 Regulation 18 B, cl. (5).

(c) Secretary of State was to report to Parliament once a month as to the action taken by him under the regulation including the number of persons detained and the number of cases in which he has declined to follow the advice of the advisory Committee.²⁴

Although the words which have fallen for construction here might be different, the issue here is the same, i.e. the place of judicial review in a national emergency. Are the circumstances here the same? Does the Constitution here provide the same safeguards? Even after the President has passed an order under art. 359 is it not possible to pass a statute which may not always require an administrative decision based on facts which cannot be disclosed in Court? There is no need for an answer.

Since it was here held that the President, under art. 359, can only suspend the remedies for enforcing certain fundamental rights and not the rights themselves the Government became apprehensive about huge bills of damages for violation of fundamental rights at the end of the period of emergency. The eighteenth amendment bill is a result of this feeling of apprehension. It sought to do two things i.e. one, to remove the distinction between arts. 358 and 359, i.e. of suspending the rights and suspending the remedies and two, to provide for indemnity for acts done under Government orders in violation of fundamental rights during the emergency. In view of what has been said above does the Constitution need an amendment?

Be all that as it may, some questions trouble the mind. Is it absolutely necessary to leave the declaration of "emergency" to the subjective satisfaction of the executive? Is the judiciary by its nature incapable of saying anything about it? Thus arise the old questions.

In at least one situation the Courts can and should be permitted to have the final say. That is when there is a state of profound peace—when it is not a question of degree. It does seem rather odd that the Courts should be asked to take for granted that there is a war on when in fact there is none. In this respect the position is the same in India as in England where the certificate of the Secretary of State is conclusive. That such a situation can lead to manifest injustice is clear. In *R.V. Bottrill*²⁵ an interned German was refused a writ of *habeas corpus* because he was an alien and the Secretary of State had issued certificate that a State of war existed between Germany and England. This was in the year 1946 when actual peace existed between the two countries and there was no danger of fighting breaking out.

The problem is more difficult when there is a war or threat of war, but it is not as if there are no examples before us from which inferences can be drawn. In various jurisdictions, through the interpretation of different heads of legislative power the Courts have taken into account the circumstances in which certain measures may be justified. Thus in Australia the "Defence Power" of the Commonwealth has performed this function. By laying down the requirement that the object of the legislation in question must have connection with the subject of defence the Courts have taken the circumstances into account.²⁶

Again in Canada the "Peace, Order and good Government" power in s.91 of the British North America Act has been construed by Courts as an emergency power, and in doing so, the Courts have invariably taken the circumstances of the use of the power into account.²⁷

²⁴ Regulation 18 B, cl. (6).

²⁵ [1946] 1 All E. R.

²⁶ Defence power is a "fixed concept with a changing content" per Dixon J in *Australian Textiles Pty. Ltd. v. The Commonwealth*, (1945) 75 C.L.R. at p. 178; *R v. Foster*, (1949) 79 C.L.R. 121; *Shrimpton v. The Commonwealth*, (1944) 69 C.L.R. 613; *Australian Communist*

Party v. The Commonwealth, (1950-51) 83 C. L. R. 1.

²⁷ *Co-operative Committee on Japanese Canadians v. The Attorney General of Canada* [1947] A.C. 87; *In re Board of Commerce Act 1919 and Combines and fair Prices Act 1919*, [1922] A.C. 191.

On this matter the position in the U.S.A. presents an acceptable *via media*. It has been held there that great weight is given to the opinion of the Legislature that 'emergency' exists, but that it is not the only judge of this fact.²⁸

Among the modern Constitutions, the Constitution of the Federation of Nigeria recognises the place of Courts in emergencies.²⁹

It may, of course, be said that since the primary duty for protecting the security of the State rests on the Legislature it should be the only judge of the circumstances justifying a particular measure. A democratically elected Legislature, it is argued, knows the requirements of the times better than a Court can. All this may be true but is it suggested that in a constitutional democracy there is no responsibility on Courts? Are Constitutions merely meant to grant powers to Legislatures or are they also meant to safeguard citizens against States? What is to become of that? It is humbly submitted that the Courts have this duty. In excluding the Courts from this function a nervousness is betrayed which is not justified by experience.

With the change in conditions of life and changing international situations the word "emergency" is acquiring an increasingly variable content. There might be war or threat of war, internal subversion or a financial crisis but a new type of emergency is now recognised viz. continuous subversion or threat of subversion.³⁰ This new position in a constitutional set up is something to notice and to think of.

A "law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial"³¹ is no longer of general applicability.

In the problems discussed above it is difficult to express any definite opinion one way or the other without either being labelled "irresponsible" or being charged with having no regard for democratic rights. Lack of clarity is written in the very nature of things. First it seems clear that safeguards to democratic rights from a Legislature are not adequate where there is one party with an absolute and overwhelming majority. Secondly, when there is provision that Constitutional amendment can only be carried out by two thirds majority there should be a similar provision for approval of declaration of emergency by Parliament since the effect of such declaration of the Constitution is considerable. Thirdly, a plain reading of art. 352 suggests that once Parliament has approved the declaration of emergency, it can do precious little about it. The sole power of withdrawal lies with the President. Should this be allowed to continue? Should not Parliament have any say regarding its withdrawal? How about requiring the President to get a renewal of proclamation periodically? Fourthly, while art. 359 enables the President to suspend the enforcement of fundamental rights in any part of India it does not oblige him to confine such suspension only in those parts where the emergency really exists. Should this co-relation not be established?

28 *Norris Baltimore*, (1937) 172 Md. 667, 192 A. 531; *Taylor v. North Kansas City*, (1950) 360 Mo 374, 228 SW 2d. 762.

29 Section 28 (1) of the Constitution of the Federation of Nigeria.

30 Constitution of India, Art. 22 (1) and (2)—the right to be informed of the grounds of detention and defence by a lawyer of choice and right not be detained for more than 24 hours after arrest with being produced before

a magistrate and without his authority. (3) All these rights greatly curtailed in case of preventive detention; only there is a right to make a representation before an advisory board and a right to know the grounds of (not facts) of detention.

31 Argument of Daniel Webster in *Dartmouth College v. Woodward*, (1819) 4 Wheaton U.S. 518.

GLEANINGS.

THE LOST WILL

THE loss of a will after the death of a testator but before it has been proved does not necessarily frustrate the last wishes of the deceased, the Court having power to grant probate of the will as contained in a completed draft or a reconstruction of that instrument. The position is more difficult in a case where the deceased person was known, or believed, to have made a will, but the document cannot be found among his papers after his death. In a case of this kind there is a presumption that the will was destroyed by the testator *animo revocandi*, though this presumption is capable of rebuttal. On an application to prove a lost will the Court must be satisfied as to the following points:

(i) How the will came to be lost, in so far as this is possible, and what efforts have been made to find it.

(ii) Whether the missing paper was a properly executed will.

(iii) Whether the testator had destroyed it *animo revocandi* or adhered to it at his death.

(iv) What were its contents.

It is proposed to discuss these various points and consider some of the relevant cases decided by the Courts.

If the will has come into the possession of a person after the death of the testator, the circumstances in which the will was lost or mislaid can usually be given, but where the will cannot be found after the testator's death the matter is more complicated. It would have to be shown that a thorough search had been made in all possible places where the deceased kept his papers; enquiry could be made at his bank or place of business, or of any solicitor with whom he had had dealings and of relatives and friends. An advertisement could be inserted in an appropriate newspaper or legal journal; in fact the enquiries should be thoroughly exhaustive.

Where the witnesses to the will are known and can be traced, this should present no difficulty, especially if the will was prepared by a solicitor and witnessed by members or employees of the firm. It may be that evidence of due execution could be obtained from a fourth party who, although not signing as a witness, was present at the time of execution. Failing this, if there is evidence that the missing paper bore the signatures of the testator and of two witnesses, the Court may apply the maxim *omnia praesumuntur rite esse acta* if the circumstances so warrant, as was done in the case of *Re Webb (deceased)*, *Smith v. Johnston* ([1964] 2 All E.R. 91). In *Harris v. Knight* ((1880) 15 P.D. 170), Lindley, L.J., said (at p. 179): "The maxim comes into operation only where there is no proof one way or the other; but where it is more probable that what was intended to be done was done as it ought to have been done to render it valid, rather than that it was done in some other manner which would defeat the intention proved to exist, and would render what is proved to have been done of no effect". In this case the will was produced at the funeral of the testator and was said to have had three signatures but no attestation clause. In another case the will was read by two people who were able to say that the will bore a proper attestation clause with the signatures of the testator and two witnesses, though they could not remember the names or addresses of the witnesses, nor were able to trace them by advertisement. The will had been lost in the post in transit to a solicitor and the Court pronounced for a reconstruction (*In the Estate of Phibbs (deceased)* [1917] P. 93). It should be noted that statements made by the testator to a third party touching the execution of his will will not be admitted in proof of due execution (*Sugden v. Lord St. Leonards* (1876) 1 P.D. 154, following *In the Goods of Ripley* (1858) 1 Sw. & Tr. 68); nor could such statements be received as evidence of revocation (*Atkinson v. Morris* [1897] P. 40). In this case it was said that the testatrix had executed the will in duplicate, both copies being retained by her. At her death

only one copy could be found and in that the signature of the testatrix and one of the witnesses were struck through in ink and there was a statement in the handwriting of the testatrix to the effect that the will was null and void. It was argued that it was obvious that the testatrix had destroyed one copy of the will *animo revocandi* and that this was supported both by the writing on the retained copy and also by a verbal statement made by the testatrix to her companion to the same effect, but it was held that the will must stand.

When the will cannot be found after the death of the testator the question arises, has he destroyed it with the intention of revoking it, or did he still adhere to it at the time of his death? In the case of *Re Webb* (*supra*) the presumption of revocation by destruction was overcome by the evidence of a sister who deposed that shortly before the death of the testatrix she found the completed draft of the will amongst her sister's papers. On being told that the will was out of date as several named beneficiaries had died, the testatrix said that the will was not to be destroyed, but that her sister could take it with her to have it re-done and bring another will form next time she came; she died however before this could be done. The completed draft was admitted to probate, the original will, which had been retained by the solicitor who prepared it, having been lost when the solicitor's office was destroyed by enemy action.

In *Sugden's* case (*supra*), the testator had made a will and eight codicils, but after his death the will could not be found though the codicils were intact. Evidence was given that the testator was a lawyer and that various papers and statements made by him pointed to his continued adherence to the will. It was said that he would be unlikely to have destroyed the will and retained the codicils without making another will. In the circumstances the Court held that the presumption of rebuttal did not apply.

The best evidence as to the contents of a missing will is the production of a completed draft or copy of the will as executed, which can be set up by the person who completed the draft or made the copy and compared it with the original. Failing this, the Court may pronounce for the will as contained in a reconstruction. This can be made by the person or persons who prepared the will or who read it subsequently and can therefore speak as to the various provisions contained in the will. It has been said that parol evidence of the contents of the lost instrument may be received as much when it is a will as if it were any other document (*Brown v. Brown* (1858) 27 L.J.Q.B. 173); but such evidence must be admitted with caution. The standard of proof required for the reconstruction of a lost will by such evidence was no different from the standard of proof in other case, namely, the establishment of reasonable probability as to the terms of the document (*In the Estate of Wippermann* [1953] 1 All E.R. 764). In *Phibb's* case (*supra*), an epitome of the lost will drawn up by the two people who had read the original, confirmed by two letters of the testator found with his papers, was accepted by the Court. In *Harris v. Knight* (*supra*), the contents of the missing will were established by the recollection of someone who had read it, confirmed by verbal statements which had been made by the testator. The Judge said that the disposition of the estate as set out was reasonable and probable.

In *Sugden's* case (*supra*) it was held that verbal statements made by the testator both before and after execution of the will may be admitted in evidence to prove the contents of the will, though not, as has been seen, to prove execution or revocation, since this would tend to evade the requirements of the Wills Act 1837 which governs these matters. Nor would such evidence be accepted to clear up a mistake or ambiguity as regards the designation of a person or property.

The fact that it is not possible to ascertain the complete contents of the lost will is no bar to admitting to probate so much as can be ascertained (*Sugden's* case (*supra*)). It was said that the wishes of the testator should not be frustrated on the ground that some may fail to profit by reason that they might have had some benefit under parts of the will which cannot be recollected.

Unless the matter has been raised in a probate action, the application to prove a lost will as contained in a copy, draft or reconstruction thereof, must be made in the first place to a Registrar of the Principal Probate Registry who may refer the matter to a Judge if he considers the circumstances made that necessary or desirable (Non-contentious Probate Rules 1954 r. 53 and r. 60, and see *In the Estate of Nuttall (deceased)* [1955] 2 All E.R. 921). The application must be supported by affidavits setting out all the relevant details, and the consents of all persons who might be prejudiced by the order sought should be obtained if possible, though in a clear case such consents might be dispensed with (*In the Goods of Hannah Apted* [1899] P. 272).—*F. C. Ottway (L.J.)*

VOLENTI

Two important points of law were involved in the recent decision of the House of Lords (Lords Reid, Radcliffe, Hodson, Pearce and Donovan) in *Imperial Chemical Industries Limited v. Shatwell* (*The Times*, 7 July), reversing that of the Court of Appeal (Ormerod, Upjohn and Davies L.JJ.), which affirmed *Elwes J.* Experienced shotfirers who had deliberately ignored the Quarries (Explosives) Regulations 1959 were injured in consequence, and one of them had recovered substantial damages against the employers, who had done everything possible to enforce the safety regulations, publicly punished and degraded a shotfirer who had been guilty of the same offence and faced trouble with the union in consequence. They had arranged a system of work and pay designed to discourage the taking of risks and Lord Pearce observed that a result which would entitle each of the shotfirers to recover damages from the employers on the ground of the other's negligence and breach of statutory duty and rendered the employers vicariously liable offended against common sense.

The first point to which attention should be drawn was dealt with by Lord Reid, who said that the defence *volenti non fit injuria*, upon which the House based its decision, had had a chequered history. At one time it had been very strictly applied. More recently it appeared to have been thought in some quarters that, at least as between master and servant, it was a dead or dying defence. His lordship thought that this might be due to the fact that in most cases where the defence would now be available it had become usual to base the decision on contributory negligence. When the plaintiff's own disobedient act was the sole cause of his injury it did not matter in the result whether one said 100 per cent contributory negligence or *volenti non fit injuria*. But it did matter in a case like the present. If the inaccurate habit of using the word "negligence" to denote a deliberate act done with full knowledge of the risk was adopted, it was not surprising that difficulties arose. There was a world of difference between two fellow servants collaborating carelessly so that the acts of both contributed to cause injury to one of them and two fellow servants combining to disobey an order deliberately when they knew the risk involved. It seemed reasonable that the injured man should recover some compensation in the former case but not in the latter. If the law treated both as merely cases of negligence it could not draw a distinction. But, in his lordship's view, the law did, and should, draw a distinction. In the first case only the partial defence of contributory negligence was available; in the second *volenti* was a complete defence if the employer had not himself been at fault and was only liable vicariously for the acts of the fellow servant. A plaintiff who invited or freely aided and abetted his fellow servant's disobedience was *volens* in the fullest sense and could not complain of the resulting injury either against the fellow servant or against the master on the ground of his vicarious responsibility.

The second point arose from the argument that there was a general rule that the defence of *volenti non fit injuria* was not available where there had been a

breach of statutory duty. Lord Reid said it would be odd if that were so. He could find no reason at all why the fact that the two shotfirers agreed to commit an offence by contravening a statutory prohibition imposed on them, as well as agreeing to defy their employer's orders, should affect the application of the *volenti non fit injuria* principle either to an action by one of them against the other or to an action by one against their employer based on his vicarious responsibility for the conduct of the other. The statutory regulation in this case placed the duty on the workmen personally, and Lord Hodson observed that in a situation such as this the pull of public opinion was in a direction opposite from that taken in cases where the statutory duty was imposed directly on the employer.— *L.T.*

MASTER AND SERVANT

In *Imperial Chemical Industries Limited v. Shatwell* ((1964) 2 All E.R. 999) the House of Lords (Lords Reid, Radcliffe, Hodson, Pearce and Donovan), reversing the Court of Appeal (Ormerod, Upjohn and Davies L.JJ.), which had affirmed Elwes J., held that employers, who had taken every precaution to see that the Quarries (Explosives) Regulations 1959 were observed, were not liable for injuries sustained by a shotfirer who had deliberately ignored the regulations. The duty imposed by the regulations were laid on the shotfirer personally, and the case was covered by the principle *volenti non fit injuria*.

In *Vickers v. British Transport Docks Board* (*The Times*, 25 March) the Court of Appeal (Lord Denning M.R., Pearson and Salmon L.JJ.), reversing Marshall J., held that the plaintiff, who was injured when employed by the first defendant in loading rails on to a ship for the second defendant exporters, was not entitled to recover against either of the defendants. The operation in which the man was engaged required considerable exertion and involved some risk, the latter being increased by the fact that paint applied to the rails to indicate their destination was wet. Factors leading to the Court of Appeal's decision were that the increase in risk due to the paint being wet was minimal, that delay until the paint had dried would have been extremely inconvenient and involved demurrage of £500 a day, and that the common law, while solicitous for the safety of workmen, did not render an employer negligent merely because the work involved was to some extent dangerous. The principle in *Donoghue v. Stevenson* (147 L.T. 281; (1932) A.C. 562) did not apply to the exporters, for, if the employers should have waited until the paint was dry, there would have been a break in the link of causation and the proximity between the employers' workmen and the exporters would not have been sufficiently close.

The plaintiff in *Doughty v. Turner Manufacturing Company Limited* ((1964) 1 All E.R. 98) was injured as the result of a loose cover constructed of special material being inadvertently knocked into a cauldron used for the heat treatment of metal parts. The contents of the cauldron erupted and gave rise to an explosion. It was subsequently discovered by experiment that the compound of which the cover was constructed underwent a chemical change at great heat such as that to which it had been subjected. The Court of Appeal (Lord Pearce, Harman and Diplock L.JJ.) held, reversing Stabile J., applying *Overseas Tankship (U.K.) Limited v. Morts Dock and Engineering Company Limited* ((1961) 1 All E.R. 404) and distinguishing *Hughes v. Lord Advocate* ((1963) 1 All E.R. 705), that the employers were not liable, because the explosion was unforeseeable by a reasonable man at the time when it occurred. Although the risk of injury by splashing was foreseeable, the chemical change which caused the explosion was not.—*L.T.*

REVIEWS.

Legal System and Lawyer's Reasonings. By JULIUS STONE, LL.M. (Leeds), S.J.D. (Harvard), B.A., D.O.L. (Oxford). BOMBAY: N. M. Tripathi Private Ltd., Princess Street. 1964. Roy. 8vo. Pages 454. Price Rs. 50.

THIS volume is the first one of a series of three works in which this distinguished savant seeks to survey the contemporary problems falling within the field of jurisprudence. In his earlier work *The Province and Function of Law* he had offered the divisions of jurisprudence under the rubrics "Law and Logic", "Law and Justice," and "Law and Society." The projected three works correspond respectively to the aforesaid divisions and the present work studies "the processes of judicial and juristic thought and the place therein of logic and other kinds of reasoning; and to do this against a background understanding of the elements of unity and disunity within a growing legal order". The book opens with a critical examination of some of the main conceptions of John Austin who was the first exponent of modern analytical jurisprudence. This is followed by a consideration of Hans Kelsen's pure theory of law which confined jurisprudence to a structural analysis of positive law to separate legal science from philosophy of justice and sociology of law. Wesley Newcomb Hohfeld's eight fundamental legal conceptions, namely, rights and duties, privileges and no-rights, powers and liabilities, immunities and disabilities, are next examined. The latter half of the book deals with the actual achievements of modern Courts and *inter alia* presents the general problem of the relation between logical reasoning and social change and the "categories of illusory reference" frequently present in the legal propositions which serve as premises for judicial reasoning. For readers who find the theoretical portion of the book heavy-going there is ample material here to interest and instruct them, e.g. the discussions on the common law theory of precedent, the principle of *stare decisis*, *ratio decidendi* and the scope for judicial creativeness in the interpretation of legislation. The author who is rightly described as the Roscoe Pound of the British legal world and who has devoted nearly four decades to the study of the problems discussed in the present work has in the text referred to nearly seven hundred English and American decisions and about a thousand items of legal literature are included in the bibliography. This closely reasoned and thought provoking thesis on an aspect of the present state of juristic knowledge set against the background of its historical setting will be invaluable to lawyers and particularly to judges who are aware of their creative role in legal growth and change.

The Republic of India. By ALAN GLEDHILL, M.A. (Cantab.), LL.D. (Lond.), I.C.S. (Retd.), of Gray's Inn, Barrister-at-law. LONDON: Stevens & Sons Limited, 11 New Fetter Lane. Second edition. 1964. Roy. 8vo. Pages 399. Price £ 3 10s. net.

THIS is the second edition of a book which explains the Constitution of India and the body of law in force in India by an experienced teacher who had also extensive practical experience as an administrator in India. Since the first edition was published there have been a large number of constitutional amendments and some 500 Acts have been passed by Parliament between 1950 and 1956. All this has necessitated much revision and re-writing of a large part of the original work. The author after tracing the evolution of the Constitution from the time of the East India Company, explains the present constitutional position in the light of judicial pronouncements. In the latter half of the book the author has dealt with the Indian legal system and after considering its historical background has described the various aspects of it such as the criminal and civil law, property and industrial law and the personal laws of Hindus and Moslems. There is a very useful table of statutes and cases at the end of the book. One small point which needs correction in a future edition

of the book is the rather disconcerting reference—at least to an Indian reader—to “Mr. J. H. Nehru” in three places. This book which is one of a series of books designed to give a succinct, accurate and up to date account of the development of the laws and constitutions of the British Commonwealth will be invaluable to students of constitutional law and the general reader.

Commentary on the Constitution of India. Volume V. By DURGA DAS BASU. Fourth Edition. CALCUTTA 12: S. C. Sarkar & Sons (Private) Ltd., 1-C, College Square. 1964. Roy. 8vo. Pages cxlix+665. Price Rs. 40.

THE final volume of this monumental commentary on the Constitution of India completes the topic of Services begun in the previous volume and brings the commentary on the text of the Constitution to an end. The legislative powers *vis-a-vis* those obtaining in other countries are discussed at length and this will prove useful to the lawyers as well as the legislators. The Emergency Provisions of the Constitution included in this volume acquire a special significance in the light of the Proclamation of Emergency in 1962 because of threatened external aggression and the various aspects of these provisions are dealt with. This volume also contains a cumulative table of cases and a cumulative index covering the five published volumes. It is now late in the day to touch on the merits of a work which has held the field for over a decade as an authoritative and exhaustive exposition of the Constitution of India. The author has adopted the comparative method of treatment to expound the various provisions by discussing the parallel provisions of the leading Constitutions of the world. Although he has primarily presented a juridical interpretation of the Constitution its political and constitutional aspects are not overlooked. This publication is not only indispensable to every constitutional lawyer but like its previous editions will be of inestimable help to parliamentarians and students of political science and comparative politics.

The Machinery of Justice in England. By R. M. JACKSON, LL.D. Fourth Edition. 1964. Cambridge University Press. BOMBAY 1: Macmillan & Co., Ltd., 276, Dr. Dadabhai Naoroji Road. Demi 8vo. Pages 456. Price Rs. 36; 45 s. net.

THIS is an extremely interesting and highly readable account of the system of law Courts and allied matters relating to the administration of justice in England. It deals refreshingly and critically with such topics as the civil and criminal jurisdiction, the various Courts and tribunals and their personnel. In this fourth edition the author has entirely revised the text in the light of recent changes in law and practice. A new section has been added on contempt of Court and *habeas corpus* proceedings which matters have been altered by legislation. The Administration of Justice Act, 1960, has necessitated a thorough revision of the section dealing with Courts with appellate criminal jurisdiction. The trial at common law is examined *vis-a-vis* the principle of open Court and the position of the press and the changes in legal aid are indicated. The Ingleby Committee Report on children and young persons and the Streetfield Committee's Report on the business of the criminal Courts which latter led to the passing of the Criminal Justice Administration Act, 1962, are fully discussed. The author has put in a strong plea for the modernisation of the machinery of justice to bring it in conformity with the conditions of a changing society and has some hard words to say about a legal system which “has been more successful in allowing *Rachmanism* to flourish than in furthering the policies of decent national development”. This concise account of the present workings of the English legal system is a minor classic which can be read with much profit not only by the members of the legal profession in this country but also by those interested in public affairs who are alive to the problem of bringing the administration of law nearer to the needs of the present day.

Proceedings of the Seminar on Current Problems of Corporate Law, Management and Practice. BOMBAY: N. M. Tripathi Private Ltd. Royal 8vo. Pages 434. Price Rs. 25.

THIS recent addition to a series of useful monographs published by the Indian Law Institute contains the proceedings of the Seminar held at New Delhi in 1962, which was attended by law teachers of several Indian and foreign universities, judges of the Supreme Court and the High Courts and distinguished lawyers and administrators of company law. The Seminar deliberated particularly on the law and regulations relating to the organisation and working of joint stock enterprises including contemporary business methods and practices. A portion of the book is devoted to the proceedings of the Seminar held under the chairmanship of some eminent jurists where various problems connected with the working of the corporate sector were discussed, such as the concept of corporate personality and international law, corporate management and its nature and obligations, supervision and control of corporate administration and company law and accounts. The latter half of the book contains extracts from papers read at the Seminar which had formed the basis of the discussions. These proceedings of the Seminar which stressed the significance and importance of the law of corporate enterprise in India and which sought to identify specific topics for research in company law will be welcomed by students of company law as a source-book for further research and study.

The Sale of Goods Act. By P. RAMANATHA AIYAR, Senior Advocate. Second Edition, 1964, by K. VENKOBABAO, M.L. ALLAHABAD: The University Book Agency, Elgin Road. Roy. 8vo. Pages 320. Price Rs. 15.

IN the three decades that have passed since the first publication of this book, a large amount of Indian and English case law on the subject has been reported. The present editor has incorporated all this case law in the text and in the process has removed obsolete matter and added new matter at the appropriate places. He has however kept to the original presentation of the subject except where later case law has necessitated re-writing of the text. The Sale of Goods Act, 1930, is based on the English Sale of Goods Act, 1893, and the author in his commentary has not only cited important English decisions but in respect of each section of the Indian Act he has indicated the corresponding provisions of the English Act with the differences, if any, between the two enactments. The basic principles underlying some of the important provisions of the Act are explained in the light of judicial pronouncements. The appendices contain some useful matter including the English Sale of Goods Act, the Indian Bills of Lading Act, 1856, and the Forward Contracts (Regulation) Act, 1952. This lucid and well-nigh exhaustive exposition of an important branch of contractual law will prove useful to lawyers, businessmen and students of law.

Taxation of Indian and Foreign Companies in India. By A. G. VENKATARAMAN, Chartered Accountant. BOMBAY 2: N. M. Tripathi Private Ltd., Princess Street. Demi 8vo. Pages 148. Price Rs. 15.

THE rapid industrial development in India since Independence and the growth of the corporate sector has brought in its wake foreign technical and financial participation and the appointment of foreign technicians. This in turn has attracted the incidence of corporate taxes on various kinds of income of Indian and foreign companies as well as tax on foreign technicians. The present brochure meets a long felt want for a concise yet accurate statement of the Indian corporate law for the guidance of foreign corporations and their tax consultants. The author after explaining the basic principles of taxation in India and the taxation of Indian companies

has dealt with the essential provisions of taxation of foreign companies and foreign technicians. There are a number of appendices which contain information useful to Indian and foreign companies which cover particulars that are required to be furnished to the Government by companies contemplating foreign collaboration and which show the illustrative types of income that may be received by foreign corporate bodies from Indian companies and the likely incidence of tax under specific circumstances. This book will commend itself to foreigners who operate in this country through the medium of a company or are interested as collaborators in Indian companies.

Clerk and Lindsell on Torts. Twelfth Edition. Third Cumulative Supplement. LONDON: Sweet & Maxwell Limited, 11, New Fetter Lane. Price 17s. 6d.

THIS Supplement to a classic work on Torts brings down the case and statutory law and statutory regulations to September 1, 1964. The latest decisions are carefully dovetailed into the original text and the implications of the latest decisions like *Rookes v. Barnard* [1964] 2 W.L.R. 269, *Commissioner for Railways v. Quinlan* [1964] 2 W.L.R. 817 and *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] A.C. 465, are fully discussed. No busy practitioner who has to deal with actions in torts can do without this up to date statement of the law on the subject.

Introduction to the Constitution of India. By DURGA DAS BASU. Third Edition. 1964. CALCUTTA 12: S. C. Sarkar & Sons (Private) Ltd., 1-C, College Square. Roy. 8vo. Pages 251. Price Rs. 14 (Board bound); Rs. 12 (Paper bound).

IT speaks for the popularity of this publication that within a short period of four years it has gone into three editions. Since its last edition was published the Constitution was amended on six occasions and the author has incorporated all these changes as well as recent decisions. A brief chapter has been added on the working of the Constitution. The author has covered the entire subject in seven short parts each part sub-divided into chapters dealing with the various topics of the Constitution such as the Union Executive, Government of States, the Judicature and the Federal System. The running commentary is lucid and to the point and at the end of each chapter references are given to sources and authorities on which the comments are based. The appendix contains a number of tables which at a glance supplies much useful information like Statewise membership of the Constituent Assembly of India, Representation of States and Union Territories in the Council of States and in the House of the People, membership of Legislative Assemblies and Legislative Councils of States and Distribution of legislative power. This book by the author of a standard work on the Constitution of India which is primarily prepared for the use of students going up for law and other examinations will also prove useful to the general reader as a brief and accurate survey of the provisions of the Constitution.

Diamond Jubilee. Aurangabad Bar Association. Souvenir.

THIS well produced souvenir contains the proceedings of the Diamond Jubilee Celebrations of the Aurangabad Bar Association which was founded in 1888. Some of the speeches delivered on this occasion and which are reproduced here throw an interesting sidelight on the administration of justice in this part of the State and the growth of the local Bar.

The Bombay Law Reporter.

JOURNAL

March 15, 1965.

PHILOSOPHY OF LAW.*

THE Chief Justice of India began his speech by observing that in the midst of the members of the Satara Bar he was feeling quite at home, and so, he desired to express his views on the basic concept of the administration of justice in this country freely and without mental reservation. Since he was talking to the members of the Bar whom he knew very well and who knew him very well, he was confident that he would not be misunderstood. "I am anxious", he said, "to share with you my hopes and my fears, my aspirations and my apprehensions in regard to the administration of justice in this country." It is likely that my statements may sound platitudinous and in that sense, may not appeal to the responsive chord in your minds. Unfortunately, in the market place of ideas, truth is a poor competitor because truth sounds platitudinous and people naturally shrug their shoulders on hearing platitudes. I would, however, appeal to you not to shrug your shoulders on hearing my speech, but give it serious thought.

I have a feeling that our Bar rooms do not respond to the revolutionary movements that the history of India has witnessed during the last fifteen years. There is an atmosphere of cynicism and frustration pervading in our Bar rooms and one feels the touch of the cold frost of indifference when one enters into a dialogue with members of the Bar in their respective Bar rooms. The cynical indifference to the mighty events that are happening in our country which seems to inspire the approach of our intellectuals is a source of very great weakness for the future of a democratic way of life in our country. I would, therefore, appeal to you to look beyond through the windows of your chambers and your bar rooms and try to understand the full significance of the question-mark which is challengingly present in the eyes of the common man. That question-mark poses before you and me the problem as to the purpose which law serves in India today.

We, lawyers and Judges, are often inclined to concentrate all our attention on the work with which we are busy from day-to-day and are apt to forget the purpose which our work is intended to serve and the motive force of the legal process on which administration of justice in a democratic country is founded. I often feel that lawyers and Judges who take delight and pride in using their tools in the discharge of their professional duties, are like the workmen who helped to build the Taj without ever having appreciated the synthetic beauty of the magnificent structure they were building. The beauty of law and its mighty role in the democratic process are not present in our minds as we do our duties in Courts from day-to-day.

Law in a democracy works as a mighty weapon in the achievement of democratic ideal of socio-economic justice. Democracy is no longer content to play the night watchman's role of keeping law and order within its boundaries. Democracy is now set on its dynamic ideal of establishing an Egalitarian State, and in the achievement of this ideal, law is its great ally and indeed its major weapon.

*Short summary of the Address delivered by the Hon'ble Mr. P. B. Gajendragadkar, Chief Justice of India, to the members of

the Bar Associations of the Satara District, on December 30, 1964.

In achieving the ideal of socio-economic justice, democracy and law have both to face the problem of reconciling the competing claims of individual liberty and freedom with social and public good. The way to resolve this conflict has to be discovered by legal process, and so, legal process assumes great significance in the progress of democracy. The Legislatures are seeking to meet the challenge of the times in which we all live and law which is forged in legislative chambers offers a response to the clamouring demand of unsatisfied but legitimate human desires and ambitions. That is how the doctrine of socio-economic justice is the foundation of all law, and in so far as law helps the process of socio-economic justice, it helps democracy itself.

In the context of today, lawyers and Judges should not be content to function merely as technicians. They must play the role of jurists who understand and explain the philosophy of law, the way of it, its basis, its motive power and its ultimate objective.

Today, democracy is passing through a difficult period in our country. It is passing through a stage of adolescence and adolescence has some unusual problems to face. The promise that the Constitution made to the hundreds of citizens staying in villages of this country that political freedom will bring them socio-economic justice, still remains to be fulfilled; and these hungry millions who have yet to receive the minimum amenities of life, such as clothes to wear, houses to live, food to eat and good water to drink, have been waiting to receive the fulfilment of that promise. Law is helping to bring that dream nearer to the citizens in this country. That is the philosophic basis of law today.

It is often said that lawyers have no place in the public life of this country. I do not think that the intellectuals should take this narrow view based on a sense of frustration, indifference or anger. Political power will need the co-operation of intellectuals in order to solve the many problems of Government. In fact, democracy can succeed only if there is an unceasing dialogue between the intellectuals and political power; and if the lawyers do not play the role as leaders of thought in this country, who else can discharge that duty? We call ourselves members of the mighty brotherhood of law and we remind ourselves every morning as we begin our work in Courts that we are worshippers in the Temple of Justice. I would, therefore, appeal to you not to treat the legal profession as a business or merely as a source of making money; we ought to treat our profession as a branch of social service and must develop and subscribe to the best ethical standards to govern our conduct. In this brotherhood, there is no superior or inferior; all are equal and between the members of the Bar and the Bench there is genuine partnership; both the members of the Bar and the Judges have to put their shoulders to the wheels over which the chariot of justice proceeds in its majestic march to bring to the country socio-economic justice based on the rule of law. Law is the foundation of social structure. That is our ancient concept of law. Law is the king of kings—that is the Upanishadic notion about law. The rule of law which is universally recognised as the most distinguishing feature of democracy looks to us, lawyers and Judges, as its servants and its advocates, and it is as such servants of law that we ought to discharge our duties not only to the litigants, but to the public at large.

Law, like democracy, seeks to synthesize in a harmonious way the conflicting and competing claims of individual liberty and social good. In the process of this harmonious synthesis, there is no room for absolutes. Reason and experience guide law and democracy, and it is on reason and experience that the changing pattern of law is based. I would, therefore, appeal to the members of the Bar to take a philosophic view of law and help the progress of the rule of law. If we fail to achieve this object, the rule of law itself would be in danger and democracy may not succeed. That briefly is the nature of my hopes and fears, my aspirations and my apprehensions in regard to the administration of justice in this country today.

THE HINDU WOMEN'S RIGHTS TO PROPERTY ACT, 1937:
A STING IN THE TAIL.*

THIS statute, which has given endless trouble, was intended to give better rights to women. But in some quarters there has been a reluctance to give them any more rights than could be avoided. The Madras High Court has recently handed down a Full Bench answer which causes us to reconsider the whole question of the rights which women might take under s. 3(2) of the Act. If Madras is right Madhya Pradesh, and, the present writer is willing to assume, the rest of India except perhaps Orissa and Patna is wrong. The present writer expressed his opinion on the question in his *Introduction to Modern Hindu Law* (which appeared in India in December, 1963) and in an earlier article entitled "Five Doubtful Cases in Hindu Law from Madras" which appeared at [1963] 1 *Madras Law Journal* (Journ. Sec.), pp. 1 and following, at pp. 20-24. In the two places he expressed concern about the judgment of Jagadisan J., in *Manicka v. Arunachala*¹. In that case the single Judge had declined to follow a bench of his own High Court, namely in *Manorama Bai v. Rama Bai*², had followed rather the unreported decision of a single Judge which was not followed in the said *Manorama Bai*³, and had relied upon the Orissa case of *Keluni Dei v. Jagabandhu Naik*⁴ which, along with many Orissa cases, this writer had thought to be eccentric and unreliable outside Orissa.

Jagadisan J's judgement has now been reviewed by a Full Bench in *Manicka v. Arunachala*⁵ which has come to hand only now, though the decision was given on January 24, 1964. The result is excruciating in the best traditions of Hindu Law. The precious subtlety which arises out of the apparently head-on conflict between this Madras Full Bench decision and the Full Bench decision of the Madhya Pradesh High Court in *Bhonda v. Ramdayal*⁶ is one which the traditional legal scholar of India should find delicious. This writer finds it doubly displeasing, firstly because he himself has not all the necessary mental flexibility to throw overboard at one step all he had understood about this dreadful statute, and secondly that, doing his level best, he finds it difficult to persuade others that the "new" point of view is after all correct. In sum, this writer believes that Madras is right, and the question arises how can this be justified, since the judgment will leave many unconvinced; and since the Madhya Pradesh case, correctly drawn to their Lordships' attention (see p. 529 of the judgment), was handled very briefly, and, to some readers, somewhat cryptically. No doubt Madhya Pradesh did consider the widow's interest a coparcener's indefinite and fluctuating interest while the Madras High Court says that fluctuation is "merely incidental to the estate she took": but what sort of difference this is will not be evident to everybody. We must take a deep breath and do what we can.

The "old" view and its justification.

The point of view upon which many were proceeding and which this writer preferred to follow in the above-cited book and article was this: a widow who took under s. 3(2) took "the same interest that he himself (her deceased husband) had" in the joint family property. That interest was a coparcenary

*By Dr. J. Duncan M. Derrett, Professor-designate of Oriental Laws, University of London.

1 [1961] Mad. 1016, [1961] 2 M.L.J. 483.

2 [1957] A.I.R. Mad. 269.

3 The case, which has played a considerable role (and ought to have been reported) was A. S. No. 299 of 1950. The fact is that this ought to have been taken more seriously in *Manorama Bai's* case. It was dismissed there at p. 288, col. i., in the following words: "The latest decision is the judgment in *Seshi Ammal v. Lakshi Ammal*, A. S. No. 299 of

1950, D./ 15-7-1955 (Mad.), wherein it was held that there is no survivorship to the widow of the rights of a deceased coparcener." It was not stated in what precise way this proposition was in conflict with their Lordships' own view, but this appears from the judgment. In fact, a decision to the fact that a widow never takes by survivorship from any coparcener would probably be wrong.

4 [1958] A.I.R. Or. 47.

5 [1964] II M.L.J. 519, F.B.

6 [1960] A.I.R., M.P. 51, F.B.

interest⁷ and, therefore, fluctuated with births and deaths, just as it would have done in the hands of her husband. This proposition is widely accepted, and indeed is not denied now by anyone.⁸ Let us illustrate what is meant by this fluctuation. If there are three brothers in the family, *B1*, *B2* and *B3*, and only *B3* is married, and we assume that the Act of 1937 is applicable (i.e. we are in imagination in the pre-1956 period), the position of the widow of *B3* would shift with the deaths of *B1* and *B2*. On the death of *B2* her presumptive third would increase to a half, and, one assumed, on the death of *B1* she would be left with the whole property. The increase in benefit upon the death of *B1* seems to be of exactly the same kind as that which occurs on the death of *B2*. The reason is that we assume that the analogy of the interest in the hands of the widow with the same interest in the hands of the deceased husband is complete and unbroken. All her rights follow in some measure the rights of her deceased coparcener husband and where he could have taken more by survivorship so she also might be expected to take more. She has a coparcenary interest (whether or not she can herself be likened to a coparcener, which people generally doubted), and therefore she should be able to survive to the whole property on the death of the sole surviving coparcener, here *B1*. The same would be the position when all the brothers are married. Let us assume *B1* married to *W1*, *B2* married to *W2*, and *B3* married to *W3*. *B3* dies first leaving *W3* the owner of his undivided Mitakshara coparcenary interest under s. 3(2) of our Act. She does not ask for partition. *B2* dies leaving *W2* similarly entitled. *W3* does not take by survivorship from *B2* because survivorship has been interrupted by the statute⁹ for so long as *W2*'s statutory interest endures. Thus we have two widows, each with a coparcenary interest, along with the sole surviving coparcener, namely *B1*. When *B1* dies leaving *W1* the same thing happens as on the death of *B2*, and *W1* takes the interest formerly belonging to *B1*. What happens when *W1* dies? In the simple and straight forward view her interest passes by survivorship to *W2* and *W3*, so that if they partitioned the estate between them each would have a half. This is the view which is not accepted in Orissa and Patna, as we shall see. The view depends upon the conception of the interest owned by the widow being essentially a coparcenary interest, so that the right to take by survivorship is attached to it, or in other words it is capable of being enlarged by deaths, whether of coparceners (including the sole surviving coparcener) or of widows who likewise had taken under the Act. It is interesting to note, in passing, that s. 6 of the Hindu Succession Act does not contemplate a female owner of a coparcenary interest taking by survivorship—but we thought that this was an oversight.

The point of view stated here was adopted in *Manorama Bai v. Rama Bai*¹⁰ and in *Bhondu v. Ramdayal*¹¹, both referred to above. The facts in *Manorama Bai*'s case are difficult to disentangle in the lengthy and learned judgment, but they amount to this: two brothers, *B1* and *B2*, were joint (in fact reunited); *B1* had two sons, *S1* and *S2*, and five daughters; *B1* gave *S2* in adoption to *B2*, so that after the sons' marriages the picture was that the two brothers each had a son, whom we can rename *B1S* and *B2S*. After their marriages the family was joined by *B1SW* and *B2SW*. In an accident *B1*, *B1S*, *B2S*, and *B1SW* were killed, and it was held as a fact that the last to die was *B2S*. The sisters of *B1S* objected to claims by *B2SW*, who was not involved in the accident, to take the family property subject to the claims of

⁷ See the present writer's discussion at (1954) 58 Bom. L.R. (Journal Section), pp. 187 and following.

⁸ *Chinniah v. Sivagami Achi*, [1945] Mad. 402, [1945] A.I.R. Mad. 21; *Secthamma v. Veerana*, [1950] A.I.R. Mad. 785, [1950] 2 M.L.J. 21; *Radhi Bera v. Bhagwan Salu*, [1961] A.I.R. Or. 378, s.b.; *Shivappa Laxman v. Yellawa* [1958] Bom. 958, [1954] A.I.R.

Bom. 47.

⁹ This is correctly observed in *Parappa v. Nagamma*, [1954] 1 M.L.J. 280, [1954] A.I.R. Mad. 576, F.B., and *Subba Rao v. Krishna Prasadam*, [1954] Mad. 257 [1954] A.I.R. Mad. 227.

¹⁰ [1957] A.I.R. Mad. 260.

¹¹ [1960] A.I.R. M.P. 51, F.B.

the widow of *B2* who had died earlier. The question was whether, as the widow of the last coparcener to die, *B2SW*, the plaintiff (*Manorama Bai*), was entitled to the entire properties of the family. The relative times of the deaths of *B1S* and *B1SW* were not inquired into and were not established and it was assumed in passing that if momentarily *B1SW* acquired any rights under the Act of 1937 these passed on her death to the sole survivor of the coparcenary, *B2S*, who himself died last in the tragedy. The Court went into a lengthy investigation of what is meant by "coparcener", held that *B2SW* was as good as if she were a coparcener, and was therefore capable of taking by survivorship all the interests in coparcenary, subject to the rights of the widow of *B2*. It is correct to say that if the learned Judges (*Govinda Menon* and *Ramaswami, JJ.*) had been asked whether *Manorama Bai* had taken the whole family property by survivorship, subject to the rights of the elder widow, they would have answered in the affirmative: but it is not correct to say, as has been said in Madras, that *Manorama Bai* took by survivorship from the sole surviving coparcener. As this writer sees the facts, *Manorama Bai* was the widow of *Hayavadana*, the youngest of the coparceners, who was held to have died last (p. 280, para. 32). She took the property of a sole surviving coparcener under s. 3(2), under which undoubtedly comes such joint family property. She took as widow under the Act, and not by survivorship arising out of a pre-existing tenure. There was no question of her taking by survivorship from *B1* or from *B1S*, because the Court held that they died before her own husband, upon whose death alone she obtained a right under the Act. But there is not the slightest doubt but that throughout the judgment, especially in the lengthy and involved considerations of the nature of a coparcenary right and of survivorship outside the pure *Mitakshara* birthright, the learned Judges believed that *Manorma Bai* could not have taken the joint family property of *B1's* branch had she not been a coparcener, and it is this catena of dicta—all of them unnecessary for the decision of the case—which comes under fire. This is what was disliked in *Manorama Bai's* case and this may have contributed to editors' refusing to report it (except in the *A.I.R.*). Thus if we were to ask the learned Judges what they would decide in a hypothetical case, where two brothers died in succession leaving two widows, each able to take under the Act of 1937, and the first widow herself died, there can be no doubt but that they would decide that the second could take by survivorship from the first. Similarly, if we asked them what they would decide if there were a sole surviving coparcener and a widow, and the coparcener died, there can be no doubt but that they would say that the widow could take by survivorship from the sole surviving coparcener. But despite what is said to the contrary in Madras the case of *Manorama Bai* did not actually decide either of these points. It was the *potentialities* of the case which disturbed people.

We may now turn to the more definite case of *Bhondur v. Ramdayal*.¹² We must neglect certain issues. Having neglected them we see that a family consisted of two coparceners, father (*F*) and son (*S*) and the father's wife (*W*). *F* died leaving the other two. *W* took a half of the property under the Act. Then *S* died unmarried. It was argued that the coparcenary having ceased the rights of *W* came to an end (a possible argument, as we shall see, and not so stupid as it appears at first sight). The learned Judges of the Full Bench, after considering a vast number of cases (not including *Manorama Bai's* case), came to a conclusion as follows (p. 54):

"It may be that a Hindu widow taking interest under sub-s. (2) of S. 3 of the Act is not a coparcener. But the Act vests in her the fluctuating interest which her husband had in his joint family property at the time of his death 'notwithstanding any rule of Hindu Law to the contrary'. The essence of this interest is unity of ownership. As observed by the Privy Council in 9 Moo. Ind. App. 539 (P.C.), at p. 611:

“There is community of interest and unity of possession between all the members of the family, and upon the death of any one of them the others may well take by survivorship that in which they had during the deceased's lifetime a common interest and a common possession.”

The deceased simply disappears and the survivors take, as a kind of accretion to the interest which they already had in the whole property, a larger interest. That being so, it is inherent in the very nature of the fluctuating interest which a widow derives from her husband that it is capable of being enlarged by deaths, and liable to be diminished by births, in the family. There is no basis in law for the supposition that she loses this interest altogether when the only other member of her joint family dies and she is in a position to obtain the whole estate as his heir.

Actually, there is no substantial difference between the nature of the estate which such a widow takes by survivorship and the one which she may take as her son's heir. In either case, it would be a Hindu Woman's estate. There is, therefore, no reason for not allowing her to take the whole estate by survivorship or for supposing that the interest which enables her to do so ‘vanishes’. In our view, the widow in such a case gets the whole estate by survivorship.”

True the result was masked by the fact that even if survivorship has been denied the lady would have taken the half as heiress: but the fact remains that the learned Judges accepted without hesitation that the widow, though perhaps not a coparcener, could take by survivorship.

It is time now to pass to the “new” and correct view.

The “new” view and its justification

THE importance of a change in the judicial interpretation of s. 3(2) cannot be overemphasised. Families in which the widow, whose rights have now been turned by s. 14 of the Hindu Succession Act into absolute rights, will seek to enlarge her right by surviving to the sole coparcener cannot be few. It is precisely because those rights have been turned into absolute rights by the statute that Madras has groaned under the otherwise rational and mild dicta in *Manorama Bai's* case. Had the limited estate remained all would have been well, because the former law was perfectly well acquainted with the situation where one widow won the championship-stakes, by being the widow of the last coparcener to die, and thus took as his heir all the family property subject to the rights of maintenance of the less lucky widows. The rule of the limited estate made that situation bearable, because the corpus of the estate would come to the family in the end. Now that position has suddenly vanished. The widow, with her absolute rights in an undivided coparcenary interest under the two statutes, cannot only spirit the capital away into enterprises of which the family does not approve, she can remarry and fall under the thumb of mercantile competitors, and so forth. It will be even less tolerable if, when the sole surviving coparcener dies, she comes in and takes what remains of the capital by pressing her claims as survivor under the old system. Hence the head-scratching in Madras and the intolerably subtle reasoning which we are now about to attempt to explain.

The explanation requires as a first step the recognition of two principles, which it is hoped readers of this article will accept as preliminary assumptions:—

(1) An investigation of the rights of a person who claims under a statute must look first to the statute, and not add to the statute any qualifications or conditions which might be suggested by any individual interpretation or application of that statute, whether by the Courts or by jurists.

(2) An explanation of the statutory right of someone who seeks to take under a statute and not otherwise must be an explanation and not a restatement of the question in other terms.

To illustrate the first point, it is unsatisfactory to say that the widow must be made a coparcener by the statute because (a) the statute gives her the interest her husband had, which happens to be a coparcenary interest, or (b) be-

cause the Hindu law knows many tenures similar to a coparcenary tenure which do not differ in effect from what the statute seems to have given the widow. To illustrate the second point it is better to take a homely example. One hears it said in the "new" cases that the widow cannot take by survivorship because she is not a coparcener. This is like saying that a woman is not a man because she does not wear a hat or does not wear trousers. The definition of woman depends on many factors and the right to wear a hat or wear trousers may itself depend on the right to be defined as a man and not a woman. This problem has been bedevilled by explanations which do not explain, but only restate the problem.

To commence with the exposition, we note that the chief argument for the widow's being able to take the family property from another widow who dies, or from a sole surviving coparcener, lies in the claim that her interest fluctuates. It does indeed fluctuate, but how do we know this, and how far does this incident of fluctuation go? The statute says nothing about fluctuation. Fluctuation has been recognised by the Courts in cases where the size of the share obtained at partition differed from what would have obtained had the suit been instituted earlier. What has really happened is that the interest given to the woman by the statute is by the same statute declared capable of being realised by partition. Not merely by partition, but by partition as if she were a male owner. This tells us that where a male owner in her situation could demand partition she can demand it, and where the right to institute a partition *at Mitakshara law* has ceased for any reason the incidents of partition formerly open to her have ceased. This may not make partition impossible (as suggested in Madhya Pradesh unsuccessfully), but will turn the co-ownership into a different kind of co-ownership (as we shall see) with a right of partition distinct from the right of partition at Mitakshara law. The point must be illustrated.

Here is a rather large joint family which can illustrate all our points:



B2 dies first. *W2* becomes entitled to the same interest that *B2* himself had. If she separated at once she would obtain a quarter share. But she remains joint. *B3* dies next. The situation of *W2* is not changed. *B4* dies next, and still *W2*'s position is not changed. The reason is that if she asks for partition the other widows have their deceased husband's interests under the same Act. If *W4* now dies what happens to her interest? As she dies undivided it returns to the coparcenary, which still exists as a *Mitakshara* entity, because there are the two coparceners, *B1* and *S*. As a result *S* is entitled to a presumptive quarter, just as is *B1* and the two surviving widows, *W2* and *W3*. *S* now dies leaving *W5*. *W5* takes his interest, still one quarter. When *W5* dies what happens to the interest, still undivided? There is no coparcenary in existence, but there is a sole surviving coparcener, *B1*, who has the right of being the sole surviving master (we shall avoid the word "vestee") of the family estate, subject to the rights of *W2* and *W3*. Therefore the branch of *B4* disappears from consideration, and we are left with three branches. Should *W2* now ask for partition fluctuation is seen to have taken place. The interest, which is still a coparcenary interest, is still capable of being realised by partition *at Mitakshara law*. Therefore *W2* would obtain a separate share amounting to one-third of the estate. Let us suppose she does so and disappears from view. This leaves *W3* with her interest in competition with the sole surviving coparcener, *B1*. What is to prevent her from separating and taking a half? Nothing. Let us suppose that she does not do this, but remains joint with *B1* until the time of *B1*'s death.

Here we come to the crux of the problem. At *B1*'s death the Mitakshara joint family comes to an end. The possibility of a Mitakshara partition is over. Can the situation of *W3* be distinguished from that of *B3* if he were alive? Yes indeed it can, and for the most important, but elusive, reason, not that *B3* was a male and *W3* is not, but that *B3* had a birthright and *W3* has not. What this means is this: *W3*'s right being statutory and not a birthright, *W3* is confined to the interest which her husband had. She is not fictionally her husband throughout the story from start to finish, though she may appear to be so for part of the story. Now the interest which *B3* had is capable of being realised by partition so long as a Mitakshara partition is available. This ceases when the sole surviving coparcener dies. All coparcenary rights have been absorbed by this last male member, who is not strictly a coparcener at all, because he has no coparcener alive with him, but only females having shadows of coparcenary rights attached to them by virtue of the statute. Had the deceased husband actually been alive the situation of a sole surviving coparcener would not have arisen. But as this, a perfectly well-known, if disputed, tenure has actually come into existence, nothing in the statute compels us to ignore it. Thus the statutory right and the situation of the sole surviving male member must be harmonised, and neither must detract from the other. The male member was manager vis-a-vis the widow, whatever her rights to partition had been, and there is no statutory gift to her of survivorship as such. Her right to a share is always subject to this limitation, that when a Mitakshara partition cannot take place her right *cannot be ascertained to have increased*. And thus we have the somewhat comical and unexpected position that when *B1* dies *W3*, whose hypothetical right stood as a presumptive half while *B1* lived, cannot claim to take by survivorship from *B1*, and is fixed by the nature of things to a half vis-a-vis *B1*'s intestate heir or legatee.

This is exactly what has been decided in the Madras Full Bench decision which we are discussing. Fluctuation may be a characteristic of the coparcenary interest in which she has a statutory right, but there is no ground for supposing that the interest has all and every characteristic which a true coparcenary interest has. This is not because she is not a coparcener, which is itself a conclusion from examining the working of the statute, but because the right to partition, carrying with it the right to ascertain the size of the share by reference to the number of owners entitled to participate, undergoes a subtle change when the penultimate coparcener to die actually dies. When *S* died in our illustration *W3* knew that she could not obtain an increase in her hypothetical share when *B1* died. She could always obtain her share in litigation with *B1* but she could not pass from a right to, at most, a half, to a right to the whole, for the Mitakshara partition-situation ends with the death of the sole surviving male member.

Now let us suppose that *B1* died before *W2* separated. The family then consists of *B1*, *W2* and *W3*; and *B1*, the last surviving male member, is taken away from it. According to the "old" view *W2* and *W3* could split the property between them, taking a half each. But this is incorrect. In reality the property of *B1*, namely the former coparcenary property, subject to the two widow's thirds goes to *B1*'s heir or legatee. The widows' not being able to institute a partition suit at Mitakshara law prevents the ascertaining that their respective shares have increased in value from a presumptive third to a half. Since they cannot do this they are stuck with their thirds.

Let us suppose that *B1* died, and his legatee has arranged a partition (as he must) with the two widows. *W2* and *W3* are now in possession of a divided two-thirds of the estate. What happens when *W2* dies? Let us assume that *W2* died unseparated. Does *W3* now become owner of the two-thirds, in fact all the remaining property, by survivorship from *W2*? No. The reason is that there being no coparcenary and no Mitakshara survivorship since the tenure of the widows was purely statutory, the two widows were tenants-in-common vis-a-vis each other, just like any other co-owners not Mitakshara co-

parceners. This is exactly what was decided in *Keluni v. Jagabandhu*¹³ which this writer so heartily deplored. The case is, after all, correctly decided. One must admit one's own error.

What happens when various widows of various coparceners live together and one dies? Her interest passes to the surviving coparceners, if any, and if there are none then not to the other widows, but to the reversioners of the deceased husband, which only in Maharashtra under the Bombay school are capable of including the widow of a deceased brother of the last male owner. This is exactly what was decided in *Khatrani v. Tapeshwari*,¹⁴ and this is also correct. The decisions one previously deplored are now almost certainly correct.

It follows, therefore, that the following propositions can be laid down:—

(1) The widow who took under s. 3(2) of the Act of 1937 was not thereby constituted a coparcener, nor had she any characteristic similar to those of a coparcener except those necessarily flowing from the nature of her interest and her right to protect and, if necessary, realise it by partition.

(2) The right to partition persisted so long as her interest endured and persists even after it has been converted into an absolute interest by the Act of 1956.

(3) But the right to partition carries with it the right to ascertainment of the size of the share, and this will be subject to a peculiarity. So long as a Mitakshara partition can occur the possibility of a fluctuation in the size of the fraction since the death of the husband can be contemplated. But when Mitakshara partition is no longer in view the signs of fluctuation cannot be perceived.

(4) For this reason the appearance of a right of survivorship continues so long as there is a male member alive. But when the last male member of the original coparcenary dies the possibility of survivorship comes to an end.

(5) Therefore there can be no survivorship, whether from a sole surviving coparcener or from a co-widow, or from a widow of another deceased coparcener.

This drastic reorientation of the law must be noticed in Maharashtra and Gujarat. The reactions of those High Courts to the new Madras decision, along with the Orissa and Patna decisions is awaited with the greatest interest.

THE MAHARASHTRA OWNERSHIP FLATS ACT, 1963—A CRITICISM.*

THE Maharashtra Ownership Flats Act, 1963, which came into operation on February 10, 1964, within the area of Greater Bombay has been in existence for the last one year. It is appropriate that a study be made of its working, inadequacies, limitations and shortcomings in a critical analysis.

The object of the new enactment was to regulate the promotion of construction, sale, management and the transfer of flats on ownership basis in the State of Maharashtra as it was found that the builders and the sponsors of ownership buildings indulged in several malpractices and abuses. To check the unhealthy activities of this class of persons, the Government imposed several curbs on the trade on the recommendations of the Paymaster Commission which it had appointed earlier to investigate into the system of sale of flats on ownership basis in Bombay.

The curbs imposed upon the builder are several. Section 3 sets out the general liabilities of a promotor and provides that notwithstanding anything in any other law, a promotor (i.e. a builder) who constructs a building of flats, all or some of which are for sale on ownership basis

"shall in all transactions with persons intending to take or taking one or more of

13 [1958] A.I.R. Or. 47.

14 [1964] A.I.R. Pat. 261, F.B.

*By A. E. Karmali, Advocate, High Court, Bombay.

such flats, be liable to give or produce; or cause to be given or produced, the information and the documents set out in sub-section (2)."

Section 4 requires an agreement between a builder and a flat purchaser to be registered with the Sub-Registrar of Assurances. Section 5 requires the builder to maintain separate account of sums taken as advance or deposit from prospective flat-owners. The responsibility for payment of outgoings by the builder until he effects the transfer of the property to a co-operative society or a company, as the case may be, is provided by s. 6. The builder is prohibited from making any additions or alterations to the plans which have been sanctioned, without the previous consent of all the persons who have agreed to take the flats by virtue of s. 7. The said section also provides for machinery for settling disputes between the builder and the flat-owners as respects any defect in the building or material used or any unauthorised change made in the construction of the building. Section 8 specifies the period within which the builder is obliged to deliver possession of the flat to the flat-owner. Section 9 prohibits the creation of mortgage by the builder after execution of agreement of sale without consent of parties. The builder is required to take steps for formation of co-operative society or a company, as the case may be, in certain circumstances, under s. 10. The builder is further required to convey his title in the property to the organisation of flat-owners, to execute all relevant documents in respect thereof and to deliver all documents of title relating to the property which may be in his possession or power to the co-operative society or a company, as the case may be, under s. 11. Breaches or omissions committed by the builder of any of the provisions of the aforesaid sections or rules made thereunder are made punishable with fine or imprisonment or both by virtue of the provisions of ss. 13 and 14. Retrospective operation has been given to ss. 2, 6, 8 to 16 to a limited extent, so that the Act will be applicable to a limited extent to builders who had sold flats prior to the enactment of this legislation.

Let us turn to the definition of a "promotor". Section 2(c) defines a promotor thus:

"'promotor' means a person who constructs or causes to be constructed a block or building of flats for the purpose of selling some or all of them to other persons, or to a company, co-operative-society or other association of persons, and includes his assignees; and where the person who builds and the person who sells are different persons, the term includes both."

The essential ingredients of the definition are that a person (i) who constructs or causes to be constructed a building of flats and (ii) for the purpose of selling them to other persons would fall within the definition of a "promotor". A person who is a "promotor" as defined by s. 2(c) *only* will attract the provisions of the Maharashtra Ownership Flats Act, 1963, and he will be liable to comply with all the relevant provisions of the Act. For it is not all building constructions carried on by a person that would make him a promotor. For example, a person who constructs a building on behalf of a co-operative society by entering into a contract with it will not come within the definition of a promotor.

The definition of "promotor" excludes the formation of a co-operative housing society by the voluntary act of coming together of the promotor members. The result will be that the benefits provided by ss. 3 to 11 to ownership buildings will not be available to such co-operative societies. If a builder constructs a building for a co-operative society, his responsibility will end with the completion of the building and as regards disputes as to defects and malpractices, the remedy available to the society will be under the terms of its contract. The builder cannot be required to comply with the details, specifications and information set out in s. 3, nor to rectify the defects or be liable to pay compensation as provided by s. 7. Thus, a builder can well escape from the provisions of the Act, by getting members to form a co-operative housing society and to construct buildings for them. In short, to form a co-operative housing society first and to construct buildings afterwards. This technique

could well obviate the builder the necessity of complying with the requirements of the provisions of the Act. It appears that such a trend is probably occurring if one observes the number of advertisements in newspapers inviting membership from the public. This invidious classification should be put an end to at once if the new Act is not to become a dead letter on the statute book.

The term 'promotor' used in s. 2(c) is inappropriate and confusing and should be dispensed with. The terms 'builder' and 'contractor' ought to be used instead. A promotor under s. 10 is required

"to submit an application to the Registrar for registration of the organization of persons who take the flats as a co-operative society or a company, as the case may be; and the promotor is further required to join, in respect of the flats which have not been taken, in such application for membership of a co-operative society or, as the case may be, of a company and nothing in this section shall affect the right of the promotor to dispose of the remaining flats in accordance with the provisions of this Act."

The term 'promotor' used in the new Act is different in meaning from the term 'promotor' referred to for registration of a co-operative society under the Maharashtra Co-operative Societies Act, 1960. Incidentally, it is worthy of note that the Registrar, Co-operative Societies will not accept a builder (who is interested only in the sale of his flats) as a promotor of a society (as defined by s. 2(c) of the new Act) unless he is going to occupy and reside in the flat. Thus, there is a direct conflict between the provisions of the Co-operative Societies Act, 1960, and the Ownership Flats Act, 1963. It is, therefore, suggested that of the term 'promotor', the definition which will be more appropriate in its stead will be a "builder" as one constructs and sells flats to others. However, where the person who constructs and the person who sells are different persons, the term "contractor" as the person who constructs or causes to be constructed a building, and 'the owner' as the person who sells the flats to others, ought to be used. Moreover, both the terms 'contractor' and 'owner' will be included in the term 'builder' in terms of s. 2(c).

Another incongruity is the conflict between the provisions of the new Act and the Co-operative Societies Act, 1960, in the case of registration of a co-operative society by the Registrar. Under the Co-operative Societies Act, 1960, at least ten persons are required for registration of a society: the Registrar in practice does not register a housing society unless the application for registration is signed by all the tenant members of the proposed society. However, s. 10 of the new Act provides that as soon as a minimum number of persons required to form a co-operative society or a company, as the case may be, have taken flats, the promotor (i.e. the builder) shall within the prescribed period submit an application to the Registrar for the formation of a co-operative society or a company. Contravention of the section is made punishable under ss. 13 and 14 of the Act. There are a number of cases where the Registrar has refused to register a society because flats have been given by members on leave and license basis prior to the application of registration of the society. In the result, whereas the new Act requires registration of a co-operative society as soon as a minimum number of flats are disposed of to members, registration has not been possible because of inherent obstacles to the registration of a co-operative society. Nor is it possible to convey the title of the builder in the property to the organizations of persons, who take the flats, which is to be registered as a co-operative society, as provided for by s. 11. The situation has more or less remained the same as before. It will thus be seen that both ss. 10 and 11 of the new Act are practically rendered infructuous.

Another weak feature of the new Act is the absence of appointment of any superintending authority to implement the provisions of the Act. While the Government has conferred substantial rights upon the flat-owners to protect and secure their rights as stated aforesaid, the Government has failed to delegate authority to appointed officers to see to the implementation of the provisions of the Act. It has been experienced in the past that benevolent legisla-

tion has not been availed of because one of the parties to the contract on account of compelling circumstances did not desire to embark upon a costly and lengthy litigation in a Court of law to vindicate its rights. Though the new Act has been in operation for a year, it can hardly be claimed that it has achieved even a small measure of success. Transactions are effected as was previously done and the loopholes are being resorted to escape whatever provisions may be applicable to the builders. An amendment to the Maharashtra Ownership Flats Act, 1963, should be made whereby authorities appointed under the Maharashtra Co-operative Societies Act, 1960, are conferred with powers to implement the provisions of the new Act. Such a provision will save much of the contradictions and conflicts between the provisions of the two Acts and ensure greater success to the achievement of the objects of the Maharashtra Ownership Flats Act.

Though s. 1(2) makes the Act applicable to the whole of the State of Maharashtra, s. 1(3) restricts the operation of the Act to such areas, and on such dates as the State Government may, by notification in the *Official Gazette* appoint and different dates may be appointed for different areas. The Government initially has brought the Act into operation within the area of Greater Bombay from February 10, 1964. The construction of buildings on ownership basis is progressing rapidly in Thana. It has also spread to Poona. There is no logic in making the provisions of the Act applicable after considerable time has elapsed when the malpractices and abuses have flourished and taken root. It is advisable to make the provisions of the Act applicable to areas as soon as the activity of construction of buildings on ownership basis have commenced there.

It is to be hoped that the above defects in the implementation of the Act will be remedied if even a small modicum of success is to be achieved by this unique piece of legislation.

GLEANINGS.

PROFESSIONAL PRIVILEGE

"UNRESTRICTED communication between parties and their professional advisors has been considered of such importance as to make it advisable to protect it even by the concealment of matter without the discovery of which the truth of the case cannot be ascertained."

It was in these words that Lord Langdale, in *Reece v. Trye* (1846, 9 Beav. 316, 319), justified the rule concerning legal professional privilege, and today, in the practical business of litigation, the first concern of a party against whom an order for discovery or inspection has been made is to protect himself, as far as possible, from a too comprehensive disclosure of his case. Yet, since litigation can only properly be conducted by professional lawyers, it is necessary that a litigant should be able to have recourse to them in circumstances which enable and encourage him to place the fullest confidence in them. It is only if a client feels that what he divulges to his lawyer will never be unexpectedly disclosed to anybody else that litigation and the law can be carried on successfully.

The general rules as to legal privilege are well established and can be easily summarised. Communications to and from a legal adviser for the purpose of getting legal advice and assistance are privileged whether or not any subsequent litigation is threatened or contemplated; communications to and from a non-professional agent or third party are privileged only if litigation is threatened or in contemplation.

The later part of this rule appears to have been stated rather loosely by Sir John Stuart V.-C. in *Ross v. Gibbs* (1869, L.R. 8 Eq. 522), when he declared

that communications with a professional "or even a non-professional agent," in anticipation of the litigation, "being confidential, are privileged." Information procured through an agent relative to litigation and with a view to it, declared the learned judge, "is as much privileged on principle as if it were procured through a solicitor."

Naturally, this authority was forcefully cited in *Anderson v. Bank of British Columbia* (1876, 35 L.T. 76; 2 Ch. D. 644). This was a claim against a bank to compel them to replace moneys alleged to have been wrongly transferred from one account to another at a certain branch. Before the bill was filed, but after litigation had become highly probable, the London branch telephoned the branch manager to send them full details of the whole transaction and the question arose whether the letter sent in reply, being a communication with an unprofessional agent, was privileged from production.

James L.J. declared that it would be "puerile nonsense if the law had been, as it is supposed to have been laid down by the Vice-Chancellor, that any communication made by a person with a view to litigation, whoever the person may be, was to be privileged." The true rule, he felt, was based upon the principle "that you have no right to see your adversary's brief: and, as you have no right to see your adversary's brief, you have no right to see that which comes into existence simply as the materials for your adversary's brief. But that seems to me to have no application whatever to a communication between a principal and his agent, in the matter of the agency, and giving information concerning the facts and circumstances of the very transaction which is the subject matter of the litigation. If there is anything which ought to be produced it seems to me it is that. And that is exactly this case."

Mellish L.J. agreed and drew a distinction between the privilege attaching, say, to a statement obtained from a witness to a road accident, when litigation is threatened or probable, and the position if privilege is claimed for information which a principal asks his own agent to give regarding things which the latter has done as agent. In law these are, after all, the acts of the principal himself and if, by law, one is entitled, by interrogation, to question the principal on facts he himself knows, one must also be entitled to question him as to information which his agent has sent him.

This decision did not, of course, mean that a man cannot safely use an agent for communication with the legal adviser. Communications via a clerk or agent employed by a solicitor or client are as much protected as if made directly between client and solicitor and it is by reason of this commonsense and necessary extension of the general rule that privilege extends, e.g., to town agents or counsel.

The agent may convey communications to the legal adviser, but, if communications are made to a non-professional person as a person who has himself to consider and act upon them, the privilege is gone. In the tactics of litigation this distinction is sometimes overlooked, but was well illustrated in *Jones v. Great Central Railway Company* (100 L.T. 710; (1910) A.C. 4), in which a member of a trade union who had been dismissed by his employer provided his union authorities, as required by their rules, with a report to enable them to decide whether he should proceed to law at their expense. The report contained the evidence in support of his proposed action and the names of witnesses. The action was sanctioned by the union and the Court of Appeal subsequently held that the report was not privileged. Lord Loreburn declared that the report was made to a party (the union) which had itself to consider it and act on it and which was "not a solicitor, nor the mere alter ego of a solicitor." "Every large concern" he concluded, "whether a railway company or a trade union or whatever it is, that must needs control its business by correspondence, is amenable to the same rule—a rule in itself wholesome, for it favours the placing before a court of justice of all material circumstances that may lead to a just decision."

Privilege may also be validly claimed for a document which has not actually been laid before a solicitor. In *Southwark Water Company v. Quick* (1878, 3 Q.B.D. 315) Lord Cockburn C.J. declared that privilege would attach to information obtained on the suggestion of a solicitor with a view to his advising upon it and to information procured spontaneously by the client for this purpose and, in each case, it mattered not whether the information had yet been so submitted. It would be privileged if the court was satisfied it was bona fide procured for that purpose.

Where it is claimed that documents are privileged on the ground that they are required for the purpose of furnishing information to the party's solicitor, it is not necessary that they should be intended solely or primarily for that purpose. It is enough if one of the purposes is submission to the solicitor.

Thus, in *Seabrook v. British Transport Commission* ((1959) 2 All E.R. 15) a widow, claiming in respect of her husband's death while a railway worker, sought production of accident reports. It was submitted that, though these reports served other purposes as well as that of assisting the defendant's solicitors, they were yet privileged. The claim was upheld and this view approved in *Patch v. United Bristol Hospitals Board* ((1959) 3 All E.R. 876).

On the other side of a rather thin line fell the decision, three months after *Seabrook's* case, in *Langthorn v. British Transport Commission* ((1959) 2 All E.R. 32), where the plaintiff successfully disputed a claim of privilege for copies of post-accident reports prepared, according to the defendants' affidavit, "wholly or mainly to furnish to [their] solicitor evidence . . . for the use of the said solicitor." It was held that, as the affidavit did not state that such was the main purpose of making such reports, the claim for privilege must fail. In fact the main purpose of these reports was more to ascertain the cause of the accident to prevent recurrences than to establish any guilt or attach any blame to anyone.

A case indicating that the Director of Public Prosecutions is entitled to claim a professional privilege analogous to the privilege a solicitor may claim for the document that he holds is *Auten v. Rayner* ((1960) 1 All E.R. 692), where a police officer was charged with malicious prosecution, false imprisonment etc., and an issue arose whether an official in the director's office should produce notes of conferences, briefs and instructions to prosecuting counsel, opinions from them, and proofs of witnesses at the criminal proceedings. Glyn-Jones J. declared that, though he had to make his ruling on the spur of the moment, as it were, and without the benefit of a full argument, he considered that "those rules of public policy which have resulted in there being established a right of a client and solicitor to claim privilege as to documents and statements in the possession of the solicitor appear to me to apply with equal, if not greater, force to the position of the Director of Public Prosecutions."

The court has, of course, power to inspect any documents as to which a question is raised (R.S.C. Order 31, r. 19A (2)), but there is no compulsion on it to do so. "The question whether the court should inspect the documents is one which is matter for the discretion of the court, and, presumably, for the judge of first instance," declared Jenkins J. (as he then was) in *Westminster Airways Limited v. Kuwait Oil Company Limited* ((1950) 2 All E.R. 596).

How long can privilege be preserved? Does it indefinitely survive the termination of the proceedings? In *Bullock v. Corry* (1878, 38 L.T. 102, 3 Q.B.D. 356) the plaintiffs, having entered into a charterparty, were successfully sued by the shipowner because the ship was not discharged according to its terms. The plaintiffs subsequently resorted to their remedy over against the merchants and sued the defendants, purchasers of a cargo of rice, for not unloading it in accordance with the terms of the contract of sale thus causing the delay in the ship's discharge. The defendants sought inspection of the papers—instructions to counsel, etc.—in the action between the plaintiffs and the shipowner, maintaining that they were highly relevant. But inspection was refused.

The question was again raised in *Pearce v. Foster* (1885, 52 L.T. 886; 15 Q.B.D. 114), where the plaintiff, a clerk, sued for wrongful dismissal. The defence was that dismissal was justified, as he was, while employed, secretly engaged as a speculator on the Stock Exchange. The plaintiff had previously started proceedings for an account against a stockbroker, and the defendants sought production of the papers—instructions to counsel and solicitors etc.—prepared for those proceedings on the grounds that, at that time, the present proceedings were never in contemplation and on the ground that a document is not privileged merely by being handed to a solicitor. The court rejected this claim and cited *Bullock v. Corry* (sup.) as an authority for holding that, if the documents were privileged in the first action, they remained privileged in the second although the latter might even involve different parties.

Common sense approves of this decision. If the reason for privilege is that there may be free and confidential communication between solicitor and client, then, if at any time such communications were subject to disclosure, this freedom would be impaired. Liability to disclose in a subsequent action would, in this regard, have the same unhappy effect as liability to disclose in the original action.

Hobbs v. Hobbs and Cousens ((1959) 3 All E.R. 827) is a modern illustration of how privilege remains even though litigation be concluded. There, the respondent to a party and party taxation (co-respondent in a divorce suit) applied on taxation to inspect the brief delivered to the petitioner's counsel. Stevenson J., the question of privilege having been referred to him, declared that "there is no doubt that a legal professional privilege, which has a sure and unshakable foundation in our law, protects from disclosures not only documents which embody communications between a client and his legal adviser which come into existence in the course of litigation, in anticipation of litigation, but even document which, without contemplation of any litigation at all, come into existence in order to enable the client to obtain the legal advice which he requires." The co-respondent was therefore held not to be entitled to inspect the brief or its contents.

So, with the exception of cases where privilege is waived by a client or cases where something of a criminal nature is involved, professional privilege is jealously guarded by the courts.

There is, however, also the rule of public policy that if two persons make an agreement, personally or by agents, they ought to be bound by it. If the agents are solicitors who negotiate a compromise which later breaks down, the two rules may be in conflict if a subsequent disclosure of the communication is sought.

In *Conlon v. Conlons Limited* ((1952) 2 All E.R. 462) the interrogatory which the plaintiff submitted to the Court of Appeal, he should not be obliged to answer, was, in effect, whether he had authorised his solicitors to accept £1,000 and costs. The court held that privilege did not apply, for this was not an inquiry as to a communication passing between a solicitor and his client confidentially. Indeed, the very object of the client in so instructing his solicitor would be that he should make the communication to the other side.

Professional privilege may be far-reaching, but in litigation a tactical advantage often goes to him who knows that it has limits which have been fixed with some degree of precision.—*L.T.*

A REASONABLE GUARD?

The "tragic injury," to use the words of Danckwerts L.J., giving rise to the claim in *Haley v. London Electricity Board* (*The Times*, 30 November) was sustained by a blind person coming into contact on the highway with a punner-hammer which had been placed across the pavement by the defendants' servants to guard an excavation lawfully made in pursuance of a statutory duty.

The hammer was set at an angle and the plaintiff's white stick passed over it and he had no warning of the danger. As the result of his injury, the plaintiff had become virtually deaf. The Court of Appeal (Lord Denning M.R., Donovan and Danckwerts L.JJ.), affirming Marshall J., held that the defendants were not liable. The Master of the Rolls indicated that the defendants must have regard to all the many sorts and conditions of people who used the pavement and must realise that it was used by men and women hurrying to work, by boys and girls running to school and by old people tottering on their morning walk. All these were commonplace users of the way, and proper provision had to be made for their safety.

But they did not have to cater for the man who walked with his head in the air and did not look where he was going. He was such an exceptional person that they need not provide for him. Nor did the defendants have to provide for the blind, at any rate in places where they had no particular reason to expect blind persons to be. It would be too great a tax on the ordinary business of life if special precautions had to be taken to protect the blind. In the words of Lord Salveson in *M'Kibbin v. Glasgow Corporation* ((1920) S.C. 590): "They do not need to pad the lamp-posts... because blind people use the streets." A blind person walking along a pavement—without a guide—must put up with all the ordinary hazards of life, lamp-posts or parking metres, traffic signs or warning notices. He had to realise that, from time to time, excavations must be made and that guards might be put up to prevent people from falling into them, and he could not complain when he fell over a guard if that was a reasonable guard put up to protect the public. That was clear from *Pritchard v. The Post Office* (1950, 114 J. P. 320).

Applying that test, the question was whether this guard was a reasonable guard put up to protect the public. The Master of the Rolls with some hesitation came to the conclusion that it was. The guard was quite sufficient to prevent anyone falling into the trench. It was not itself a danger to any ordinary person who was walking along the pavement. It was a hazard for a blind man, but no more of a hazard than a more conventional type of guard. Donovan L.J. said that the question was whether the defendants ought in the circumstances of the case to have taken some added appropriate precautions. He emphasised "in the circumstances of the case" because certain circumstances might arise requiring some additional precautions as, for example, if the board had been digging its trench outside St. Dunstan's. The trench here was in a quiet suburban road, and there was nothing to fix the defendants with direct notice that a blind man would be coming along the pavement during the course of their work. One's natural sympathy gave impetus to the view that some special precautions had to be taken for the blind; but a rule to that effect would place a duty upon the citizen which it would often be impossible to discharge. The extent of the duty must be measured by the standard of the normal person.

—L.T.

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THE SUPREME COURT RESTORES THE *CY PRES* DOCTRINE.*

THE judgment of the Supreme Court in *Shah Chotalal Lalubhai v. The Charity Commissioner, Bombay*¹ is of great importance as it restores the *Cy pres* doctrine, embodied in ss. 55 and 56 of the Bombay Public Trusts Act, 1950,² hereinafter called the Act, to its rightful place in the law of charitable trusts. The obiter observations of Mukherjea J. in *Ratilal Panachand Gandhi v. The State of Bombay*³ had created the erroneous impression that the *Cy pres* doctrine had been widened out of existence by ss. 55 and 56 of the Act. In *Ratilal Panachand's* case it was unfortunate that the attention of the Supreme Court was not pointedly called to the effect of the expression *Cy pres* used in the marginal note to s. 55 and in the body of s. 56(1) to qualify the power of the Court to give directions. No argument appears to have been addressed to the Court that the expression *Cy pres* was a term of art and that if the legislature used it in an Act it was meant to carry its ordinary legal meaning. It was equally unfortunate that the decisions of the Bombay High Court on the *Cy pres* doctrine were not cited on the construction of a Bombay Act, because they would have shown that the sections merely embodied the view which was taken in Bombay, and by the Bombay High Court, of the content in England and India of the *Cy pres* doctrine. Thus in *Hornasji Framji Warden, In the matter of*,⁴ Davar J. carefully reviewed English and Indian authorities on *Cy pres*. The judgment showed that the strict literal construction put in the early cases on the word "impossible" in the context of an object of a trust having become impossible of performance, had been relaxed in favour of a more liberal construction; that "impossible" was taken to mean "impracticable" or "inexpedient"⁵ or "impolitic"⁶. Again, directions had been sought for the *Cy pres* application of trust funds from the Bombay High Court by the Court being asked to say whether it was *necessary, desirable or proper* that

*By H. M. Seervai, Advocate-General, Bombay.

1 (1965) Civil Appeal No. 634 of 1964, decided on January 22, 1965, (Supreme Court).

2 The material provisions of ss. 55 and 56 are:

"S. 55. (1) If upon an application made to him or otherwise the Charity Commissioner is of opinion that (a) the original object for which the public trust was created has failed, (b) the income or any surplus balance of any public trust has not been utilized or is not likely to be utilized, (c) in the case of a public trust other than a trust for a religious purpose, it is not in public interest expedient, practicable, desirable, necessary or proper to carry out wholly or partially the original intention of the author of the public trust or the object for which the public trust was created and that the property or the income of the public trust or any portion thereof should be applied to any other charitable or religious object.

S. 56. (1) On such application being made,

the court after hearing the parties and making an inquiry shall decide the matter and shall give directions. In giving the directions, the court shall, so far as may be expedient, practicable, desirable, necessary or proper in public interest, give effect to the original intention of the author of the public trust or the object for which the public trust was created. If the court is of opinion that the carrying out of such intention or object is not desirable, necessary or proper in public interest the court may direct the property or income of the public trust or any portion thereof to be applied *cy pres* to any other charitable or religious object. In doing so, it shall be lawful for the court to alter any scheme already settled or to vary the terms of any decree or order already passed in respect of the public trust or the conditions contained in the instrument of the public trust."

3 [1964] S.C.R. 1055, at pp. 1070-71.

4 (1907) 32 Bom. 214.

5 *ibid*, p. 224.

6 *ibid*, p. 229.

the directions of the settlor should be strictly carried out and whether the literal execution of the trust had become *inexpedient*, and the Court had answered the questions by declaring that it was *impossible* and *inexpedient* to carry out the settlor's directions.⁷

But though a liberal meaning was given to the word "impossible", Davar J. was at pains to point out that the object of the settlor had become impracticable, first because due to shortage of funds the trustees had been unable to carry out his wishes for 22 years and it was doubtful whether they would be able to do so at the end of 8 or even 20 years. Secondly, because, on the evidence, a Hall of the kind directed to be built was not wanted by the community for whose benefit the trust was created and would be rarely, if at all, used. Having held that it had become impracticable to carry out the original object, Davar J. asked the correct question, whether the proposal placed before him was "one that is near enough to the original object of the testator" and he answered it in the affirmative.⁸ That giving a liberal interpretation to the word "impossible" according to the trend of English and Indian authorities did not involve the Court substituting its own ideas of public utility in place of the settlor's was shown by the decision of the same judge in *Advocate General v. Fardoonji*⁹ where he held that in cases of charitable bequests the Court had no right to set aside the wishes of the testator and substitute another charity in the place of one directed to be established by him, simply because, the one might not be so useful as some other that the Court might substitute. He said that after his decision in the case of *Hormasji Framji Warden*.¹⁰

"the Appeal Court in England has discussed the same subject very elaborately in *In re Weir Hospital*,"^{11a} and I find that the principles on which the Courts should act have been re-affirmed and stated again with great clearness."

In the light of these considerations it ought to have been submitted to the Supreme Court in *Ratilal Panachand's* case that ss. 55 and 56 of the Act used words which in Bombay had been used to describe the content of the *Cy pres* doctrine and that no change in the law was intended, or effected, by those sections. Be that as it may, the present judgment of the Supreme Court gives no countenance to the observations made by J. C. Shah J. in the judgment under appeal that

"It is evident that the Legislature has conferred jurisdiction of wide amplitude upon the Courts to apply funds *cy pres*. The Court is entitled on application under s. 55 to deviate from the directions of the settlor even if the trust has not failed... Again, the Court is not obliged to apply the fund to a purpose even similar to the purpose of the settlor which has failed. The Court may apply the fund to any other charitable or religious objects."¹¹

It is clear that Shah J. overlooked the fact that s. 56(1) of the Act gave the Court power to apply the funds "*Cy pres*", which expression means "as near as possible to" the testator's or the settlor's intention. It is not surprising therefore that in reversing the judgment, the Supreme Court held that the directions of the High Court were objectionable because they did not provide for objects as near as possible to those of the settlor. The facts leading to the Supreme Court case may be stated thus:

The trustees of a trust were under an obligation to apply the income of the trust to several objects one of the most important of which was the giving of a feast in connection with the sacred festival of *Pajusan* to the members of the settlor's caste in certain specified villages. The feast was given till 1941-43, when due to rationing laws, it could not be given. Although rationing was removed, the trustees did not give a feast in 1954-5 alleging that the income of the trust was not sufficient to meet the expenses. The Charity Commissioner applied to the Court for directions to apply *Cy pres* to some educational pur-

7 *Ibid.*, p. 238.

8 *Ibid.*, p. 244.

9 (1911) 13 Bom. L.R. 882.

10 *supra*.

10a [1910] 2 Ch. 124.

11. *Chhotalal Lallubhai v. Charity Commissioner, Bombay*, (1957) 59 Bom. L.R. 349, pp. 352-8.

pose the accumulations of the unexpended income of the trust. The trustees were impleaded and, pursuant to a public notice, the appellants intervened. The District Judge held that the *Swamivatsal* feast confers religious benefits and that certain objects of the trust were of a religious character while others were charitable so that the entire trust was not of a religious character. But assuming that the trust was wholly religious, the accumulation was not held for religious purposes. He accordingly directed that the accumulation of about Rs. 45,000 should be distributed as to a half to provide from the income free-ships for deserving students, preferably Jains, and failing such, to other Hindu students; and as to the other half, to a named Hospital to apply the income in providing maintenance, food and medicine to poor and deserving patients. On appeal, the High Court held that except for one object of the trust, namely, offering flowers for worship in a Temple, the other objects were not religious; that the giving of a feast in connection with a sacred festival was charitable and not religious and the Court was competent to entertain the application under s. 55. Accordingly, the appeal was dismissed. Leave to appeal to the Supreme Court having been refused, special leave to appeal was granted by the Supreme Court and the judgment of the High Court reversed.

For lack of evidence the Supreme Court declined to express any opinion on the question whether the objects of the trust were religious and addressed itself only to the question whether any case had been made out by the Charity Commissioner for applying the accumulations of the trust *Cy pres* to different objects. The Supreme Court analysed the material provisions of ss. 55 and 56 and held that the conjunction "or" in s. 56(1) had the effect of introducing several alternatives. The Court must give effect to the original intention if and in so far as it may be either expedient or practicable or desirable or proper or necessary to do so. On the facts the Court said that one of the objects for which the trust was created was the giving of the *Swamivatsal* feast to the members of Ladva Shrimali Shravak Bania Community on the occasion of the holy festival of *Pajusan*. The Jains of that community were the chief beneficiaries of the trust and looking at their interest, it would certainly be expedient, practicable, desirable and proper to give the feast, the giving of which, if not a religious, was a meritorious, act prescribed by the scriptures of Swetambar Murti Pujak Jains. The Supreme Court rightly pointed out that:

"The wider public interest does not require that this special charity for a section of the Jain public should be subverted and overthrown. In the wider public interest also, it is expedient, practicable, desirable and proper to respect the sentiments and interests of this section of the Jain public and to give effect to this charity, and we find no reason for giving directions under the latter part of s. 56(1). We, therefore, propose to give directions under the first part of s. 56(1)."¹²

Accordingly, the Supreme Court allowed the appeal. In giving directions, the Supreme Court laid down the correct doctrine of *Cy pres*. It directed that the accumulation of the unexpended income should be applied as nearly as possible to the original uses and purposes of the trust and any surplus should be applied to increase the amounts expendable for the objects of the trust. The surplus arising from the stoppage of the *Swamivatsal* feast due to rationing should be applied for carrying out the same object. "The trustees cannot be allowed to defeat the objects of the trust by refusing to carry them out." If the feast could not be given to a very large number of people it should be given to a smaller number; and the great rise in prices of food was an additional ground for investing the surplus and applying the income to the objects of the trust instead of spending the surplus outright. The Supreme Court found that the scheme framed by the lower Courts was objectionable in several ways:

"(it) disregards the basic principle that the trust funds should be applied for effectuating the intention of the founder of the trust as far as possible."

The direction for freeships to students on the ground that it was an analogous to a *Gyan* Fund, overlooked the fact that the freeships were not restricted to Jains, and also the fact that a *Gyan* Fund meant a fund for imparting knowledge of Jain religion and Jain Sastras, and not knowledge in general. The direction to give monies to a Hospital was objectionable, because giving medical treatment to poor and deserving patients was not one of the objects of the trust. The Supreme Court has thus restored *Cy pres* to its rightful place and has made it clear that in a valid charitable trust it is the intention of the settlor, and the objects prescribed by him, which are paramount, and it is not the law that the settlor proposes and the Court disposes.

A DILEMMA IN LEGAL THINKING.*

SOME propositions of legal philosophy may appear extremely difficult to reconcile, though, if taken separately, seem to be self-evident. A good illustration of such a problem in legal philosophy would be that of a distinction between law and morals. It is true that law should not be identified with morality; but to what extent should there be a distinction or a separation between law and morals, how sharp a line of demarcation can be drawn between them, are the problems with which we are faced.

It was Christian Thomasius who differentiated law from morality, while admitting the necessary relationship between the two. Immanuel Kant distinguished between law and morality by showing that law deals with or regulates external conduct, while morality is concerned with the internal nature of man.¹ Morality is an appeal to conscience of the individual who has the free will to choose between the right and the wrong. If he chooses the right he does so because he *likes* to do what is right and not because of any fear of punishment or evil consequence which may follow a breach of the moral order by reason of society's condemnation. The theory of Kant has been correctly and widely followed, though to some extent morality may be a set of external rules also which man should follow, whether he likes to do it of his own free will or not, and, to keep up this basic requirement of morality, law is necessary. In the latter case, law helps morality to maintain and assert herself. Law, therefore, cannot be identified with morality but may be regarded as a powerful instrument for maintaining morality at the level at which society at a given time and place may desire it to be maintained.² Similarly, it may be said that there should be a great dependence of law on morality. Moral principles should be able to show themselves in law. Law may be based on morality, if morality and public opinion are identical.³

According to positivism, the civil law, as also the law of nature, can exist without any moral basis. Man-made law may even be in conflict with the natural law or the higher moral law. According to the positivists, law is concerned with the actual or positive morality of the people at a given time and in a particular place. Public policy, which is one of the fountains of law, has a variable content and may differ from what the moral order may dictate. Yet

*By Jehangir M. J. Sethna, LL.M. (Harvard), Advocate, Bombay High Court.

1 "It follows from Kant's sharp distinction between morality and law that compulsion is essential to law and a right is characterized by the power to compel." Friedmann, W.: *Legal Theory*, 1960, p. 109. See also p. 117, *Id.*, where Dr. Friedmann says that to Hegel morality is a rational factor, a stage of the reflection of the individual. Thomasius: *Fundamenta Juris Naturae et Gentium*, Bk. I, Ch. I, pp. 4-6. Kant: *Philosophy of Law* (Hastie's Translation).

2 It is difficult in this respect to accept Professor Bodenheimer's thesis on p. 246, in his "*Jurisprudence*", 1962 edn., pp. 246, 248.

3 "The moral and philosophical tenets of the time not only affect old precepts; they shape or help to shape new ones. But they are active direct sources chiefly in the stage of equity and natural law, when the identification of morals and law leads to the notion of a superior sanctity of a body of ideal precepts putting in ideal form the morality of the time." (Pound, R.: *Jurisprudence*, Vol. III, p. 385).

such a deviating law may be a good law in the constitutional and legal sense, though not in the sociological or moral sense.⁴

As to the necessity of following a bad law (bad from a social point of view, but valid constitutionally), it may be said that to preserve the law and to prevent people from flouting the law it should be regarded as law. If a law, for reason of its desirability, were to be flouted by people, then that would tend to make people lose all respect for the law, and gradually they would tend to ignore the law which, though agreeable as a whole, is rather disagreeable to follow in individual cases. In such a situation a conscientious Judge finds himself in a dilemma because of the positivist concept binding him down to the fetters of statute or precedents, however much he may think apart and wish to decide otherwise. It should be worthwhile mentioning here that the doctrine of *stare decisis* should be modified. Grave hardship would occur if Judges were not at liberty to correct decisions already given, even though such decisions are too unreasonable to be tolerated or allowed. It is true to say "*communis error facit jus*", but this should be read with the saying: "*cessante ratione legis cessat lex ipsa*". When the reason of the law ceases, the law itself ceases. Very serious errors cannot be allowed to be perpetrated, simply on the ground of judicial decorum or certainty of the law. In *Smith v. Glen Alden Coal Co.*,⁵ the Supreme Court of Pennsylvania for compelling reasons of public policy or the imperative demands of justice, accepted the judicial setting aside of a rule of property long acquiesced in.

The positivist doctrine that a law which is valid constitutionally, irrespective of whether it is a good law or a bad law, should be regarded as a law, is subject to a further limitation. Our social environment is subject to constant change. Hence, latitude should be allowed to Judges even to change the law which was previously valid but has, in the light of changed circumstances, become too unreasonable.

Austin and other positivists considered law as the formal command of the sovereign one or sovereign body or some delegate of that sovereign one or body.⁶ Austin regarded law as so much divorced from morality that he said that even the 'most pernicious laws' which may be opposed even to the will of God have been upheld by the Courts of law. He again gives a converse illustration. If a man were to do an act which would definitely be a beneficial one and if that were prohibited by the Sovereign under the death penalty, the person would be tried and sentenced to death, irrespective of the moral quality of the act. He adds: "...an exception, demurrer or plea, founded on the law of God, was never heard in a Court of justice, from the creation of the earth down to the present moment."⁷

Professor Fuller considers the definition of 'law', as given by Bentham and Austin, and the proposition that, according to Austin, there can be no limitation whatsoever to sovereign authority. Professor Fuller rightly opines that if all that positivism offers is that law is always different from morals, the teachings of positivism are not of much use to us.⁸

Our conclusion, on this point, should be that in case of a statute which is merely undesirable it has to be followed even by the Judges. But if the statute is inhuman or atrocious, the Judge should consider it his duty not to apply it and to ignore it and to hold that it is no law at all. If the law is a common law

4 Professor Hart has appropriately pointed out that even immoral laws are laws though it would be easier to impugn them. Hart, H.L.A.: *Positivism and the Separation of Law and Morals*, 71 Harv. L. R. 625. Austin demonstrated that law was nevertheless law even if it conflicted with the principle of morality and natural law. Stone, J.: *The Province and Function of Law*, 1950, pp. 224, 225.

5 (1943) 347 Pa. 290, 302.

6 The positivist aspect of Austinianism is most in evidence in the rigid separation of law and morals. Lloyd, D.: *Introduction to Jurisprudence*, 1959, p. 119.

7 Austin, *The Province of Jurisprudence Determined*, 185 (Library of Ideas, 1954 edn. cited by Hart, H.L.A.: *Positivism and the Separation of Law and Morals*, 71 Harv. L. R. 616, ft. n. 41).

8 Professor Lon Fuller: *Fidelity to Law*, 71 Harv. L. R. 634.

rule which has been established by precedents, then, as already shown above, the Judges ought to be given a latitude to change such a law which has ceased to be reasonable, so as not to perpetuate gross errors in the law leading to grave injustice.

Nature of Morality

Morality is that internal force which appeals to the conscience, while law acts externally through sanctions. Justice seeks to secure an ideal relation between men; morality aims at the ideal development of human character. Law procures security. These three have to be kept in a harmonious balance, so that all the social services within the power of men may lead to the good of humanity. Through morals we get healthy ideals; through morality, justice and ideals are reflected in time and place.⁹

The so-called 'moral sanctions' of Bentham are really 'social sanctions', for in morality there can be no such thing as 'sanction'. If there are sanctions in morality, then morality becomes an externally working power. But morality does not work by external compulsions or sanctions; morality appeals to the conscience.¹⁰

Relation between Law and Morality

Though law and morality are not identical, yet there is an intimate relationship between these two.¹¹ If law is based on public policy, public policy itself is based on some healthy principles valued by the community at a given time and at a particular place. Undoubtedly some laws may be the result of totalitarian enforcements on the down-trodden subjects, in a totalitarian State; but living in democracies, as we do today, our laws, on the whole, are (or should be) the outcome of public opinion. Public opinion is, on the whole, based on healthy moral principles in all civilized societies.¹²

The formulation of a legal system is not coercive power, but certain fundamental accepted rules specifying the essential law-making procedure. These rules do not appear to be rules of law but rules of morality, because they must necessarily be rules of what is accepted by society as just, fair and reasonable.¹³ Though formally law is a command, yet, in substance, that is to say, so far as the material or substantial fountain is concerned, law is meant to maintain the healthy principles of morality or the positive morals of the people concerned.¹⁴ At the root of most law we have some fundamental moral principle, e.g. "Thou shalt not kill" or "Thou shalt not steal." At the structure and superstructure there is the working of positivism making and shaping law. As Professor Lon Fuller very aptly puts it, law must have general acceptance of the people. He very vividly gives an example to show how law cannot come into existence without a general acceptance by the people for whom it is meant. He says that when a country has just revived out of troubled times and a constitution is to be

9 Pound, R.: *Jurisprudence*, 1959, Vol. II, pp. 277, 278.

10 Enforced conformity to a moral code, merely for the sake of such conformity, would not generally be thought in these days to be in itself of any value. To force a person by fear and threat of punishment to act according to certain moral standards is not to make him act morally. (Fitzgerald, P. J.: *Criminal Law and Punishment*, Oxford, 1962, p. 80.) Professor Hart admits that morality has its private aspect shown in the individual's recognition of ideals which he need either share with others or regard as a source of criticism of others, still less of society as a whole. (Hart, H. L. A.: *Concept of Law*, 1961, p. 179.)

11 "It is equally a mistake wholly to divorce law and morals as the analytical jurists sought to do and wholly to identify them as the natural jurists sought to do." Pound, R.: *Jurisprudence*, 1959, Vol. II, p. 260.

12 Lamont: *Value Judgment*, p. 205. "... in any given case, the practical distinction between morality and law is determined by the hypothesis laid down in the legal order itself." (Paton: *Jurisprudence*, 2nd edn. p. 55.)

13 Professor Lon Fuller: *Fidelity to Law*, 71 Harv. L.R. p. 639.

14 "Law is a great civilizing agency, it is so not because it throws conduct into artificial uniformity and order, but because it is a working partner with the advancing ethical sense of the community." (Hookin, W.E.: *Ways of Thinking About Rights: A New theory of the Relation between Law and Morals. A Century of Progress*, N. Y. 1937.) And as shown by Professor Hart, "... the law of every modern State shows at a thousand points the influence of both the accepted social morality and wider moral ideals." (Hart, H.L.A.: *The Concept of Law*, 1961, p. 190.)

framed it is necessary to show that the constitution itself is necessarily good and right and in accordance with morality.¹⁵

Professor Fuller discusses the question of the morality of law itself. He points out that the distinction between 'order' (i.e. any law as it may be) and 'good order' (i.e. law as it ought to be) would involve several complexities arising from the difficulty in the concept of 'ought' and that of 'right'. Even just mere 'order' (leaving apart 'good order') involves some element of morality in it.¹⁶ Professor Fuller then shows, by an example of a selfish and absolute ruler whose word is law, that even his commands bear self-restraint; and his selfish aims would not be achieved until he is ready to accept "that minimum self-restraint that will create a meaningful connection between his words and his actions."¹⁷ Law, as pointed out by Professor Fuller, has its own intrinsic morality. Even an arbitrary despot has got to face the responsibility of his position; otherwise he will have to pass a meaningless command to punish himself.¹⁸

Though there may be a considerable volume of enactments that are not based on, and are not meant for the upkeep of, any moral principles, and stand only by the force of positivism, yet there are many laws, legal principles and decisions and rules based on definite and well-recognized moral principles and are meant to serve, protect and upkeep morality and to promote justice in the real (and not merely the positivistic) sense.¹⁹ Positivism is the outer garb or the formal instrumentality mainly for sanctions. In this connection what Professor Ralph Newman has so appropriately stated may well be noted. He says:

"In spite of the wide difference of opinion as to what is right or wrong in many situations, in spite of the impossibility of enforcing some moral duties by specific coercion, and in spite of the need of the law for uniformity, there remains a wide area in which the enforcement of moral standards which are generally accepted is perfectly practicable.... Among the moral standards setting forth certain minimum decencies of life, on which most men are in accord and which are particularly related to problems which are within the scope of effective legal control, are the substantive legal principles by which equity corrected the law in the early stages of its development and which later developed into a separate system. These principles can be correctly stated. They are that right should be based on substantial factors rather than on form; that the law should not aid the unscrupulous in carrying out their plans; that fully intended agreements should be carried out; that advantages gained through accident or mistake should be relinquished, and that hardship arising from accident or mistake should be fairly distributed even at the sacrifice of strict legal rights."²⁰

As Dean Roscoe Pound has so aptly expressed: "Equity and natural law insist on good morals. The strict law insists on form; equity and natural law on duty; the strict law insists on rule, equity and natural law on reason."²¹ Though law and morality are closely inter-related, and the one cannot be divorced from the other without baneful consequences, yet it should be borne in mind that law and morality cannot be regarded as identical.²²

15 Fuller, L. : *Fidelity to Law*, 71 Harv. L. R. 642.

16 Id. p. 644.

17 Ibid.

18 Id., 646.

19 Lamont : *Value Judgment*, p. 295; Paton : *Jurisprudence*, 2nd edn. p. 55, may also be referred to.

20 Newman R. A. : *Equity and Law*, A, Comparative Study, p. 19.

21 Pound, R. : *Jurisprudence*, 1959, p. 407; cited by Newman, R. A. in his *Equity and Law*, A Comparative Study, p. 20.

22 "Law, positive morality and ethics are overlapping circles which can never entirely coincide, but the hand of man can move them and determine the content that is common to all or to two or confined to one.... We do

find a close relationship between the rules of law and those of positive morality, for the latter determine the upper and lower limits of the effective operation of law. If the law lags behind popular standards it falls into disrepute; if the legal standards are too high there are great difficulties of enforcement." Paton, *Jurisprudence*, 2nd edn., p. 54. See also Bodenheimer, E. : *Jurisprudence*, 1962, p. 248, where he says "Law and morals do not represent entirely separate or mutually exclusive vehicles of social control. They converge and overlap on various occasions in the actual operation of a legal system." See also Del Vecchio : *Philosophy of Law*, p. 276. He says : "Between law and morals there is a distinction but not a separation."

Law is, and should always be regarded as, a means to an end; the end is the preservation of the social and moral order. There is always a purposive element in law; though the Legislature makes some laws for the purpose of expediency, still these laws do not lose their purposiveness, the underlying purpose being that of expediency.

Law seeks to promote the good of the people in the society in which it has been enacted, by promoting the proper integration of society, preventing strife and by protecting and harmonizing the various interests in the life of men in civilized society. It is concerned with recognizing and protecting the rights and liberties of the citizens in the State in relation to the State and also in relation to the citizens *inter se*. Administrative relations are dealt with under the administrative law of the country concerned. The law of property deals with regulating the proprietary status of the citizen and his rights and obligations arising from the ownership, possession and alienation of property. The legal order thus is a reflection of the social order and even the moral order to an extent. The task of the legislator should be that of an investigator,²³ first and foremost, into the changing needs of different sections of the people at the time and the place. With automation and technological advances, there may have to be new systems of legal control and limitations of hours of work so as to enable the human being to enjoy the fruits of his leisure.

Balancing of Interests

Dean Roscoe Pound considers law as a process of balancing of interests for removing conflicts and compromising of rival claims and interests of different sections of society. This is his theory of 'social engineering'.²⁴ The sociological jurist realises that the purpose of the law is that of promoting social, economic and moral interests in the life of men. If the law does not seek to do this, it would not have an important place in the scheme and would not serve the purpose of an effective means or value.

Solution of disputes by adjudication, discovery and recognition of the common need, agreement and negotiation between interested parties help to maintain the social order. A discovery and a recognition of the social order may best be served through sociological investigation of the common need, to the extent to which it may be possible.²⁵ Just as a physician cannot and should not prescribe the remedy without first diagnosing the disease, so also a law-maker must first determine what exactly is the malady in the existing law. It is necessary to see, for example, how the links of love in the family are maintained through the rules of family law, how the relation between husband and wife, between parents and children could be well balanced; it is fruitful to observe how the labour laws actually work and how industrial disputes are settled. It is important to determine the actual working of the rent laws and how those laws protect tenants while guarding landowners' rights also. It is also valuable to examine how the fundamental rights under the Constitution of the country concerned actually operate and to what extent curbs are necessary for maintaining the solidarity of the State while protecting and maintaining the fundamental freedoms of the citizens.

Laws have, to a great extent, to help religion to cleanse itself of some of its misconceptions. In India, a long time ago, the prevalent practice of *sati* was

23 In the words of Pollock: "The office of a lawyer is first to inform the legislature how the law stands, and then if change is desired... to advise how the change may be effected. Every modern legislature is constantly and largely dependent on expert aid of this kind." (Justice according to Law, 9 Harv. L. R. 307, 308, cited by Dr. J. M. Williams, in his "The Foundations of Social Science," at p. 212. Cited by Dr. M. J. Sethna, in his Jurisprudence, 2nd edn. p. 178, ft. n. 1.)

24 "Like an engineer's formulae, laws represent experience, scientific formulation of experience and logical development of the formulations; also inventive skill in conceiving new devices and formulating their requirements by means of a developed technique." Pound, R.: Interpretations of Legal History, cited by Dr. M. J. Sethna, Jurisprudence, 2nd edn., 1959, p. 35, ft. n. 1.

25 Professor Lon Fuller: "The Problems of Jurisprudence", pp. 694-714.

that under which the widow was even forced to jump into the funeral pyre of her husband. Lord Macaulay passed a law against this practice. The people first thought this to be a great encroachment on their religious feelings and sentiments, but when moral consciousness dawned upon them they realized that the intention of such legislation was not that of hurting their religious sentiments but that of putting an end to this undesirable practice.

Conclusion

It may be said that apparently the dilemma lies in the difficulty of pursuing the ends together, namely, to admit purpose in legal reasoning and at the same time preserve a clear distinction between law and morality. We would, however, not be faced with this dilemma if we try to understand the great relationship between law and morals. A sharp line of distinction between law and morality cannot be drawn.

Holmes rules out the purposive element in law. According to him, law has only a predictive value; only enabling one to know what the Courts would do and how they would act in future.²⁶ If we were to put ourselves in the position of the Courts to see what they would do in the future, a host of presuppositions enter which cannot be examined. Prediction then disappears from our consciousness.

By a proper understanding of the relation between law and morality and by seeing to what extent there can be a separation (at the same time realizing that the one cannot be completely divorced from the other), it may be said that this dilemma would be minimised. Undoubtedly, problems would be found in all branches of philosophy, but by not insisting on a sharp line of distinction between law and morality, it can be realized that the dilemma is not so acute and its shadows not so grave.

GLEANINGS.

SOME ASPECTS OF COPYRIGHT LAW

IN the context of copyright law, "the word 'original' does not in this connection mean that the work must be the expression of original or inventive thought," said Peterson J. in the well-known case of *University of London Press Limited v. University Tutorial Press Limited* (115 L.T. 301; (1916) 2 Ch. 601). "Copyright Acts are not concerned with the originality of ideas, but with the expression of thought, and in the case of 'literary work' with the expression of thought in print or writing. The originality which is required relates to the expression of the thought. But the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work—that it should originate from the author."

Copyright in any original literary work is automatic, and the dictum of Peterson J. makes it clear that even the simple writings of a schoolboy may constitute an original literary work. This prompts some general reflections on the nature of copyright and some of the law surrounding it. A start may be made by looking at the *London University* case. The university senate appointed examiners for its matriculation examinations. In a letter of appointment, sent to each examiner, it was made a condition that any copyright possessed by an examiner in the examination papers he prepared should be vested in the university. This is a common arrangement, as any present-day examiner will know. In turn the university assigned all the copyright and publication rights in the papers to the plaintiff company. These papers were later published in book form. The defendant company also republished some of the papers. The learned judge held that the examination papers were "literary works" within the meaning of sect. 1 of the Copyright Act 1911 (now sect. 2(1) of the Copyright Act

²⁶ Holmes, O. W. : *Path of the Law*, 10 Harv. L. R. 457.

1956), and dealt with the meaning of the word "original" in the terms already set out. Among other things, the defendants pleaded the statutory defence of fair dealing with the papers for the purposes of private study (now contained in sect. 6(1) of the 1956 Act). Not surprisingly, that plea also failed, for the publication had been for private gain.

The originality or otherwise of a literary work is a matter of considerable importance. Once it is established that a work is "original," copyright is created the minute the work is committed to paper. It persists for the author's lifetime, and for 50 years after his death: sect. 2 of the 1956 Act. Under sects. 11-14 of the Literary Copyright Act 1842 provision was made for registration of literary copyright at Stationers' Hall. Although registration was not compulsory, before any action could be brought for infringement of copyright, the work had to be registered in this way: sect. 24 of the 1842 Act. The only formality now necessary arises in the case of international copyright under the Universal Copyright Convention signed at Geneva in 1952. This provides that all copies of a work published outside the territory of the member's state should bear the letter C, with the name of the owner of the copyright and the year of first publication.

Whatever may happen to the original manuscript, copyright remains with the author, unless he disposes of it. Thus, only a few weeks ago an American collector paid £1,000 for the original typescript of Georges Simenon's *Maigret et les Braves Gens* at a sale in London. His acquisition gives him no right to reproduce the work or to publish it any way. He bought it as a holograph—a literary curiosity. Copyright may be internationally protected under the provisions of the International Copyright Convention 1948 and similar international agreements.

Generally, the issues are fairly clear cut, but what of copyright in an unpublished lecture? Prior to 1911 there could be no copyright in an unpublished lecture, and, as is stated in *Copinger and Skone James on Copyright* (9th edit. p. 30), this would still seem to be law "that there is no copyright in a mere extempore speech. It is submitted, however, that, where a speech is made from notes, it might be held that anyone copying the speech was infringing the copyright in the notes." In order for copyright to subsist in a lecture, therefore, it must be expressed in print or writing, even if only in skeleton form. (A lecture includes an address, speech or sermon: sect. 35(1) of the 1911 Act.)

In *Caird v. Sime* (1887, 57 L.T. 634; 12 App. Cas. 326) the House of Lords had considered the question of copyright in lectures, albeit from a Scottish standpoint. The appellant was a professor at a Scottish university, and delivered lectures as part of his ordinary course. Students were admitted to the course on payment of the prescribed fees. It was held that, in delivering lectures in this manner, the lecturer does not communicate them to the whole world so as to entitle anyone to republish them without the author's permission. The appellant was entitled to restrain publication without his consent. Lord Fitzgerald, in his dissenting judgment, did not take that view. In his opinion delivery of the lectures was tantamount to a communication of them to the public at large. Sect. 48(1) of the 1956 Act defines "performance" so as to include the delivery of a lecture. In fact, in *Caird v. Sime* the decision turned round the fact that the public at large were not admitted.

It seems that, where a lecture is delivered to a limited audience, it is on the tacit understanding that, while the public can take the fullest notes for personal use, they cannot utilise them afterwards for the purpose of publishing the lecture for profit: see *Nichols v. Pitman* (1884, 50 L.T. 284; 26 Ch. D. 374). Probably a newspaper can report any lecture without infringing any copyright, assuming that reporters are permitted to be present: see sect. 6(3) of the 1956 Act.

It is quite clear that students present at a lecture can take down as much of it as they are able, for this contingency is envisaged by sect. 6(1), which pro-

vides: "No fair dealing with a literary...work for the purpose of research or private study shall constitute an infringement of the copyright in the work." It is equally clear, however, that an injunction would lie restraining publication, and for the destruction of existing copies, if any over-zealous student published his tutor's work without permission, or attempted to do so.

Recently the House of Lords considered the question of originality and the infringement of copyright in *Ladbroke (Football) Limited v. William Hill (Football) Limited* ((1964) 1 All E.R. 465.) The subject-matter of the copyright claim was somewhat unusual—a "fixed odds football coupon" prepared by the respondents, and widely used by the gambling public. There were two points at issue. First, whether the coupon was an original literary work within the meaning of sects. 2 and 48 of the 1956 Act; and secondly, if so, whether the part produced by the appellants as their own was a substantial part of the whole. (Sect. 48 defines "literary work" so as to include any written table or compilation.) The House of Lords (Lords Reid, Evershed, Hodson, Devlin and Pearce), affirming the Court of Appeal (Lord Denning M.R. and Donovan L.J., Diplock L.J. dissenting), held that the coupons were the subject of copyright and that on the facts there was an infringement of it. Lord Reid, having quoted with approval the dictum of Peterson J. referred to at the beginning of this article, dealt quite shortly with the appellants' contention that only the skill and judgment involved in writing out the material had to be taken into account. The respondents' business, he said, "was to devise a coupon which would appeal to the betting public, and its form and arrangement were not something dictated by previous decisions about the nature of the bets to be offered. The appellants likened the coupon to a trader's catalogue of his wares, and argued that in considering whether a catalogue is entitled to copyright one must disregard the trader's skill and work in deciding what wares he will stock for sale and only consider the skill and labour involved in the actual preparation of the catalogue. I do not think that is a true analogy. Even in the case of a catalogue there may be a question whether the work in deciding what to sell and the work in deciding how to sell it are not so interconnected as to be inseparable. Copyright in a catalogue in no way prevents honest competition—any other trader can decide to stock and sell any or all of the catalogued articles, and he can thereafter make a new catalogue of his own wares. What he must not do is simply to copy the other trader's catalogue."

To continue the analogy, that is what the appellants had done in this case. Thus their ingenious defence was bound to fail. Lords Reid, Hodson and Pearce all expressly approved another dictum of Peterson J. in the *London University* case to the effect that "there remains the rough practical test that what is worth copying is *prima facie* worth protecting," and most certainly this provides a useful general guide.

Football coupons have been added to the catalogue of original literary works protected by the law of copyright. Collections of precedents are protected if the Scottish case of *Alexander v. Mackenzie* (1846), 9 Sess. Cas. (2nd Series) 784) is anything to go by, as are mathematical tables—*Bailey v. Taylor* (1829, 1 Russ. & My. 73)—and compilations of various kinds. These range from a list of railway stations in the unhappily defunct Bradshaw—*Blacklock and Company Limited v. Arthur Pearson Limited* (113 L.T. 775; (1915) 2 Ch. 376)—to a commercial advertisement: *Maple v. Junior Army and Navy Stores* (1882, 47 L.T. 589; 21 Ch. D. 369). The essence of the matter appears to be that there must be some skill and labour involved in the preparation of the work. *Copinger and Skone James* (op. cit. p. 39) sums up the matter in this way: "While the mere copyist of a written document does not obtain copyright in his copy, it is clear that neither original thought nor original research is essential, and that the standard of originality required is a low one. But it is difficult to state any principle upon which the standard is based." Each case is considered on its merits, but reported decisions provide general guidance and

no surprise need be expressed at the *Ladbroke* decision, as skill, care and ingenuity were needed to draft a coupon to test the punter's skill.

Protection of copyright on an international basis has already been briefly referred to, and to round off the subject a few words on this aspect of the law may be helpful. The present international reciprocal arrangements arose out of a conference held at Berne, as a result of which the well-known Berne Convention was formulated in 1887. It was designed to eliminate pirated editions, and the original convention has been subsequently revised. The present definitive instrument is the Brussels Convention of 26 June 1948. Great Britain acceded to the convention with effect from 15 December 1957. The member countries agree to extend protection of copyright in their own countries to works protected in the country of origin. Art. 4(1) provides: "Authors who are nationals of any of the countries of the union shall enjoy in countries other than the country of origin of the work, for their works, whether unpublished or first published in a country of the union, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this present convention" (Cmd. 361).

The United Kingdom also ratified, on 27 September 1957, the Geneva Convention of 1952, which attempts to rationalise still further the protection of copyright internationally, as many countries (notably the Americas) are not signatories to the Berne Convention, although the United States has bilateral copyright relations with many countries by virtue of treaties.—*L.T.*

JUDICIAL BLUE PENCILS

IN view of the appointment of a committee to advise on tape-recording court proceedings, under the chairmanship of Mr. Justice Baker, a recent case, casting doubt on the accuracy of shorthand reporting, is of interest. In *Bromley v. Bromley* [1964] 3 W.L.R. 666; a wife appellant had had delivered to her because of the pressure of time, a copy of the shorthand note of the judgment at first instance showing judge's revisions, rather than a plain copy incorporating them as is usual. For the appellant it was argued that the revisions showed marked variations from the original, particularly in regard to the findings of fact. The Court of Appeal, however, held that they would not look behind the revised version. They did, however, add that the position would be different if a judge so revised his judgment as to alter its sense materially. In such a case evidence from someone in court when it was delivered, preferably with a note taken at the time, would be needed. On the face of it, the private revision of judgments once given is open to criticism. One cannot doubt the human fallibility of shorthand writers, although the problems of taking down judgments are less than those often involved in recording evidence. The Court of Appeal also mentioned the difficulties of delivering extempore judgments, so the object of revision is often to ensure that the judge is recorded as saying what he meant to say. Normally, the parties have no chance to see the extent and nature of the judge's revisions. This case is a danger signal. It is clearly advisable for a solicitor to take a contemporaneous note of the findings on all material issues as judgment is delivered, so comparison can be made if a transcript is later bespoken.—*S.J.*

JUDGES AS LEGISLATORS

VISCOUNT RADCLIFFE told us at Folkestone that there was never a more sterile controversy than that upon the question whether a judge makes law. "Of course he does. How can he help it?" He went on to say that the Legislature and the judicial process respectively are two complementary sources of law-making, and in a well ordered state each has to understand its respective functions and limitations. Viscount Radcliffe said that more and more he is impressed by inescapable personal element in the judicial decision and that it is

unreal to think of a judge of experience as a mere hearing aid and almost hypocritical to speak of him as if each presented itself to his eye in the light of the first dawn of creation. "To me, fairness of mind cannot involve such innocence as that...judicial decisions, no matter who gives them, must always be related to certain basic beliefs about the nature and purpose of a human being which are held by another human being. In that sense he (the judge) may not be 'objective'; but he can be honest and fair...the almost passionate desire sometimes shown by statute-makers to do the judge's work for him in advance by regulating in detail what they cannot even dimly envisage in practice needs to be firmly checked on...ground of constitutional propriety and common sense." The courts have definite disadvantages as legislators. Viscount Radcliffe himself dealt with *Rookes v. Barnard* [1964] 2 W.L.R. 269; by saying, among other things, that he would take it as fairly clear that it did not come anywhere near laying down a proposition to the effect that trade union officials, by intimating an absolute or conditional intention to call a strike, are thereby rendering themselves liable in damages to an employer affected. Those of us who have ploughed through the fifty pages in the *Law Reports* cannot say with any confidence what the case did decide and it is comforting at least to have the opinion of one former law lord, who took no part in the decision, on what it did not decide. Realists are delighted that Viscount Radcliffe has said so clearly that judges help to make the law; he would avoid the confusion (which so delights university professors) caused by dissenting judgments by having a single judgment of the House of Lords just as we have a single opinion of the Judicial Committee of the Privy Council. One of the chief disadvantages of the courts as an instrument of law reform is that they depend on the accidents of litigation. By a side wind the position has been revolutionised by legal aid; we go so far as to say that many overdue measures of law reform have been brought about by legal aid.—S.J.

REVIEWS.

Foreign Enterprise in India: Laws and Policies. By MATTHEW J. KUST. BOMBAY: Oxford University Press, Oxford House, Apollo Bunder. Roy. 8 vo. Pages 498. Price Rs. 35.

THIS book is one of a series of studies prepared under the auspices of the American Society of International Law in its research programme "to describe and analyse", in the words of its Director, "by reference to the experience of and in selected countries, the legal institutions that affect the participation for foreign capital and technology in economic development and to clarify the factors that impede or facilitate foreign participation". The author is a member of the American Bar and for three years he was posted at New Delhi as a Department of State Legal Advisor for economic and technical assistance programmes in South and South-East Asia. In the light of his experience and study during his stay here, he refreshingly examines the legal environment for foreign capital in the context of India's present political, social and economic climate. He also deals comprehensively and analytically with the relevant Indian law and institutions that affect the participation of foreign capital in India. This well-documented and carefully prepared thesis will be invaluable to foreign collaborators and will prove useful to those concerned with the problems of international trade and finance. Further studies in this series, dealing with Colombia, Japan, Mexico and Nigeria, are promised in the near future and judged by their precursor, can be looked forward to with great interest.

Wages, Dearness Allowance, Bonus and other Allowances. By G. L. KOTHARI, Advocate, Maharashtra High Court. BOMBAY 2: Kothari Mc-Dunell & Co., 'A' Aidun Building, Dhobi Talao. Royal 8vo. Pages 603. Price Rs. 27.50.

BASIC wages, dearness allowance, bonus and other allowances and benefits which form the components of wages are exhaustively dealt with in this volume not merely from a legalistic point of view but are studied in the larger context of sociological jurisprudence. With this end in view the author has in the main part of the book endeavoured to present a rational texture of wage fabric deduced from principles laid down by judicial adjudication and has sought to determine how far these principles have achieved socio-economic objectives and attained social justice. In a final chapter the author has made some pertinent suggestions for formulation of a rational wage policy. A section of the book deals with the Payment of Wages Act, 1936, and the Minimum Wages Act, 1948, with their related State amendments. The parent Acts are expounded with brief commentaries and the relevant case law is referred to. The concluding section of the book reproduces reports and summaries of Fair Wages Committee, Bonus Commission and Central Wage Board. Much labour has gone into the preparation of this book which will provide much useful data at a time when, in the words of the author, there is need for evolution of a proper formula for just settlement of wage issue and the development of a system of wage fixation. This book which presents an important facet of labour law will be useful as a book of reference to all engaged in the complex problem of wage determination.

The Central Sales Tax Law. By KHARAG RAM CHATURVEDI, B.L., Advocate.
CALCUTTA: Eastern Law House Private Limited, 54 Ganesh Chandra Avenue.
1965. Roy 8vo. Pages 320 + 353. Price Rs. 25.

THIS treatise exhaustively deals with all the different aspects of the central sales tax law which has grown round the fifteen sections of the Central Sales Tax Act, 1956. After considering the historical background and the factors which led to the passing of the Act, the author examines the provisions of the Act in the light of all the decisions of the Supreme Court and the various High Courts bearing on the subject. This is followed by a number of very useful appendices which *inter alia* contain, notifications about authorised officers who could sign and give valid D-Form certificates, State-wise list of tax-free goods, notifications under s. 8(5) issued by different States, and Sales Tax Geography showing the constituent districts and other important towns of the various States and Union territories of the Indian Union and the general sales tax laws as well as the particular Central Sales Tax Rules applicable to each of them. A portion of the book gives the full texts of the Central Sales Tax (Registration and Turnover) Rules, 1957, and the various Central Sales Tax Rules made by the individual States and the Union territories. This publication which contains all the relevant material on the Central sales tax law within the covers of a single handy volume will be indispensable not only to lawyers but also to sales tax practitioners and the business community at large as a safe and reliable guide through the mazes of an important wing of "the multi-storied sky-scraping criss-cross taxation-structure" in India.

Disciplinary action against Government servants and its Remedies. By KIRPA DAYAL SRIVASTAVA, M.A., LL.B., Advocate and NARESH KUMAR SRIVASTAVA, Advocate. LUCKNOW: Eastern Book Company, Lalbagh Road. Roy 8vo. Pages 680. Price Rs. 25.

IN a parliamentary democracy the important role played by civil servants can hardly be minimised and therefore constitutional safeguards for security of their tenure, machinery for redress of their grievances and discipline among them are crucial questions if they have to function as efficient members of the administration. The present book which now enters into a second edition within a short period of two years deals with the various aspects of these questions under different heads which cover such topics as, dismissals, removals, discharge,

suspensions, reduction in rank, retrenchment, compulsory retirement, superannuation and resignation. Apart from a full reference to decided cases the book offers much useful material in the appendices which contain the texts of the All India Services Act, 1951, the Public Servants (Inquiries) Act, 1880, and the various Rules and Regulations affecting the Civil Services. This commendable effort to present the law on the subject which is garnered from various sources will be of much use to lawyers and Government employees.

Commentaries on the Workmen's Compensation Act, 1923. By KIRPA DAYAL SRIVASTAVA, Advocate and NARESH KUMAR SRIVASTAVA, Advocate. LUCKNOW: Eastern Book Company, 43 Lalbagh Road. Roy 8vo. Pages 380. Price 17.50.

THE Workmen's Compensation Act was the first piece of social security legislation in this country, and since it was passed as far back as in 1923 it has been amended several times so as to extend its application to cover a greater number of workmen and to allow them more compensation. The fundamental basis of the Act has, however, remained unchanged. The author of this commentary has critically analysed the provisions of the Act and as the Act has been modelled on the English statute of 1925 on the same subject, he has freely drawn upon English decisions and has moreover wherever necessary referred to the corresponding English law. The Indian case law is fully dealt with and liberal extracts are given from important English and Indian decisions to ensure a clear understanding of the principles involved. To add to the utility of the book the full text of the Workmen's Compensation Rules, 1924, is also included. Apart from the legal profession the book will be found useful to industrial workers and management of industries as the author has been at pains to adopt a popular approach in his exposition of the law without in any way sacrificing its more technical aspects.

Law on Bails, Forfeiture of Bonds & Habeas Corpus. By KESHAVA CHANDRA MEHROTRA, Advocate. LUCKNOW: Eastern Book Company, Lalbagh. Roy 8vo. Pages 310. Price Rs. 15.

THE various provisions regarding bail are essentially a part of adjectival law and as such are regulated by the law under which a particular trial is held. The Criminal Procedure Code, 1898, contains an exhaustive statement of the powers to grant bail and there are also special Acts which lay down their own provisions regarding bail for offences falling under them. This book deals exhaustively with the various aspects of the law on bails in the light of the relevant case law. The author has *inter alia* discussed the stages at which the accused may be enlarged on bail and how such an application for bail has to be made, the authority which may grant bail, the powers of the Supreme Court, the High Court and the Court of Sessions to grant bail, bail from non-accused persons, discharge of sureties and forfeiture of bonds. A final chapter is devoted to directions in the nature of Habeas Corpus in which the implications of this high prerogative writ are considered. This handy book of reference which lucidly and succinctly expounds the entire law on bails will be of great practical use to criminal lawyers and judicial and police officers.

Please Your Worships. By BANSILAL C. VAKIL, B.A., LL.B. BOMBAY: N. M. Tripathi Private Ltd. 1965. Demi 8vo. Pages 196. Price Rs. 10.

THIS is a welcome addition to the rather scanty literature dealing with the lighter side of law as administered in India. The author who in the beginning of his career had occasion to appear before Honorary Magistrates has based most of his humorous sketches in this book in the setting of their Courts. It would be invidious to single out a particular sketch from a collection which offers a wide variety of humour but mention may be made of "Is mosquito

killing an offence?" in which all the risible possibilities of a prosecution and acquittal of an offence under the Prevention of Cruelty to Animals Act, 1960, are worked out to their hilarious conclusion. At the same time the author's approach to the various incidents and anecdotes retailed in the book is leavened with his long experience on the Bench when he had occasion to observe, as he puts it, the quibbling of a lawyer and his playing on the vanity of a Court, the sense of self-importance of some practitioners usually practising in some higher Courts and their inability to adjust themselves and their submissions to the lower Courts. This is an eminently readable and entertaining book in a genre which unfortunately is not much practised here and which might come in as a corrective to the pomposity and ineptitude which are displayed in some of our judicial proceedings.

The Transfer of Property Act. By KAZI ABDUL-AZIZ, B.A., LL.B. KARACHI-29: Mrs. Nafees Begum A. Kazi, 6/1-F, P.E.C.H.S. Demi 8vo. Pages 353. Price Rs. 8.50.

THIS commentary on the Transfer of Property Act, 1882, as adapted in Pakistan is prepared for students of law by the author who was a lecturer and is now the vice-principal of the Sind Muslim Law College at Karachi. Knowing the special needs of the students, he has explained the difficult provisions of the Act and the principles underlying these, briefly and with commendable lucidity. The commentary is section-wise but in places different sections are grouped together for a complete understanding of similar topics dealt with by them. Important decisions are referred to and wherever necessary extracts from judgments are given to elucidate the points under discussion. The book can be recommended to students as a succinct and reliable guide to the law on the subject.

Principles of Mercantile Law. By KAZI ABDUL-AZIZ, B.A., LL.B., KARACHI: Mrs. Nafees Begum A. Kazi, 6/-F, P.E.C.H.S. Demi 8vo. Pages 90. Price Rs. 3.50.

THIS book, now in its second edition, deals with that portion of mercantile law which is prescribed by the University of Karachi in its syllabus for the 1st LL.B. examination. It briefly explains with the help of relevant case law, life, fire and marine insurance and contract of carriage by land, sea and air. Within a short compass the author has lucidly explained these topics and students going up for the law examination of the university will find it very useful.

BOOKS RECEIVED.

Specifying the Backward Classes without the Caste basis. By L. G. HAVANUR, Advocate. BANGALORE-3: Mysore State Backward Classes Welfare Association, 178 Palace Lower Orchard. Pages 122. Price Rs. 3.

THIS brochure deals with the interpretation of the term "Classes of Citizens" occurring in the Constitution of India with special reference to the Supreme Court decision in *Balaji's* case reported at [1964] A.I.R. S.C. 649.

Gujarat Law Times. AHMEDABAD: Gujarat Law Reporter Officer, Gandhi Road. Annual subscription Rs. 15.

THIS weekly publication, the first issue of which appeared in October 1964, publishes short notes on decisions of the Supreme Court and the Gujarat High Court.

The Bombay Law Reporter.

JOURNAL

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ASCERTAINMENT OF A DECEASED COPARCENER'S SHARE.*

DR. DERRETT is critical of the view taken by the learned Judges of the Bombay High Court in *Shiramabai Bhimgonda v. Kalgonda*¹ on the ascertainment of a deceased coparcener's share² and subsequently preferred to characterize it as "fantastic"³. The present writer is of the view that in the absence of legislative intervention a liberal interpretation subserves best the ends of justice and, therefore, respectfully agrees with the view of the Bombay High Court. In eschewing the lines of least resistance like the literal construction and the views of text-writers their Lordships exhibited conspicuous judicial valour. The doctrine of inconsistency evolved in this decision constitutes a landmark in the judicial process in India and ushers a new era in the progressive interpretation of statutes.

Hiranandani says:

"The rule that law expresses the intention of the legislature applied in the good old leisurely days when laws were few and the legislators had the time to scrutinise the laws carefully before passing them. In these days, laws are not made. They are being manufactured. How can a machine have any volition?"⁴

Therefore the literal construction of Explanation I to s. 6 of the Hindu Succession Act pressed forward by the learned editor of Mulla and Dr. Derrett needs be examined with reference to the legislative history as to the objects and motives behind the adoption of particular language.

On cl. 5 of the first draft of the Hindu Succession Bill the Joint Committee stated⁵:

"The Joint Committee is of the opinion that this Bill is not complete unless it provided for a share to the daughter in Mitakshara Coparcenary properties and also regulated intestate succession to the properties governed by the *Marumakkattayam*, *Aliyasantana* and *nambudri* laws".

Referring to cl. 6 of Bill No. 13-B of 1954 (as amended by the Joint Committee) it was observed⁶:

"It makes clear that this Act does not in any way interfere with the special rights of those who are members of a Mitakshara Coparcenary except to the extent that it seeks to ensure to the female heir, if any, who would be entitled to succeed under the provisions of this Act, a rightful share in the property of such coparcenary".

It is important to notice that cl. 6 of Bill No. 13-B and cl. 6 of Bill No. 13-C refer to "partition" and not to "partition of property". To quote the language of the proviso to cl. 6 of Bill No. 13-C⁷:

"Provided that, if the deceased had left him surviving a female relative specified in Class I of the Schedule or a male relative specified in that class who claims through such female relative, such female or male relative shall be entitled to succeed to the interest of the deceased to the same extent as she or he would have done had the interest

*By B. Shivaramayya, Lecturer, Faculty of Law, University of Delhi.

1 (1963) 66 Bom. L.R. 351.

2 (1963) 66 Bom. L.R. Journal, p. 109.

3 *Teaching Hindu Law in this Decade*, p.12; All India Seminar on Hindu Law, 1965.

4 *Legislative Drafting : An Indian View*.

27 Modern Law Review, 1, at p. 2 (1964).

5 Report of the Joint Committee, at p. (iv).

6 Report of the Joint Committee, at p. (iv).

7 Clause 6 to Bill No. 13-C of 1954; the Hindu Succession Bill, 1955 (as passed by the Rajya Sabha).

of the deceased in the coparcenary property been allotted to him on a partition made immediately before his death".

During the debate on the Hindu Succession Bill in the Lok Sabha, introducing a revised draft of cl. 6 and referring to Explanation I to cl. 6 of the Bill (that is Explanation I to s. 6 of the Hindu Succession Act, 1956, after the assent) Hon. Pataskar stated⁸:

"This was in the original Bill and it formed part of the first proviso. It had to be separated because we wanted to provide that there should be no hardship so far as the Punjab people were concerned".

Therefore the alteration in language of the section was intended to provide for the position in the Punjab where a son cannot ask for partition of the ancestral property during the lifetime of the father according to the Full Bench decision in *Hari Kishen v. Chandu Lal*⁹.

It is submitted: (1) That the interpretation sought to be put by the text writers like Mulla and Dr. Derrett on Explanation I to s. 6 was not actually contemplated by the Legislature; (2) That the words "partition of the property" in Explanation I to s. 6 was meant to be understood as "partition" in the earlier drafts; and (3) That the section and the Explanation in particular have been enacted to confer on daughters a share in the coparcenary properties and should be construed justly and equitably with reference to their rights.

Also, according to the decision of the Privy Council in *Pratapmull Agarwalla v. Dhanabati Bibi*¹⁰ a mother or grandmother would be entitled to a share on actual partition only. As has been observed by Mitter, J., in *Sheo Dyal v. Judoonath*¹¹:

"But partition, in her case, is the sole cause of her right to the property. It follows therefore, the effect cannot precede the cause".¹²

Therefore, it would savour of begging the question to allot shares to female members under a notional partition. As to *Munnalal v. Rajkumar*¹³ it cannot be deemed to have overruled *Pratapmull Agarwalla's* case, *in toto*. The case decides that where a preliminary decree in a partition suit has been passed allotting a share to a female member, it will be deemed to be property possessed by a female for the purposes of s. 14 of the Hindu Succession Act, 1956. Where the applicability of s. 14 does not arise *Pratapmull Agarwalla's* case must be regarded as binding.

The present writer respectfully agrees with Dr. Derrett when he says

"It is of greatest importance that we should make up our minds whether greater injustice will follow in the vast majority of cases if the instant case is followed, than if it is eventually deviated from and another rule adopted".

For, as has been pointed out by Hiranandani¹⁴:

"The Courts have also liberally construed a statute where literal construction would lead to injustice".

In the submission of this writer a literal interpretation of Explanation I to s. 6 of the Hindu Succession Act, in the absence of statutory intervention, will give rise to much greater hardship and injustice, and will introduce complexity and diversity instead of promoting uniformity and simplicity in the Mitakshara law of succession. It is now attempted to discuss this aspect of the matter only. If literal interpretation were to prevail, it follows that effect must be given to the rule of *Patni Bhaga* where it is in vogue in the law of partition.¹⁵ The paternal grandmother should be allotted a share when a

8 Lok Sabha Debates, 1956, V. 4, cl. 7229.

9 [1918] A.I.R. Lah. 291.

10 (1935) 63 I.A. 33.

11 (1868) 9 W.R. 61.

12 It may be pointed out that in *Pratapmull Agarwalla's* case the Privy Council in general approved of the observations of Mitter, J., in *Sheo Dyal's* case. A passage from the judgment of Mitter J., quoted with approval

by the Judicial Committee, includes the first sentence in the above statement.

13 [1962] A.I.R. S.C. 1493.

14 *A new approach to statutory interpretation*, 66 Bom. L.R. (Journal) 81, at p. 84.

15 See *Palaniappa v. Alayyan*, 48 I.A. 539. For the applicability of the *Chundavand rule* in the Punjab, see *Rattigan's Digest of Customary Law*, 13th edn., pp. 245 to 279.

partition takes place between her son and his sons under the Bengal¹⁶ (in cases of families governed by the Mitakshara law) and the Mithila¹⁷ schools along with the wife or wives of her son; and she need not be allotted a share in the Bombay¹⁸ State and in case of a family governed by the Benaras School of Law¹⁹. She will be entitled to a share when partition takes place between her son and the sons of a deceased son, and also where the partition is between her sons' sons, her own sons being dead²⁰. In the South the practice of allotting shares to female members had become obsolete and therefore no share need be allotted under a notional partition. The literal construction inevitably leads to disparity in the shares of female heirs under the Mitakshara law in the different regions. Such a construction might well offend art. 14 of the Constitution. The decision in *The State of Bombay v. Narasu Appa*²¹ will not be of avail in this context, for therein Gajendragadkar J., as he then was, observed:

"...So long as the State Legislature in taking gradual steps for social welfare and reform does not introduce distinctions or classifications which are unreasonable, irrational or oppressive, it cannot be said that the equality before law is offended".

In trying to evaluate the relative merits of liberal and literal interpretations, one question of crucial importance needs be answered. That is: Where a widow of the deceased gets a share in the coparcenary properties under s. 6 and subsequently an actual partition takes place among the sons is the widow-mother entitled to a further share under the law of partition? This question is, as yet, not specifically decided by the Courts. Dr. Derrett thinks she is "indubitably entitled to a share". In *Shiramabai's* case their Lordships observe:

"But now that they are entitled to succeed to a share on the death of the husband and father under section 4 the rule of partition must be deemed to have been abrogated". The present writer respectfully doubts Dr. Derrett's view for the following reasons:

(1) The judicial decisions hold and the writers on Hindu law generally agree that the share given to a widow-mother at a partition after the death of the father is in lieu of maintenance. In *Munnalal v. Rajkumar*²² Shah J. stated:

"...It is true that under the Sastric Hindu Law, the share given to a Hindu widow on partition between her sons or her grandsons was in lieu of her right to maintenance". As the Hindu Adoptions and Maintenance Act, 1956, codifies the law on the subject and confers a specific right of maintenance under its provisions, the right of a widow-mother to take a share on partition stands abrogated under s. 4(a) of the Hindu Adoptions and Maintenance Act, 1956.

(2) In the view of the learned editor of *Mayne* the Hindu Women's Right to Property Act, 1937, "replaces" the right of a widow-mother to take a share on partition. Referring to that Act it was observed²³:

"The Act replaces the rule of Hindu Law recognised in all the Provinces except in Madras where it has become obsolete, that a widow was entitled to a share when her sons or her step-sons actually divided the estate between themselves".

The observations of the Supreme Court in *Munnalal's* case lend support to the above view, wherein Shah J. stated (p. 1500):

"...It is true that under the Sastric Hindu Law, the share given to a Hindu widow on partition between her sons or her grandsons was in lieu of her right to maintenance.

16 *Badri Roy v. Bhugwat Narain Dobey*, (1882) 8 Cal. 649.

17 *Krishna Lal v. Nandeswar*, [1918] A.I.R. Pat. 91.

18 *Jannabai v. Vasudeo*, [1930] A.I.R. Bom. 302.

19 *Sheo Narain v. Janki Prasad*, (1912) 34 All. 505.

20 See Mulla's *Principles of Hindu Law* Section 317.

21 [1952] A.I.R. Bom. 84, at p. 95.

22 [1962] A.I.R. S.C. 1493, at p. 1500. See also *S. G. Jadhav v. V. G. Jadhav*, [1955] A.I.R. Bom. 410.

23 *Mayne's Treatise on Hindu Law and Usage*, 11th edn., p. 702, sec. 590.

She was not entitled to claim partition. But the Legislature by enacting the Hindu Women's Right to Property Act, 1937 made a significant departure in that branch of the law; the Act gave a Hindu widow the same interest in the property which her husband had at the time of his death, and if the estate was partitioned she became owner in severalty of her share, subject of course to the restrictions on disposition and the peculiar rule of extinction of the estate on death actual or civil". (Emphasis added).

The repeal of the Hindu Women's Right to Property Act, 1937, cannot have the effect of reviving the right of a widow-mother to take a share at a partition, in view of s. 6 of the General Clauses Act, 1897.

Thus, the literal interpretation can well lead to the anomaly that while we reduce the share of a deceased coparcener on the basis that female members are entitled to shares at a partition, and thereby reducing the shares available to female heirs under s. 6, an actual partition can be postponed merely to defeat their rights or even if it takes place no share need be allotted to the widow-mother.

Even if it is assumed for the sake of argument that a widow-mother is entitled to both the shares, that is under the law of succession and at a partition, the hardship is not obviated. Though technically the widow-mother seems to be a recipient of two shares, her shares cannot exceed the share of a son at a partition, in view of the deduction of *stridhana* from her share at a partition. Vyavahara Mayukha after citing Yajnavalkya (ii, 123), Vishnu (xviii, 34) and another Smriti says:

"The meaning is, that if she (mother) have dower she shall take only so much as, with that dower, will make her an equal sharer with her sons. But no share (belongs to her) if the property be more than that share".²⁴

To take a concrete illustration: A joint family consisted of deceased father, two sons S1 and S2, two daughters D1 and D2, and a widow-mother W1. The coparcenary property is worth 24000 units. According to the interpretation of Mulla, on the death of the father, W, D1 and D2 will each get 1200 units. At a subsequent partition between S1 and S2 the widow will get (according to Dr. Derrett's view) 4800 units which with her share of 1200 units under the Succession Act will make up for 6000 units. Whereas under the liberal interpretation W1, D1 and D2 will each be entitled to 1600 units. If there is a subsequent partition the widow-mother will be entitled to 3733.3 units which together with her share on succession will be 5333.3 units. No doubt it looks impressive that the mother will be getting 6000 units instead of 5333.3 units. But one must not forget that out of the gain accruing to the coparcenary by the literal interpretation, the sons take a lion's share. In fact in all normal cases where the deceased had left behind not more than one widow, sons and daughters, the maximum benefit to the widow from the gain to the coparcenary property cannot exceed 1/3. If "n" represents the number of sons and there is one widow her share in the accretion arising out of the literal interpretation will be $1/(n+1)$. Here the minimum n will be two, for there cannot be a partition with less than two sons. In other words the maximum benefit that can be obtained by a widow (where the deceased leaves one widow only) from the saving to coparcenary property by a literal interpretation cannot be greater than 1/3 of the saving. The literal interpretation results in augmentation of coparcenary property to the detriment of daughters, and also of mother of a deceased in some cases.

Their Lordships wanted to avoid such result and stated:

"It (Mulla's view) would be highly unjust to her and the other heirs and the sons' shares will be augmented for which there is no rational reason".

Sometimes it is argued that even though a daughter's share is reduced under the literal interpretation still as she is an heir to her mother's property along with the son, under s. 15 of the Hindu Succession Act, there is no real injustice.

While noticing this argument we must remember that execution of wills is not common amongst women in India. So what?

On the intestacy of a woman, if the number of sons exceeds that of daughters in a family, greater portion of the wealth of the mother will go to sons and *vice versa*. Can it be said that in India in an average family the daughters outnumber the sons? It will be instructive to consider the demographical data at this stage²⁶. The sex ratio *at birth* for 100 females according to 1951 census in the North, East, West and Central Zones is 105, 101, 101 and 102 respectively. The higher mortality rate among Indian women is well known. The sex ratio per thousand males in some States where the question under consideration assumes importance is as follows: Maharashtra 936; Punjab 864; Rajasthan 903; Uttar Pradesh 909; Madhya Pradesh 953; Gujarat 940 and Bihar 994.²⁷ "The feature of higher masculinity of Indian population is intriguing, but has not been studied in detail."²⁸ If we notice the number of males and females age-wise upto 69 years in the 1961 census we find that in the Northern Zone the females outnumber males only in the figure for the age of 20; in the Central Zone at the ages of 20, 28, 34, 38, 48, 58 and 68; in the Western Zone at the age of 3, 20, 22, 24, 28, 60 and 65²⁹. In the 1951 census per 100 households sons were 108 and daughters 81³⁰. From this data the assumption that in an average family the sons are either equal to or greater than the number of daughters is justified and the view that the daughters vicariously obtain an advantage by the gain to the property of the mother is not convincing.

Another disquieting feature about the literal interpretation is that it has the effect of "feeding the rich and starving the poor" among the female heirs. If the assumption that a mother is entitled to a share at a subsequent partition is correct, the widow-mother is well provided for under the Act. Mother is a Class I heir to a deceased son and as has been pointed out if sons die as infants there is a greater concentration of properties in the hands of the mother³¹. The literal interpretation results in hardship to the needy among the female's heirs like an issueless widow daughter-in-law and a widowed daughter.

Also if the deceased had contracted *avyavaharika* debts, the shares devolving under s. 6 of the Hindu Succession Act will have to bear the burden, whereas the interest of the sons in the coparcenary properties arising from the right by birth will not be liable. This affects the proprietary interest of female heirs *vis-a-vis* that of sons.

An argument against the liberal interpretation which has considerable force and which appears to have troubled their Lordships, is that it might affect the rights of unmarried sisters of a deceased coparcener, who might not have acquired any share in the joint family properties or other properties. It is submitted: (1) Social factors reveal that on a balance hardship to daughters is apt to be more than gain to unmarried sisters by a literal interpretation. (2) That within the ambit of the existing law the hardship, if any, can be relieved.

Sociologists refer to a family consisting of parents and unmarried children as a nuclear family, and where it consists of parents, married and unmarried children, or any family consisting of members of three or more generations as a joint family. Their studies reveal that even prior to 1957, the nuclear fami-

²⁶ The writer is indebted to Dr. Ashish Bose, Institute of Economic Growth, for his help in securing the data.

²⁷ See *India 1964*, p. 16.

²⁸ *Census of India*, Paper No. 2 of 1963, p. 40.

²⁹ *Census of India, 1961*, Paper No. 2, Pt. 2,

at pp. 5 and 6.

³⁰ *Census of India, 1951*, Vol. 1, Part 1-A, Report. However, the writer would not like to rely on this figure excessively as it might not have included married daughters.

³¹ See R. N. Towary's *Principles and Practice of Hindu Law*, p. 103.

lies were equal, if not more than the joint families. Prof. Kapadia observes³². "In rural community, the proportion of joint families is almost the same as that of nuclear families". His study indicates that while among the higher castes we find 0.6 nuclear family per every joint family, among the lower castes every joint family has its counterpart 1.2 nuclear families. Further in view of the land legislations in most States joint families (in the sociological sense) became nuclear families by effecting partitions. Otherwise one does not find any necessity for s. 10 of the Maharashtra Land Ceilings legislation³³. And in the joint families

"the cases where unmarried sisters are to be provided for along with the daughters of the deceased must be fewer in number for it must be either a case where there the deceased died prematurely, in which case the statistical probability is far less or if the deceased had the normal span of life, the unmarried sister must be belonging to the higher age-group. It may be noted that the proportion of unmarried women to the total population of India diminishes rapidly with successive age-groups."³⁴

But even in the limited number of cases where there is hardship, relief can be envisaged within the ambit of the existing Hindu Law of partition. Mitakshara lays down:

"Sisters also who are not already married must be disposed of in marriage by the brethren, contributing a fourth part of their own allotments".³⁵

In *Rajagopala Ayyar v. Venkatarama*³⁶ the Privy Council accepted the proposition that the right of an unmarried daughter in a joint Hindu family for maintenance and marriage expenses is in lieu of a share on partition and allowed the mother the right of reimbursement for marriage expenses where she had already incurred them. The Full Bench of the Madras High Court in *Subbayya v. Ananta Ramayya*³⁷ relies on the analogy of the law of debts in relation to the marriage expenses of unmarried daughters (females of the first generation in our discussion). Ramesan J. observed³⁸:

"...But the debts of a father not illegal or immoral will certainly fall upon all branches of the family not only upon the father but upon the branches of each of his sons. In each case we have to see whether there is an obligation peculiar or personal to the head of the particular branch or sub-branch or an obligation to which the whole family is liable. In the case of a father's debts, the whole family is liable; in the case of son's debts, the son's branch only is liable...Therefore, after partition, the obligation falls upon all the members of the family...The analogy of the debts which is well-established and well-known makes my meaning clear".

In the writer's humble view the above analogy can provide a solution to the difficulty encountered in relation to the marriage expenses of the unmarried sisters of the deceased. Not only the coparcenary interest of the sons but also the shares devolving on sons and other female heirs under s. 6 should be made liable for such expenses. The Courts are bound to consider this question afresh in view of the categorical duty cast on the brethren to initiate the unmarried sisters.

The present writer submits that a literal construction of Expl. 1 to 6 will give rise to much injustice and needless diversity and complexity. In conclusion it may be said that if what has been laid down by the learned Judges in *Shirumabai's* case is not sound law then so much the worse for law.

32 Rural Family Patterns : A Study in Urban Rural Relations. 1950 Sociological Vol. I, Pt. 1-A Report, at p. 74.

Bulletin, p. 111, at p. 113.

33 The Maharashtra Agricultural Lands (Ceiling on Holdings) Act, 1961.

34 See Table 26, *Census of India, 1951*,

35 Chap. I, VII, 6.

36 [1947] II M.L.J. 37, P.C.

37 (1928) 53 Mad. 84, F.B.

38 At p. 99.

THE CONVERT'S POLYGAMOUS MARRIAGE.*

THE Judicial Committee of the Privy Council cannot make pronouncements on the laws of India nowadays with authority (as it very well knows), but it may still happen that Indian cases may be studied there and commented upon. A curious instance of this has arisen in the case of *Attorney-General of Ceylon v. Reid*¹, the Advice in which is supported by a commendably clear and concise judgment. This was an appeal by special leave from the judgment of the Supreme Court of Ceylon. The facts were somewhat disquieting. One Reid married a Christian lady according to Christian rites in Badulla in 1933. They lived together as man and wife for 24 years and there were eight children of the marriage. At the end of those 24 years the wife left her husband and obtained a maintenance order against him in the Magistrates' Court of Colombo. About two years later Reid himself and a divorced lady called Pansy, subsequently Fatima Pansy, were both converted to the Muslim faith. A month later they were married by the registrar of Muslim marriages at Colombo, after all the statutory formalities had been duly complied with. A little over two years later (one wonders why so long a delay occurred) Reid was indicted, and subsequently convicted, for bigamy under s. 362B of the Ceylon Penal Code which corresponds to s. 494 of the Indian Penal Code.

The litigation proceeded upon the footing that the conversion was sincere. Why the two sides agreed this highly debatable point is not clear. Here was a case, one might suppose, where, if ever, it might have been profitable to argue the insincerity and therefore ineffectiveness of the supporting conversion. However, it seems that the *factum* of conversion could not be impugned, and the matter must rest there.

Their Lordships found that the question of Reid's guilt turned upon the words of the section, "...marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife..." Was this second marriage a marriage void because of the existence of the first wife?

There were no distinct authorities in the Privy Council. The passing opinion expressed by James, L.J., in *Skinner v. Orde*² was cited but not treated as decisive—no doubt correctly. There were no authorities in Ceylon on the subject. Public policy would, one might suppose, have required the closest scrutiny of such a situation. If we are to admit that any non-Muslim husband, tired of his first, Hindu or Christian, wife, and unable to divorce her, but willing to pay for her maintenance so much as the Court will be able to extract from him, might simply become a Muslim and then marry the lady of his current fancy, should we not be admitting a great fault in the legal system of the country? Is Islam to be utilised with such motives? The matter requires the closest thought. If one feels (as this writer does) that Islam should not be utilised for this sort of abuse of the law of marriage, it might be one further argument for gradually inhibiting the right of plural marriages by Muslims. The argument, to which we return, namely that cases are numerous in which conversion or re-conversion to Hinduism was allowed to have exactly the same effect, is no longer operative, since Hindus cannot since 1955 contract marriages while spouses to whom they are validly married still live. An argument on the other side is that a wife, whose husband embraces Islam in this fashion and for this purpose, has a simple remedy in that she can sue for matrimonial relief³. But this is hardly adequate in the case of the majority community for whom divorce is not always a desirable step. In Hindu as in Christian marriages the status of marriage does not preclude termination by divorce: but

*By Dr. J. D. M. Derrett, University of London.

1 [1965] 1 All E.R. 812, p.c. The Board consisted of five Lords of Appeal.

2 (1871) L.R. 4 P.C. 60, 71, s.c. 14 M.I.A. 309, 324.

3 As we shall see (below) the only ground

prima facie open to her, in default of cruelty or desertion, is that given in s. 13 (i) (ii): "...has ceased to be a Hindu by conversion to another religion." It will be recollected that cruelty and/or desertion are at present grounds only for judicial separation or separate maintenance.

the unexpected arrival of a co-wife *via* the husband's change of religion is a hazard for which few can be said to be prepared. Yet the device, which had not been examined in the Privy Council before, and had apparently not bothered the Courts of Ceylon, had often been attempted in India.

The Privy Council turned to Indian cases. A complete set of Indian authorities was not before their Lordships' Board. But the necessary distinctions were observed, with a result which will be observed by authors of textbooks on Indian Criminal Law in their future commentaries on s. 494. The decision of Holloway and Innes, JJ., in *Proceedings, dated 8th November 1866*^{3a} was favourably cited. The case was one where a Hindu was converted to Christianity, married a Christian, reverted to Hinduism and married a Hindu—a pattern not seldom repeated in the succeeding century. Their Lordships noticed that when a non-Christian became a Christian he did not throw off for ever the possibility of marrying polygamously. The Privy Council quoted from Innes J.'s judgment with approval. Our instant judgment goes on to contrast the case of *Emperor v. Lazar*⁴, in which the earlier Madras cases was not followed. The Privy Council distinctly disapprove of the reasoning in that case. Their Lordships had there relied on English bigamy cases where they should have distinguished them (for both marriages were monogamous marriages), and on other cases, notably *In the matter of Ram Kumari*,⁵ which most certainly should have been distinguished, since no one can contend that any wife can marry during the lifetime of a spouse by a subsisting marriage, whatever religion she may embrace, plural marriages being open only to Muslim males and (at that period) to Hindu males.

Their Lordships of the Privy Council place emphasis (at pp. 816-7) upon the judgment of Henderson J. in *John Jiban Chandra Datta v. Abinash Chandra Sen*⁶. This case was a case in succession and not marriage, nor was bigamy directly in issue, but the validity of the marriage of a convert from Christianity to Islam to a Muslim lady while his Christian wife still lived was under consideration. Their Lordships of the Calcutta High Court held that upon conversion to Islam the husband became perfectly entitled to contract a further marriage with a Muslim lady.

Citing Chagla J., as he then was, in *Robasa Khanum v. Khodadad Bomanji*,⁷ their Lordships of the Privy Council emphasise that in India and equally in Ceylon there is no one law of marriage. No marriage was therefore in essence not potentially polygamous. It was emphasised that in a country of many personal laws a change of faith must mean a change of personal law, and so long as no statute provided to the contrary there could be no impediment to full enjoyment of the rights attached to the new personal law.

"In their Lordships' view, in such countries there must be an inherent right in the inhabitants domiciled there to change their religion and personal law and so to contract a valid polygamous marriage if recognised by the laws of the country notwithstanding an earlier marriage. If such inherent right is to be abrogated, it must be done by statute. Admittedly there is none."⁸

The appeal failed, and the respondent, Reid, was held free from guilt.

It will be noted that the position which is adopted in this case is entirely in accord with the more recent Indian case law. *Datta v. Sen* was decided in 1939. Independently the High Courts of Madras and Mysore have followed rather the authority of *Emperor v. Antony*,⁹ for what it was worth, than that of *Emperor v. Lazar*.¹⁰ In cases of Hindus being converted to Christianity and relapsing into Hinduism in order to marry another wife the Courts held that no offence of bigamy within s. 494 was committed thereby: *David v. Sudha*,¹¹

3a (1866) 3 M.H.C.R. App. p. VII.

4 (1907) I.L.R. 30 Mad. 550.

5 (1891) I.L.R. 18 Cal. 264.

6 [1939] 2 Cal. 12, 16.

7 [1947] A.I.R. Bom. 272, 273, s.o. [1948]

Bom. 223, 48 Bom. L.R. 864.

8 [1965] 1 All E.R. 812, at 817 H.

9 (1910) I.L.R. 33 Mad. 371.

10 (1907) I.L.R. 30 Mad. 550.

11 [1950] A.I.R. Mys. 26.

Mrs. Marthamma v. Munuswami.¹² The case of *Lazar* seems now to be no longer good law.

There is, however, a statement in the course of the judgment not necessary to the decision and therefore not to be treated too seriously. At p. 814 E their Lordships say that it is not in controversy between the parties that "the first wife can if she so desires treat the second marriage as an adulterous association by her husband on which she can found a petition for divorce." This cannot be right. As the quotation from *Datta v. Sen* at p. 817 C shows, the second marriage, now held not to be bigamous, is valid and not void, and is not adulterous. Matrimonial offences are judged according to the law applicable to the alleged offender and it has never been the position that a husband of two wives under a polygamous system commits adultery against one wife when he has intercourse with the other.

What follows from this? A Hindu husband falls in love with a young girl whom he can obtain in marriage if he finds a method of so doing. He has no complaint against his Hindu wife, beyond the fact that she no longer attracts him. He treats her with every courtesy. But for the Hindu Marriage Act of 1955 he might have married within Hinduism. The law in fact drives him out of the faith. He and his lady love are converted to Islam. They marry according to Muslim usages. He brings his Muslim wife home. He expects his Hindu wife to live amicably with them. If she sees no prospect of gaining from suing for matrimonial relief upon the only possible ground, namely change of religion, the triangular household somehow manages to survive.

Having become a Muslim for the purpose of marrying, the question may arise whether the convert can freely relapse into Hinduism. Why not? There are respects in which, no doubt, full return to his pre-Muslim condition will be impossible. But do these matter in this day and age? Some Hindus will surely accept him, especially when it is pointed out to them that the conversion was genuine but under the influence of emotion which, when satisfied, gave place to more sober feelings. The lady will likewise relapse into Hinduism. And the triangular household is placed in the situation which it might have occupied but for the Act of 1955, save that the husband has paid a penalty for his religious scruples which, we may be sure, he will not have rated very dear. Someone may object that being a Hindu he cannot have two wives? To this there is a complete answer. One cannot evade one's responsibilities by changing one's faith: *In the matter of Ram Kumari*¹³, and so a husband, by relapsing into Hinduism, does not imperil his rights as against his now-Muslim wife, any more than he deprives her of her rights against him, and the position is not altered if she too relapses into Hinduism. So long as the original Hindu wife is willing to suffer this arrangement the compulsory monogamy of the contemporary Hindu seems to be more nominal than real.

One amusing discovery out of all this relates to s. 13 (2) (i) of the Hindu Marriage Act. That clause was intended to enable wives of polygamous husbands to obtain their freedom, if they wished, upon the mere ground of the subsistence of another marriage of the common husband. But unfortunately the clause refers only to marriages which took place prior to the enactment of the statute itself. Where a Hindu husband has validly married again after the Act (we have shown above how he can do it) he commits no matrimonial offence thereby. Even the provision of a ground for relief in change of religion (see s. 13 (1) (ii)) "has ceased to be a Hindu by conversion to another religion" cannot help her if, shortly after his Muslim marriage he relapses

¹² [1951] A.I.R. Mad. 888.

¹³ (1891) I.L.R. 18 Cal. 264. See also *Robasa Khanum v. Khodadad* (cited at f.n. no. 7 above), also *Farooq Leivers v. Adelaide B.M.*, [1958] Pak. L.R. 2 W.P. 1116, in which cogent reasons appear why we should not follow *Ayesha Bibi v. Subodh Ch. Chakravarty*,

[1949] A.I.R. Cal. 436 to the extent there contended for. The rights gained by a change of faith do not extend to the divorcing or repudiating of an existing spouse. The decision in *Sinammal v. The Administrator General of Madras*, (1885) I.L.R. 8 Mad. 169 may not now be good law.

into Hinduism. It is very difficult to claim relief on the ground that a husband became a Muslim if his first defence is that he has been a Hindu and remains a Hindu, notwithstanding a period as a non-Hindu. And the husband may provide no other ground for relief.

GLEANINGS.

NEGLIGENCE AT LEVEL CROSSINGS

THE coming of the railways in the last century ushered in an era of cheap and speedy transport, but at the same time brought many legal problems in its wake. As Pollock and Maitland pointed out (*History of English Law*, vol. 2, p. 471): "In 1846 we still in theory maintained the rule that any animate or inanimate thing which caused the death of a human being should be handed over to the king and devoted by his almoner to pious use 'for the appeasing,' says Coke, 'of God's wrath'." Deodands were eventually laid to rest by the statute 9 & 10 Vict. c. 62.

Problems of greater magnitude arose too. Thus, sparks from steam locomotives sometimes set fire to standing corn, but in the absence of negligence the farmer was without remedy: *Vaughan v. Taff Vale Railway Company* (1860, 2 L.T. 394; 5 H. & N. 679). The mantle of statutory authority clothed the railway companies with a protective coat—e.g. the Railway Fires Acts 1905-1923—but with the advent of diesel and electric locomotives such things have become of little more than historical interest.

However, one railway-inspired problem is of abiding importance. Put shortly, what liability attaches to the railway companies (and their successor the British Railways Board) in connection with level crossings? What are their duties in respect to the public, whether pedestrians or drivers?

The Railways Clauses Consolidation Act 1845 deals, in sect. 47, with the case of public crossings thus: "If the railway cross any turnpike road or public carriage road on a level, the company shall erect and at all times maintain good and sufficient gates across such road, on each side of the railway, where the same shall communicate therewith, and shall employ proper persons to open and shut such gates; and such gates shall be kept constantly closed across such road on both sides of the railway, except during the time when [road traffic] passing along the same shall have to cross such railway." Thus far the position is clear, although today the gates at level crossings are more often than not operated automatically. The basic duty of care remains the same.

Gray v. North Eastern Railway Company (1883, 48 L.T. 904) is authority for the proposition that it is the duty of a railway company whose line crosses the public highway at a level crossing to take reasonable precautions to warn persons using the crossing of the approach of trains. What are reasonable precautions depend on all the relevant circumstances, but there is voluminous case law on points surrounding the duty imposed by sect. 47. Thus, in *North Eastern Railway Company v. Wanless* (1874, 30 L.T. 275; L.R. 7 H.L. 12) a youth came to a crossing and followed a horse-drawn vehicle on to the line. Seeing a train approaching on the up line, he waited until it had passed, but in doing so was caught and killed by a down train. The company was bound by sect. 47 to have the gates closed at the time, and this was held to be sufficient evidence of negligence on the part of the company. Again, in *Charman v. South Eastern Railway Company* (1888, 21 Q.B.D. 524) the defendants were held to be in breach of the obligation imposed by sect. 47 where a fence adjoining level crossing gates had been allowed to fall into disrepair, and the plaintiff's horses got through on to the line and were killed. The duty to keep the level crossing itself in repair is a duty to see that it is kept in a state of repair suitable for ordinary and regular traffic: *Oliver v. North Eastern Railway Company* (1874, L.R. 9 Q.B. 409).

In *Stubley v. London and North Western Railway Company* (1865, 13 L.T. 376; L.R. 1 Ex. 13) it was made clear that there is no general duty on railway companies to place gatekeepers at level crossings, provided other due precautions are taken. Their obligation is to do all that is reasonably necessary to secure the safety of those who are using the crossing. The burden of proving negligence lies on the plaintiff and the important decision of the House of Lords in *Wakelin v. London and South Western Railway Company* (1886, 55 L.T. 709; 12 App. Cas. 41) serves to illustrate this. There a man's body was found on the line at a level crossing, at a point from which trains coming in either direction could be seen from a considerable distance. The accident took place at night, and, though the driver had not sounded his whistle as he approached the crossing, the train had carried headlights. As Lord Halsbury L.C. observed, there was nothing "to show that the train ran over the man rather than that the man ran against the train," and accordingly the evidence did not disclose any negligence on the part of the respondents. However, in *Smith v. South Eastern Railway Company* (73 L.T. 614; (1896) 1 Q.B. 178) it was possible to draw a "reasonable inference" of negligence where the deceased had crossed the line to visit the gate-keeper in his cottage on a dark but clear night. The usual practice was for the gate-keeper, on receiving a signal from further down the line, to go out and signal to approaching trains that the line was clear. On the night in question, after the deceased had left, he remained in his cottage, and almost immediately a train was heard to whistle, and the body of the deceased was found on the line. On the facts, there was sufficient evidence of negligence on the part of the railway company. The principle of *res ipsa loquitur* is frequently called in aid in a case of this sort because "where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care:" per Erle C.J. in *Scott v. London Dock Company* (1865, 13 L.T. 148; 3 H. & C. 596).

The same principles will apply where a level crossing is replaced by a subway, as the more recent case of *Law v. Railway Executive* (1949, 65 T.L.R. 251), a decision of Hallet J., shows. There the defendants had not taken reasonable precautions to make a subway, which replaced by statutory authority a public level crossing, safe, and they were liable to the plaintiff, albeit he had been contributorily negligent. The railway company are not insurers, but are under a duty to take reasonable care in all the circumstances to see that the crossing is safe. The general principles of negligence apply, and, broadly speaking, all depends on the particular facts.

In the case of private accommodation crossings different principles might apply. Once again, there is a duty to take all reasonable precautions, and the difference is in the degree of care which is required in all the circumstances. The position was fully reviewed in *Dublin, Wicklow and Wexford Railway Company v. Stattery* (1879, 39 L.T. 365; 3 App. Cas. 1155). There the deceased had attempted to cross the line at a private accommodation crossing late at night, a spot where the public were in the habit of crossing with the acquiescence of the company. At the time he attempted to cross the up line there was a train standing on the down line which obscured his view. He was struck by an express train and killed. Although the train carried lights, it was held by the House of Lords that there was evidence of negligence to go to the jury, as it seemed that, in spite of a company ruling that express trains should whistle at this point, the driver had failed to do so. The effect of notices forbidding members of the public to cross the line was also considered. Their lordships held that, where such notices are displayed, but are constantly disregarded by the public, and the railway authority have not interfered, they cannot subsequently set up the existence of the notices by way of answer to an action for damages.

A similar point arose to be decided in the recent decision of the Privy Council in *Commissioner of Railways v. Quinlan* ((1964) 1 All E.R. 897), where the respondent was a trespasser on a private level crossing, the gates of which were open. He was injured by a train, the driver of which sounded his whistle too late to be a sufficient warning. The Judicial Committee held that, in these circumstances, the trespasser must take the occupier's activities on the land as he finds them, for there is no duty of care towards a trespasser. The only obligation on an occupier is not to cause wilful injury to a trespasser. In *Slattery's* case the deceased was not a trespasser, as the occupiers had acquiesced in the position.

The leading case on private accommodation crossings is undoubtedly *Cliff v. Midland Railway Company* (1870, 22 L.T. 382; L.R. 5 Q.B. 258), which has been applied on many subsequent occasions. The facts are not without interest. The plaintiff, while using a private accommodation crossing, was knocked down and injured by a train, allegedly as a result of the defendants' negligence. There were gates across the road, which were left open, and at one time the railway company had kept a gate-keeper at the crossing, although they had ceased to do so for some time before the accident. A few years before the accident the defendants had received statutory authority to make a new road and discontinue the crossing, these powers to be exercised within a period of five years. In fact, nothing was done about the road until after the accident. The jury negatived negligence in the train driver, but found for the plaintiff on the general ground of "negligence as to the crossing." In summing up the judge left to the jury as evidence of negligence the company's omission to keep a gate-keeper and their failure to exercise their statutory powers. This was held to be a misdirection.

The principle of *Cliff* was applied by the Court of Appeal in *Liddiatt v. Great Western Railway Company* (175 L.T. 224; (1946) 1 All E.R. 731), where the plaintiff's servant was driving some cattle over a private accommodation crossing, some 200 yards down the line from a public level crossing which was operated by a gate-keeper. The gate-keeper did not have any regard to the private accommodation crossing, and only one gate of it was visible to him. The Court of Appeal held that the defendants were under no duty to place a keeper at the accommodation crossing, and its nearness to the manned public crossing did not extend their duty in any way.

The duty laid on a railway company in these circumstances is a duty to take reasonable precautions: per Pickford J. in *Jenner v. South Eastern Railway Company* (1911, 105 L.T. 131). In that case a man drove over an accommodation crossing habitually used for vehicular traffic to the defendants' knowledge and without hindrance by them. The line was curved, and a sign-board instructing train drivers to whistle was partially obscured by a line of trees, which might possibly deaden the sound of approaching trains. The learned judge found on the facts that the precautions taken were an insufficient safeguard for vehicular traffic, but was at pains to point out that the degree of care required varied with all the circumstances. It may be observed that a private accommodation crossing may become a public crossing, as, for example, happened in *Lloyds Bank Limited v. Railway Executive* ((1952) 1 All E.R. 1248), and in such a case the company are bound by the requirements of the Railway Clauses Consolidation Act 1845 (and similar statutes), which require inter alia the provisions of a gate-keeper. Denning L.J., as he then was, pointed out there that, apart from the statutory requirements, the company is under a common law duty to prevent danger, and as this increases, so must their precautions increase. Clearly, in these days of express diesels and other fast locomotives, a higher standard of precautions is required than in the days of Stephenson's "Rocket."

As in all cases where negligence is alleged, no clear cut answer is possible, and all must depend largely on the facts of the case. That a duty of care exists in favour of users of level crossings there is no doubt, and as Lord Macmillan said, in dealing with negligence in general in *Glasgow Corporation v.*

Muir (169 L.T. 53; (1943) 2 All E.R. 44, 48), "those who engage in conduct inherently dangerous must take precautions which are not required of persons engaged in the ordinary routine of daily life." There may be only one standard of care, but the degree of care is variable. Thus, greater precautions are necessary in the case of public level crossings than those required at private crossings, while a trespasser must take things as he finds them. The statutory obligations imposed are quite unequivocal, but, as the foregoing survey shows, considerable latitude exists.—*L.T.*

CONNIVANCE

ONE evening the husband came home to find the wife and the co-respondent embracing. Angrily and in the heat of the moment he said: "If you two want to go to bed together, why the hell don't you?" He slept in his son's room. In the morning he turned the co-respondent out of the wife's bed. Thereafter he made persistent and genuine efforts to persuade the wife to give up the co-respondent and return to him, but without success. During the next twelve months, up till the date of the petition, the wife continued the adulterous relationship which had begun on that crucial night. In these circumstances the House of Lords was called upon to consider the law relating to connivance: *Godfrey v. Godfrey and Wall* [1964] 3 W.L.R. 524.

The classic definition of connivance is to be found in the judgment of Lord Merriman, P., where he said:—

"The issue is whether, on the facts of the particular case, the husband was or was not guilty of the corrupt intention of promoting or encouraging either the initiation or the continuance of the wife's adultery."

Churchman v. Churchman ([1945] P. 44, at p. 52 (C.A.)), now indorsed by *Godfrey, supra*.

First, although as a matter of language, connivance means literally to "wink at" or "to take no exception to," as a matter of law mere passivity is not enough. There must be some intentional consent or concurrence. Turning a blind eye may support an inference of connivance, but probably there must be some active encouragement or incitement either by words or by conduct, such as the providing of an opportunity for adultery. For example, words which are "only wild words of little import" (Lord Hodson in *Godfrey, supra*, at p. 534) uttered in distress at finding the wife and co-respondent in a compromising situation may not constitute sufficient evidence of the necessary corrupt intention.

Secondly, the encouragement must, to some degree at least, effectively cause the adultery to take place as a consequential outcome. A casual connection is likely to be most readily inferred where an adulterous relationship thereupon commences but much less likely to be inferred where the relationship merely continues. On principle it is wrong to permit the husband to complain of adultery to which he has in some degree contributed.

If the husband reasonably suspects that an adulterous relationship *has already started* he is not guilty of connivance simply because he watches for proof. He is not then consenting to the inception of adultery but only seeking proof of its repetition. Acquiescence in continuance, even by the creation of an opportunity, does not constitute a corrupt intention:—

"The question is, which is the greater evil? To allow the adultery to continue undetected and unproved? or to allow the husband to obtain his proof by creating an opportunity for it?" (per Denning, L.J., in *Douglas v. Douglas* [1951] P. 85, at p. 98 (C.A.)).

Assuming that there was connivance, how can the husband escape from this absolute bar to divorce which, so long as it operates, prevents him from complaining of the wife's adultery? Certainly there is no principle known to the law of "once connivance, always connivance."

First, there must be true repentance and sincere efforts by the husband to

repair the damage and restore the marriage. He must have done all in his power to make amends for his regrettable lapse.

Secondly, the act of connivance must have ceased to be an operating or contributory causal factor upon any subsequent adultery on which the petition is founded. This proposition is best illustrated by examples.

(1) The adulterous relationship may have been only continued and not originally promoted by the connivance, when the husband's behaviour might have no lasting effect and quickly be spent.

(2) A full and complete reconciliation may have intervened, i.e., the husband's efforts to repair the marriage were crowned with success, only to be dashed to the ground by renewed adultery by the wife.

(3) A very long lapse of time may have occurred.

(4) There may have been a break in the adulterous relationships, taken up again for the second time in circumstances far removed in time or purpose from the husband's original connivance.

(5) The wife may have formed an adulterous relationship with an entirely different third party.

Nevertheless, as Lord Hodson said (in *Godfrey*, *supra*, at p. 535):—

"It is difficult for a petitioner to discharge the burden which lies upon him to prove that he has not connived at the continuance of adultery with the same person after he has encouraged its initiation."

Where, as happened here, the adulterous relationship continues unbroken for the next twelve months, it cannot be said that the effect of the original connivance has worn off and become spent. The effects may endure so that the subsequent adultery cannot be dissociated from the original connivance.

The burden of proof rests upon the petitioner to satisfy the court either that there was no connivance, or, if there was, that it has ceased to play any effective part upon the respondent's adultery.—Alec Samuels in *S.J.*

WHOM TO SUE

ATTENTION was focused on the strategy to be adopted in cases where a client has the chance of suing either a principal or his agent by *Clarkson, Booker, Ltd. v. Andjel* [1964] 3 W.L.R. 466. The defendant had bought air tickets from the plaintiffs on credit. He was in fact acting as agent for a travel agency company who were undisclosed principals. Solicitors for the plaintiffs demanded payment from both the defendant and his principals. Subsequently they issued a writ against the travel agency only, but before judgment was obtained the company went into liquidation. So the present proceedings were then started and the defendant alleged that the plaintiffs had irrevocably elected to proceed against his principals which exonerated him. The Court of Appeal held that taking into account all the circumstances no irrevocable election had been made. What seems new is that it is possible to make an election before a final judgment has been obtained against one party or the other. In a similar case, *United Australia, Ltd. v. Barclays Bank Ltd.* [1941] A.C. 1, the plaintiffs sued for money received on a cheque fraudulently indorsed in favour of a company which went into liquidation before they could obtain judgment. They then sued the bank for conversion, and succeeded because there had been no judgment in the first case. Similarly, in *Moore v. Flanagan* [1920] 1 K.B. 919, a dressmaker, suing both husband and wife for the price of necessaries where the wife was the husband's agent, failed in her action against the husband because she had obtained judgment in default against the wife. The position now must be that while a judgment is clear evidence of an irrevocable election, other actions prior to that can constitute one.—*S.J.*

HUSBAND AND WIFE

ECHOES from the American courts suggest that matrimonial relations in the United States have a colour and a character all their own. Where else would

you find a case to parallel that of Charles Narrow, aged twenty-three, who married Sissy, the sixteen-year-old daughter of the proprietor of a nudist camp, when for her wedding she wore only a veil and a necklace. Barely six months afterwards he obtained a divorce from her on the ground of extreme cruelty, alleging that she was cold. Perhaps it was well for him that it was he who put the law in motion, for in America a husband who has the misfortune to be divorced by his wife is apt to find himself crippled by the awful weight of alimony. Thus, Mr. Edward Eddington, of New York, a retired policeman whose marriage lasted three years has in the last thirty-five years paid more than the equivalent of £17,000 in alimony and has gone to prison twice for falling into arrears. Now he has rallied together more than 500 aggrieved ex-husbands into a society called Alimony Limited, formed to agitate for the reform of the divorce and alimony laws in New York State. Meanwhile the psychiatrists are, as ever, fertile in their suggestions for improving the husband and wife relationship. Recently the psychologist director of the Institute for Rational Living, addressing the New York League of Sexual Freedom, suggested that 'civilized adultery' (or wife-swopping) was psychologically helpful to marriage. Another stimulating theory embodied in a paper published in the Archives of General Psychiatry by three American psychiatrists, who had devoted five years of research to its elaboration, was that among certain types of marital partners, wife beating may hold a marriage together. The wife beater, they say, is a good provider and a faithful husband, averse from divorce. 'The aggressive act satisfies deep unconscious needs of both man and wife'. Lawyers should whole-heartedly welcome the complications which this discovery will introduce into the law relating to cruelty.—S.J.

LETTER OF THE LAW

Case from Paris.

A bank clerk called Clavier had married a very pretty Greek wife called Ritza. One day she went off for a holiday in Athens with her parents, saying she would be back in three weeks. She stayed away five months. In her absence two letters addressed to her arrived, and in the circumstances her husband opened them. They were Greek to him, so he took them to a translator who told him that they were obviously from a man who had had a passionate love affair with his wife. On the strength of his evidence he started divorce proceedings and, when at last the truant Ritza tripped home, he locked her out. She thereupon took legal advice and counter-attacked, launching a prosecution under the post office regulations against her husband for opening and appropriating her mail. With the prosecution she linked a claim for heavy damages. Counsel for the defence contended that it was absurd to give a wife a remedy against her husband for intercepting her lover's letters. But the law was clear and the court was adamant; the post office regulations were sacred and above human passions and the defence of *crime passionnel*, although it might be recognised in a case of murder, did not cover tampering with the mails. The defendant was fined the equivalent of over £20. At that point the law unbent enough to look at the merits of the case and awarded the lady nominal damages of one franc.—S.J.

PRINCE CHARLES'S NOTEBOOK

THERE has been much indignation about the ethics of publishing school essays written by H.R.H. the Prince of Wales. They have been printed in both *Der Stern* and *Paris Match*, but in all the furore the important question of copyright appears to have been entirely overlooked. The acquisition of a manuscript does not automatically convey the right of publication. Even if the Prince did pass on his exercise book to a school-fellow, there would have

been no assignment of copyright. This remains with the author, and his writings may not be published without his consent. It was transferred as a holograph, a literary curiosity, and at no time would it appear that copyright was transferred. Even the writings of a schoolboy may constitute an original literary work, and the existence of copyright is automatic. For a work to be original within the meaning of the Copyright Act 1956, it is not essential that it be the expression of original or inventive thought. As Peterson, J., pointed out in *University of London Press, Ltd. v. University Tutorial Press, Ltd.* ([1916] 2 Ch., at p. 608): "Copyright Acts are not concerned with the originality of ideas, but with the expression of thought, and, in the case of 'literary work' with the expression of thought in printing or writing. The originality which is required relates to the expression of thought. But the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work—that it should originate from the author". Copyright is created as soon as the work is committed to paper, and persists for the author's lifetime and for fifty years after his death. It is his property to do with as he wishes, and unless copyright is disposed of it remains with him. In the absence of any agreement with the author to this end, whoever made copies of the notebook infringed the author's copyright. Both France and West Germany are signatories to the International Copyright Convention, 1948, whose members agree to extend protection of copyright in their own countries to works protected in the country of origin. Article 4 of the Convention extends protection to unpublished works, but be the copyright position as it may, it is a great pity that a schoolboy's jottings should have been published in any country at all.—S. J.

AFFRAY

It is not necessary that the incidents giving rise to the offence of affray should occur in a public place. The common law conceived the offence as one of a number of offences to uphold public order and to protect the public generally against lawlessness and disorder; so, where two or more people fight in the presence of persons who neither participate in nor encourage the fighting and thereby some of those persons are frightened or put in fear, the offence is complete. It matters not whether few or many persons are present. The few are entitled to the same protection as the many when public order is being violated. In so deciding the Court of Criminal Appeal (Lord Parker C.J., Marshall and Widgery JJ.) in *Reg. v. Button and Swain* (*The Times*, 24 February) certified that a point of general importance was involved and gave leave to appeal to the House of Lords.—L.T.

REVIEW.

On the lighter side of the law. By K. G. SUBRAMANYAM, Advocate, Coimbatore. MADRAS: Madras Law Journal Office, Post Box 604. Demi 8vo. Pages 100. Price Rs. 2.

THIS interesting brochure collects some articles which have already appeared in a journal and contains anecdotes and scenes from Courts of law. The author tackles some serious problems in the latter portion of the book where, for example, the question of capital punishment is considered in the framework of an imaginary trial. The author's "deep liaison with English Literature," in the words of the learned Judge who has contributed the introduction, has at least resulted in the creation of a lively and witty production which will cause legitimate mirth.

The Bombay Law Reporter.

JOURNAL

June 15, 1965.

TERMINATION OF TENANCY.*

AN interesting problem is raised in the Journal of the Bombay Law Reporter under the caption "Termination of Tenancy".¹ The learned author has quoted various decisions, of the Revenue Tribunal, of the Bombay High Court and even of the Supreme Court, to point out the conflict of decisions and the prevailing uncertainty in giving a correct answer to the question as to when exactly an agricultural tenancy is terminated, and one is apt to recall the following lines of Cowper:

"And differing judgments serve but to declare,
That truth lies somewhere, if we knew but where."

In *Sri Ram Ram Narain v. State*² challenging the validity of the Bombay Tenancy and Agricultural Lands (Amendment) Act (Bom. XIII of 1956), the Supreme Court *inter alia* observed as follows (pp. 824-825):

"...The title of the landlord to the land passes immediately to the tenant on the tillers' day and there is a completed purchase or sale thereof as between the landlord and the tenant... This title is defeasible only in the event of the tenant failing to appear (under s. 32G) or making a statement that he is not willing to purchase the land or committing default in payment of the price thereof as determined by the Tribunal. The tenant gets a vested interest in the land defeasible only in either of those cases and it cannot, therefore, be said that the title of landlord to the land is suspended for any period definite or indefinite."

A large majority of the tenants having thus been deemed to have purchased the lands held by them on the tillers' day, the question as to when an agricultural tenancy is terminated would not affect such cases, though, unfortunate as it is, numerous applications made by former landlords for restoration of possession on the ground of purported termination under s. 14 on notices given by them to the tenant-purchasers after the tillers' day are entertained and still pending before the Mamlatdars through ignorance of law, resulting in avoidable inconvenience to the tenant-purchasers. The question, however, has its importance limited to cases in which tenants are not deemed to have purchased the lands held by them on the tillers' day, such as those affected by s. 32F or s. 88C or those under notices of termination under s. 31 and/or s. 14 prior to the tillers' day. Since there is quite a good number of tenants falling in this latter category, it would be worthwhile to explore an answer to the question.

Until the Full Bench judgment of the Bombay High Court in *Ramchandra Anant v. Janardan*,³ it has been consistently held that the tenancy of a tenant is terminated on the expiry of the period of the notice, as is evident from the following cases:

(a) In *Valu Kom Krishna Shirke v. Naru Joti Borge*⁴ it was observed that a notice under the old s. 34 (similar to the present s. 31) must commence on April 1 and end with the midnight of March 31 next. The notice of termina-

*By C. C. Anajwala, B.A. (Hons.), LL.B.,
Advocate, High Court, Bombay.

1 (1964) 66 Bom. L.R.J. 185.

2 (1958) 61 Bom. L.R. 811, S.C.

3 (1962) 64 Bom. L.R. 635, F.B.

4 (1956) Special Civil Application No. 63
of 1956, decided by Gajendragadkar and
Gokhale JJ., on April 2, 1956 (Unrep.).

tion of tenancy to be effective should specify the date of such termination which should statutorily be March 31.

(b) In *Shripad Govind Kulkarni v. Subrao Mahadu Pawar*⁵ where the notice of termination was worded "we have terminated your tenancy rights", it was held that it was a demand forthwith and the landlord did not validly terminate the tenancy.

(c) In another case of *Dagdulal Hirachand v. Dattatraya Nana Sonar*⁶ the landlord's application for possession under s. 25 read with s. 34 was decided in his favour on the tenant agreeing to give up possession, but the landlord having sold the land thereafter, the tenant applied under s. 37 for restoration of possession. The High Court held that there was no surrender as, once the tenancy was terminated, no other tenancy survived for being surrendered.

(d) Chagla C. J. observed in *Durlabbhai v. Jhaverbhai*⁷ that the vested right, the right to possession, accrues to the landlord when the notice has run out its natural course and the tenancy has been determined by reason of the expiry of the notice.

(e) In *Jasvantrai Tricumlal v. Bai Jiwi*⁸ in which the landlord terminated tenancy on ground of default in payment of rent and applied for possession from two sub-tenants, who were let into possession at the time sub-tenancy was not declared to be invalid, the Full Bench held that, on termination of the tenancy of the tenant, the contractual tenancy between the tenant and the sub-tenants came to an end, but by reason of s. 4 a statutory tenancy had come into existence and, therefore, the sub-tenants could not be evicted by the landlord.

(f) It was observed in *Satyanarayan v. Vithoba*⁹ that by a notice under s. 14 the landlord can only communicate to his tenant his decision to terminate his tenancy after the lapse of three months from the service of the notice, that if the landlord goes beyond it and calls upon the tenant to do something which he is not entitled to ask the tenant to do under the provisions of s. 14, e.g. calls upon the tenant to hand over possession of the land to him upon the expiry of three months from the date of receipt of the notice, then such a notice is invalid, that a notice under s. 14 is only a notice of termination of tenancy and that upon termination of tenancy, a landlord does not become entitled to possession automatically, but has to apply for possession.

(g) In *Raojibhai v. Karsanbhai*,¹⁰ S. T. Desai J. dissenting from *Satyanarayan v. Vithoba* observed that the notice under s. 14 stating "your tenancy is terminated" must be read in its proper context along with the words immediately following, namely, "you should hand over possession of our land after three months of the receipt of this notice", and that, therefore, the notice was effectual and sufficient and was valid.

(h) The Full Bench while considering the effect of the amendment made in sub-s. (2) of s. 25 in *Ganpati Appa v. Maruti Bala*¹¹ distinguished between the right to terminate the tenancy and the right to obtain possession of the land and observed that the former right was not affected by the amendment, that in respect of the latter right, it had not accrued in cases in which the tenancies had not been terminated before the amendment came into force on August 1, 1956, that the amendment did not affect any accrued or vested rights and that it would apply in all cases in which tenancies were terminated on or after August 1, 1956.

(i) While considering four appeals involving the notices for three defaults in *Raja Ram v. Aba Maruti*¹² the Supreme Court quashed the High Court judgments refusing applications for possession on equitable grounds and ob-

5 (1956) Special Civil Application No. 506 of 1956, decided by Shah and Vyas JJ., on July 24, 1956 (Unrep.).

6 (1957) Special Civil Application No. 3584 of 1956, decided by Dixit and Tendolkar JJ., on March 8, 1957 (Unrep.).

7 (1955) 58 Bom. L.R. 85, F.B.

8 (1956) 59 Bom L.R. 168, F.B.

9 (1958) 61 Bom. L.R. 159.

10 (1960) 62 Bom. L.R. 461.

11 (1960) 62 Bom. L.R. 802, F.B.

12 (1961) 64 Bom. L.R. 569, S.C.

served that a statutory right cannot be displaced by operation of equity, though a contractual right may be. It further observed (p. 572):

"...It is not in dispute in these cases that the tenants were in default in paying rents for three years within s. 14(1)(a)(i) and due notices had been served by the landlords terminating the tenancies as required by the proviso to s. 14(1)," and further (p. 573):

"...First, we have to point out that the tenancy having been terminated in terms of the statute, the statute would necessarily create a right in the landlord to obtain possession of the demised premises. The tenancy having been terminated, the tenant is not entitled to remain in possession and the only person who would then be entitled to possession would be the landlord. The statute having provided for the termination of the tenancy would by necessary implication create a right in the landlord to recover possession. The statute recognises this right by providing by s. 29(2) for its enforcement by an application to the Mamlatdar."

After a chain of consistent decisions on the question of termination of tenancy, the judgment in *Ramchandra Anant v. Janardan* apparently came as a bomb-shell. In that case the landlords gave notice to the tenant terminating his tenancy under s. 31 before December 31, 1956, and filed an application for possession under s. 29 read with s. 31 before March 31, 1957. During the pendency of the application the landlords gave another notice to the tenant under s. 14 for non-payment of rent and filed an application for possession under s. 29 read with s. 14 on December 11, 1958. The Aval Karkun ordered restoration of possession, but the District Deputy Collector in appeal set aside the Aval Karkun's order on the ground that the landlords' application was not tenable. The Maharashtra Revenue Tribunal confirmed the order of the District Deputy Collector in revision. The landlords, therefore, filed a writ petition, which was heard by Tarkunde and Chitale JJ., who raised two questions of which only the first being relevant for the present purposes is reproduced below:

"Whether the landlords' application for possession under section 29 read with section 14 was not tenable on the ground that the landlords, having once terminated the tenancy under section 31, were not entitled to terminate the tenancy again on any of the grounds mentioned in section 14."

Tarkunde J., who delivered the judgment for the Division Bench, held in reply to this question (pp. 637-638):

"...The tenant continues to be in lawful possession of the land even after the landlord's notice terminating the tenancy. Section 29(2) read with s. 15 makes it clear that a landlord, after he terminates a tenancy, cannot obtain possession of the land from his tenant, even where the latter is willing to give it, except by an order of the Mamlatdar. It follows from these provisions, and particularly from s. 4, that after the termination of the tenancy by the landlord the tenant is not only in lawful possession of the land but that he continues to be the tenant of the land... During this period the tenant is liable to pay rent as provided by s. 8 and other relevant sections of the Tenancy Act, and not mesne profits calculated on the basis of the income which he derived or ought to have derived from the cultivation of the land.

We are, accordingly, of the view that the statutory tenancy of a tenant does not come to an end merely by the expiry of the period of notice of termination of the tenancy given by the landlord, and that the landlord, having once terminated the tenancy by a notice under s. 31, is not precluded from giving another notice intimating his intention to terminate the tenancy under s. 14 and approaching the tenancy Court for possession on the grounds mentioned in that section."

The Division Bench referred the case to a Full Bench as its decision ran counter to a former judgment of another Division Bench of the Bombay High Court.

In delivering the Full Bench judgment Chainani C. J. agreed with the conclusion reached on this question by the Division Bench, but for different reasons, namely, that a second notice of termination may waive the first notice,

or, if it is given without prejudice to the rights created by the first notice, it may furnish to the landlord an alternative ground for obtaining possession, and observed (pp. 641-642) :

"...Under the ordinary law, if a tenant continues in possession after his tenancy has been determined, his possession is protected by law and he cannot be ousted except in due course of law, but he has no right to possession after the termination of tenancy. Under the Tenancy Act, however, even after his tenancy has been determined by a notice given by his landlord, the tenant has a legal right to continue in possession, until the Mamlatdar has made an order for possession being restored to the landlord. During the intervening period, the tenant has an estate in possession, of which he can only be deprived by an order of the Mamlatdar... It seems to us, therefore, that even after the landlord has terminated the tenancy by giving a notice under s. 31, it is open to him to give another notice intimating to the tenant his intention to terminate the tenancy under s. 14 and to approach the Tenancy Court for possession on the grounds mentioned in this s. 14."

Let us now examine the merits of this judgment insofar as it relates to the first question. At the outset it must be clarified that the judgment was not purported to decide the question as to when tenancy is terminated, but whether an application for possession based on a second notice would be tenable. In the referring judgment answer to the latter question in its turn was based upon an answer to the former and, therefore, the Court incidentally considered the former question also. Tarkunde J. in his referring judgment observed that even after the termination of tenancy by the landlord the tenant continues to be the tenant of the land particularly in view of the provisions of s. 4, and that the tenancy comes to an end not on the expiry of the period of the notice of termination, but on the Mamlatdar's order for restoration of possession of the land. This, it is respectfully submitted, is not a correct view. True that on the expiry of the period of notice of termination the landlord cannot automatically take possession of the land from the tenant, but has to make an application to the Mamlatdar under s. 29(2). What is the position of the tenant during the interim period, that is, from the date of expiry of the period of notice till the Mamlatdar's order for restoration of possession? There is no provision in the Tenancy Act to indicate that the tenant whose tenancy is terminated continues as tenant or that he should continue to cultivate the land until he is dispossessed or that he should pay rent or compensation to the landlord at a certain rate or in a certain manner. It may be possible that the tenant whose tenancy is terminated may continue to cultivate the land or may continue to pay rent at the rate applicable to him prior to the determination of his tenancy, but, as observed in *L. I. Corp. v. Bombay Municipal Corp.*,¹³ practice does not necessarily make law. After the expiry of the period of the notice of termination, the tenant continues to be in possession of the land until ousted by the Mamlatdar on the landlord's application under s. 29(2). The tenant has, therefore, a right to continue in possession in the meantime. But lawful possession cannot be equated with lawful cultivation. Therefore, until ousted, the tenant is certainly lawfully in possession of the land, but would not be lawfully cultivating the land during the period from the date of termination of his tenancy till the date of his dispossession by an order from the Mamlatdar. A person lawfully cultivating land belonging to another person is deemed to be a tenant under s. 4, but the tenant whose tenancy is terminated by the landlord and is lawfully in possession until dispossessed by proceedings under s. 29(2) cannot be deemed to be a tenant within the meaning of s. 4. The Legislature may perhaps consider amendment of the Tenancy Act by providing for payment of compensation on the lines of s. 32H(1B)(b)(ii) and thus regularise the relations between the former landlord and the ex-tenant in possession of the land for the interim period. That, however, is incidental. The net result would, therefore, be that on the reasoning of the Division Bench

a second notice of termination and subsequent application for possession under s. 29(2) would not be valid. Probably for this reason, and, with respect, correctly, the Full Bench avoided the reasoning adopted by the Division Bench. The Full Bench held that after the determination of the tenancy by a notice given by the landlord, the tenant has a legal right to continue in possession or has an estate in possession, of which he can be deprived only by an order of the Mamlatdar. An estate connotes limited interest,¹⁴ and possession connotes the opposite of reversion.¹⁵ Further, possession does not necessarily imply use or enjoyment,¹⁶ e.g. a warehouseman has possession of the goods entrusted to him, without having a right to the use or enjoyment of the goods. His Lordship Chainani C. J., therefore, resorted to the provisions of s. 113, Chap. V, of the Transfer of Property Act, 1882, which are made applicable to agricultural tenancies insofar as they are not inconsistent with the provisions of the Tenancy Act by an express provision made in s. 3 and observed that a second notice of termination of tenancy after termination by the first notice is valid and tenable, as it amounts to waiver of the first notice or, if given without prejudice to the first notice, may provide the landlord with an alternative ground for termination.

Nowhere in the Full Bench judgment in *Ramchandra Anant v. Janardan* it is said that tenancy is not terminated on the expiration of the period of the notice. On the other hand, it clearly recognises the fact of termination by the first notice, but for the reasons stated therein maintains that a second notice of termination is tenable. In fact the statute itself provides that tenancy stands terminated on the expiration of the period of the notice, but the landlord has to apply for possession under s. 29(2) after such termination and the question whether or not to restore possession to the landlord on such application is to be decided by the Mamlatdar. A notice of termination envisages a valid notice, valid both in law and fact. A notice that is not valid will not have the effect of termination of tenancy on the expiration of the period of the notice. There may be a thousand possible circumstances in which a notice may prove to be invalid. The tenant might not have committed any of the defaults stated in s. 14, but the landlord might wilfully assume that the tenant has defaulted, e.g. the landlord might serve upon the tenant a notice of termination on the ground that the tenant failed to cultivate the land personally. "Failed", as observed in *Devu Rau v. Jasingrao*,¹⁷ implies omission to do something which it was possible for him to do, whereas, in fact, the land might not have been cultivated personally for reasons beyond the control of the tenant. In all such cases, the notice, though conveying the landlord's decision to terminate the tenancy on the expiry of the period of the notice, would not be operative. Further, s. 14 itself provides for an opportunity to the tenant to remedy the breach during the period of the notice. In the event of the breach being remedied during the period of the notice, the notice becomes ineffective. Thus every notice has not got the effect of terminating the tenancy on the expiry of the notice period. Further, as observed by the Full Bench a notice may be waived by service of a second notice. In such a case also the previous notice becomes ineffective. But barring these and similar circumstances a notice of termination validly given, would have the effect of terminating the tenancy on the expiry of the notice period. That the landlord has to put in an application for possession after such notice of termination within the prescribed period of limitation does not and cannot affect the fact of termination. It is only in the event of the application for possession being rejected that, as provided in s. 25(1), the tenant "shall hold the land as if the tenancy had not been terminated." By necessary implication this would mean that until the rejection of the landlord's application for possession, the termination of tenancy

¹⁴ The Dictionary of English Law by Earl Jowitt, Vol. I, p. 735.

¹⁵ *Harrison* In re: *Johnstone v. Blackburn and East Lancashire Royal Infirmary*,

[1918] 2 Ch. 374, at p. 376.

¹⁶ The Dictionary of English Law by Earl Jowitt, Vol. II, p. 1368.

¹⁷ (1961) 64 Bom L.R. 97.

on a valid notice is effective. This view is further confirmed by the opening words of ss. 24 and 25(1) which read as under :

"24. Where any tenancy of any land held by any tenant is terminated on the ground that the tenant has done any act which is destructive or permanently injurious to the land, no proceeding for ejectment against such tenant shall lie unless and until the landlord has served on the tenant a notice in writing specifying the act of destruction or injury complained of and the tenant fails within a period of one year from the service of notice to restore the land to the condition in which it was before such destruction or injury.

25. (1) Where any tenancy of any land held by any tenant is terminated for non-payment of rent and the landlord files any proceeding to eject the tenant, the Mamlatdar shall call upon the tenant to tender to the landlord the rent in arrears together with the cost of the proceeding, within three months from the date of order, and if the tenant complies with such order, the Mamlatdar shall, in lieu of making an order for ejectment, pass an order directing that the tenancy had not been terminated and thereupon the tenant shall hold the land as if the tenancy had not been terminated."

These two provisions of the Tenancy Act in terms envisage termination of tenancy on landlord's notice and are sufficient to show beyond any shadow of doubt that the Legislature has expressly provided for termination of tenancy on the landlord's notice, but has sought to give relief under s. 24 to the tenant whose tenancy is terminated on the ground that he has done any act which is destructive or permanently injurious to the land by providing for a notice specifying the act of destruction or injury complained of and giving the tenant one year's time to restore the land to its original condition. As Vyas J. observed in *Satyanarayan v. Vithoba*, when the landlord seeks to eject a tenant on grounds of destruction or injury to the land, he has to give two separate notices to the tenant: one under s. 14 conveying to the tenant his decision to terminate the tenancy on the ground of an act which was destructive or injurious, and second, upon the termination of the tenancy, under s. 24, specifying the act of destruction or injury giving him one year's time to restore the land to its original condition, failing which he would be ejected from the land. A second notice to the tenant, whose tenancy is terminated, is thus clearly envisaged by the Act and is not a concept foreign to the Act. The fact of the second notice does not in itself vitiate the termination. So also s. 25 seeks to give relief to the tenant (except one who has committed three defaults), whose tenancy is terminated for default in payment of rent, if he tenders to the landlord the rent in arrears and costs within three months from the date of the Mamlatdar's order.

In *Commr. E. P. Tax v. Karamchand*,¹⁸ Chagla C. J. held (p. 609) that a statute must be so read that all the sections as far as possible are reconciled and fitted into the scheme which the Legislature embodied in the statute. The Full Bench judgment in *Ramchandra Anant v. Janardan* seems to be perfectly in accord with this principle. In discussing the judicial rule '*stare decisis*' Blackstone said¹⁹ :

"It is an established rule to abide by former precedents, where the same points come again in litigation; as well as to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion... Yet this rule admits of exception, where the former determination is most evidently contrary to reason."

Even long established decisions can be overruled [*Admiralty Commissioners v. Valverda (owner)*].²⁰ The Division Bench in this case having taken a different view on the impugned question of law from the view taken by a previous Bench, the case was properly²¹ referred to a Full Bench. But the Full Bench having discarded the reasoning adopted by the Division Bench, notwithstanding the fact that the conclusion reached was the same, it seems that it is the

18 (1952) 54 Bom. L.R. 607.

19 Blackstone's Commentaries, 21st edn. Vol. I, p. 69.

20 [1938] A.C. 173, at p. 194.

21 *Ahar Chandra v. Dolgobinda Das*, [1936] A.I.R. Cal. 663.

Full Bench decision, and not that of the Division Bench, that creates a precedent²² and has a binding force on all the Courts of concurrent and subordinate jurisdiction. If this be so, the judgment of the Maharashtra Revenue Tribunal in *Govind Mahadeo v. Daji Babu*,²³ it is submitted, is patently incorrect.

Judicial creativeness in the interpretation of statutes is not only inevitable but desirable in a growing legal order. Law is never static, and law includes case law. The Full Bench judgment in *Ramchandra Anant v. Janardan* in such a process of judicial evolution has resulted in an earlier judgment in *Janardhan Damodhar Dindore v. Bupchand Revchand Gujar*²⁴ being overruled. That need not, however, be deplored, for, in his recent address before the Bar Association of Satara District His Lordship the Chief Justice of India observed²⁵:

"Law, like democracy, seeks to synthesize in a harmonious way the conflicting and competing claims of individual liberty and social good. In the process of this harmonious synthesis, there is no room for absolutes. Reason and experience guide law and democracy, and it is on reason and experience that the changing pattern of law is based."

GLEANNING.

SOLICITORS: NEGLIGENCE

A WELL-KNOWN passage in the judgment of Greer, L.J., in *Jarvis v. Moy, Davies, Smith, Vandervell & Co.* ([1936] 1 K.B., at p. 405) deals with the distinction between contractual and tortious liability: "Where the breach of duty alleged arises out of a liability independently of the personal obligation undertaken by contract, it is tort, and it may be tort even though there may happen to be a contract between the parties, if the duty in fact arises independently of that contract. Breach of contract occurs where that which is complained of is a breach of duty arising out of the obligations undertaken by the contract". In relation to a solicitor, the duty to use reasonable skill and care arises only out of contractual relationship, so Plowman, J., held in a careful judgment in *Clark v. Kirby-Smith* ([1964] 2 All E.R. 835), quoting authorities going back to *Howell v. Young* ((1826) 5 B. & C. 259). It was there contended that the result of the decision of the House of Lords in *Hedley Byrne & Co., Ltd. v. Heller & Partners, Ltd.* ([1963] 2 All E.R. 575) was to the effect that negligence constitutes a tort whether it arises out of negligence misstatements made by a person who is not under any contractual or fiduciary obligation to give information or advice, or whether it arises out of the contractual relationship of solicitor and client, but Plowman, J., did not accept that argument—at any rate so far as the liability of a solicitor to his client for negligence is concerned. In *Bagot v. Stevens Scanlan & Co.* ([1964] 3 All E.R. 577) Diplock, L.J., sitting as an additional Judge of the Queen's Bench

22 See *Collector of Customs v. East India Commercial Co.*, [1963] A.I.R. S.C. 1124 and *I.-T. Commr. v. Amritlal Bhogilal & Co.*, [1958] A.I.R. S.C. 868, propounding that "as a result of the confirmation or affirmation of the decision of the tribunal by the appellate authority the original decision merges in the appellate decision and it is the appellate decision alone which subsists and is operative and capable of enforcement."

Also see *Mathew v. Dadi Bivi*, [1965] A.I.R. Kerala 29.

23 (1964) Mh. L.J. 143. In this case the landlord gave a notice to the tenant under s. 14 for non-payment of rent and filed an application for possession before the period of notice expired. The Aval Karkun decided the application in favour of the landlord,

but the District Deputy Collector, in appeal, holding that the application was bad, set aside the Aval Karkun's order. Relying on the judgment of Tarkunde J. in 64 Bom. L.R. 636, the Maharashtra Revenue Tribunal held in revision that tenancy would not be terminated on the expiry of the notice, or on the filing of the application, but when the Revenue Authority made an order for restoration of possession and that the application for possession was not premature. It accordingly set aside the order of the District Deputy Collector and restored that of the Aval Karkun.

24 (1961) Special Civil Application No. 067 of 1961, decided by Chainani C.J. and Mody J., on October 21, 1961 (Unrep.).

25 See Summary of the Address, (1965) 67 Bom. L.R. J. 33.

Division, applied the principles stated in the *Clark* case to the relationship between architect and client, thus approving *obiter* the view taken by Plowman, J., in respect of a solicitor's liability to his client. It may be of interest to note that Scottish and English law appear to differ on this point. In *Robertson v. Bannigan* 1964 S.L.T. 318, an action for damages for professional negligence against a solicitor, the Lord Ordinary, Lord Hunter, confessed himself "unable to accept the proposition that a client does not have a remedy in delict against a negligent solicitor in addition to such remedy as may be available to him in contract", and held that the pursuer was entitled to sue an action for damages for delict.—*L.J.*

REVIEWS.

Hawkins and Ryder on the Construction of Wills. By E. C. RYDER, M.A., LL.B., Barrister-at-Law. BOMBAY 2: N. M. Tripathi Private Ltd., Princess Street. LONDON: Sweet & Maxwell. Roy 8vo. Pages 418. Price Rs. 56.

THIS book is based on Francis Vaughan Hawkin's once famous *Concise Treatise on the Construction of Wills* which first appeared in 1863. The passing of the Law of Property Act, 1925, rendered a certain amount of matter dealt with by Hawkins obsolete and problems of construction arose as a result of this and other statutes. The present author had, therefore, to rewrite the text completely "with a view to making it a homogeneous work on modern lines". He has however retained certain passages from the original text which have received judicial approval and without impairing the conciseness of the treatment has exhaustively dealt with all the relevant construction cases. The author while acknowledging his indebtedness to *Jarman on Wills* has rightly claimed that he has paid particular attention to points which are not touched on or dealt with summarily in that book. Much new material has been added consequent on the passing of the aforesaid Act of 1925 and the Administration of Estates Acts of 1926 and 1959 and the legislation on adoption since 1926. The book will be invaluable to the Indian lawyer as an up to date and definitive statement of the general principles governing the construction of wills.

Stroud's Judicial Dictionary of Words and Phrases. Second Cumulative Supplement. Editors: LIONEL L. LOEWE, M.A. and CHARLES H. MOSS, M.A. Barristers-at-Law. BOMBAY 2: N. M. Tripathi Private Ltd., Princess Street. LONDON: Sweet & Maxwell Ltd. 1965. Roy 8vo. Pages 267. Price Rs. 40.

THIS cumulative supplement to the third edition of Stroud's Judicial Dictionary which was published in 1953 is brought down to May 1, 1964. Apart from words and phrases already in use, phrases like "abnormality of mind" and "automatism" which have recently come in vogue and judicially interpreted are included here. This is a welcome supplement to a work which has guided the Courts in the English speaking world for over six decades.

Criminal Law. By MICHAEL WALKER, M.A., LL.B. (Cantab.), Barrister-at-Law. BOMBAY 2: N. M. Tripathi Private Ltd., Princess Street. LONDON: Sweet & Maxwell Ltd. 1964. Demi 8 vo. Pages 185. Price Rs. 8.

THIS is one more useful addition to the publisher's Nutshell Series. The present brochure is a collection of leading criminal cases decided by the English Courts and is mainly designed for law students. Each case is prefaced by a short explanatory note on the law point involved in it and this is followed by a short statement of the facts of the case and the relevant extract from the judgment in which the law point is dealt with. Of particular interest to the Indian criminal lawyer are the reference to the M'Naghten Rules made in recent decisions and automatism as a defence of a charge of crime considered by the House of Lords in *Bratty v. Attorney-General for Northern Ireland* [1963] A.C. 386.

The
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JOURNAL

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SITABATI DEBI v. STATE OF WEST BENGAL.*

(An unreported judgment)

It may appear late in the day to call attention to a judgment of the Supreme Court delivered in December, 1961, but the continued citation in our Courts of the observations of Subba Rao J. in *Kavalappara Kottarathil Kochunni v. State of Madras*¹ that

"The decision of this Court in *Bhanji Munji's Case*² no longer holds the field after the Constitution (Fourth Amendment) Act, 1955."

shows that *Sitabati's case*³ has not become generally known to the profession. This is not surprising, for the judgment is not reported, and by a curious coincidence prints of that judgment were not received by Law Libraries which normally receive such prints. But for the reference to the print of *Sitabati's case* in *Sachindra Mohan v. State of W. B.*⁴ the decision might have escaped attention altogether.

Bhanji Munji's case decided that art. 31 of the Constitution and art. 19(1)(f) and (5) were mutually exclusive and that when property was requisitioned or acquired, the law fell under art. 31, and art. 19(1)(f) and (5) had no application. The decision was given on art. 31 before its amendment. After sub-art. (2A) was added to art. 31 it was clear that there were some kinds of deprivation of property which were not to be treated as acquisition or requisition. It would follow, therefore, that as regards such deprivation of property, art. 19(1)(f) would apply. The impact of art. 31(2A) was averted to, but was not considered, in *Bombay Dyeing & Manufacturing Co., Ltd. v. The State of Bombay*⁵ as the impugned law was enacted before the amendment. But on the assumption that money could not be acquired, the Court held a part of the law void under art. 19(1)(f) and (5). *Kochunni's case* did not deal with acquisition or requisition of property. It dealt with an unusual law, ostensibly for the purpose of removing doubts and purporting to amend the Madras Marumakkatayam Act, 1932, but in substance reversing a decree of the Privy Council and having the effect of giving to the respondents in that appeal rights in property which the Privy Council had held to be the exclusive property of the appellant. It was, therefore, unnecessary to make the wide pronouncement that the decision in *Bhanji Munji's case* no longer held the field. However, in *Sitabati's case* the validity of the West Bengal Land (Requisition and Acquisition) Act, 1948, was questioned on the ground, *inter alia*, that after *Kochunni's case*, *Bhanji Munji's case* no longer held the field and consequently the impugned law must satisfy the test of art. 19(1)(f) and (5). In rejecting this contention Sarkar J., delivering the unanimous judgment of the Constitution Bench, observed that before the amendment of art. 31 the Supreme Court had held by a majority that both cls. (1) and (2)

*By H. M. Seervai, Advocate General, Bombay.

1 [1960] 3 S.C.R. 887, at p. 916.

2 *The State of Bombay v. Bhanji Munji*, [1956] 1 S.C.R. 777, s.c. 57 Bom. L.R. 595.

3 *Sitabati Debi v. State of West Bengal*: Civil Appeal No. 322 of 1961. Judgment delivered

on December 1, 1961, by Sarkar J. for himself and Gajendragadkar, Wanchoo, Das Gupta and Rajagopala Ayyangar JJ.

4 [1963] A.I.R. Cal. 373, 377.

5 [1958] S.C.R. 1122, at p. 1131, s.c. 60 Bom. L.R. 731, at p. 739.

of art. 31 dealt with a law giving power to the State to acquire or requisition property. He added:

"*Kavalappara Kochunni's Case* held that after the amendment cl. (2) of Art. 31 alone dealt with acquisition and requisition of property by the State and cl. (1) dealt with deprivation of property in other ways. This case did not deal with a law of acquisition or requisition of property by the State but was concerned with a law by which deprivation of property was brought about in other ways, which law, it held, had to satisfy Art. 19 and the principle in *Bhanji Munji's Case* which could have saved that law before the amendment could not save it after the amendment. The observation in *Kavalappara Kochunni's Case* that *Bhanji Munji's Case* 'no longer holds the field' has, therefore, to be understood as meaning that it no longer governs a case of deprivation of property by means other than requisition and acquisition by the State. *Kavalappara Kochunni's Case* was not concerned with a law of requisition or acquisition of property governed by Art. 31(2), as it now stands, and did not decide that question". (Italics mine).

It will be seen that *Sitabati's* case is of far reaching importance since it "explained" the observations of Subba Rao J. which, but for such explanation, might have been treated by the High Courts as binding on them. *Sitabati's* case shows that *Bhanji Munji's* case holds the field as regards any law which provides for acquisition or requisition of property within the meaning of art. 31 of the Constitution.

ETHICS OF CAPITAL PUNISHMENT.*

CAPITAL punishment is a matter of regularly recurring debate and discussion as it concerns one of the vital issues of social awareness. In 1948 the British Labour Ministry got passed the abolition of capital sentence in the Criminal Justice Act by the House of Commons, but the Lords voted the measure out. Thereafter a massive Report of the Royal Commission on Capital Punishment was published in 1953. It was followed by a private member's Bill sponsored by Mr. Silverman in 1956 seeking to scrap the death penalty. Once again the House of Lords vetoed it. Next year the Homicide Act, 1957, was passed confining capital punishment to six types of murders viz., (1) murder done in course of furtherance of theft, (2) murder by shooting or explosives, (3) murder for preventing lawful arrest or effecting escape from lawful custody, (4) murder of a police officer acting in course of his duty or of a person assisting a police officer, (5) murder by a prisoner of a prison officer or a person assisting a prison officer, and (6) murder by a person who was convicted of another murder before.

For all these offences death is the sole penalty and there is no room for a lesser punishment. In effect this Act curtailed the scope of murder but enlarged that of manslaughter. Once again the new Labour Ministry is attempting to abolish the extreme penalty. In India too voices are periodically raised for and against the ultimate punishment. Recently the question has been brought into a sharp focus by way of reflex action to the uproar of the abolitionists in England. The circulation of a questionnaire on capital punishment by the Law Commission, India, has also stimulated a thoughtful interest in the controversy.

I came across a few articles advocating the abolition of the extreme penalty such as:—(1) Capital punishment abolition move in India (A.I.R. 1956 Journal p. 69); (2) Capital punishment, (1962) (2) Cr. L.J. Journal, p. 1) and (3) The Legal and Sociological aspect of Death Penalty (66 Bom. L.R. Journal, p. 153). The arguments in these articles and elsewhere in support of abolition may be grouped under three heads (A) Legal; (B) Sociological; and (C) Ethical.

(A). *Legal arguments for abolition.*

The foremost legal objection to capital punishment seems to be that there is a high degree of probability of miscarriage of justice. In a majority of

6 See the printed judgment.

*By H. S. Ursekar, M.A., LL.B., Presidency Magistrate, Bombay.

cases only the probable guilt is proved legally, which may be far from moral certainty. Accused arraigned for murder are sometimes condemned to capital punishment on the basis of a confession alone. However, the probability of a confession which may neither be true nor voluntary cannot be ruled out. Besides, an accused may be victimized as a result of mistaken identity, even on the testimony of an otherwise truthful witness. Sometimes witnesses may fail not only in their observation, but also in their memory. Lies may be told to wreak a vengeance on a criminal by persons acting in concert. Further the principle of vicarious liability of the members of an unlawful assembly given effect to by s. 149 of the Indian Penal Code may lead to injustice.

Now, this formidable array of arguments against capital punishment do appear *prima facie* attractive, but whatever is attractive may not be sound. Sometimes it is the other way about.

Generally speaking these legal objections pose a challenge to the vires of our criminal jurisprudence. The Indian criminal jurisprudence is rooted firmly in the British jurisprudence. The theory underlying the Indian Evidence Act is the theory of probability.

The definition of the word 'evidence' as given in s. 3 of the Indian Evidence Act is as follows:—

"Evidence means and includes—

(1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry; such statements are called oral evidence;

(2) all documents produced for the inspection of the Court; such documents are called documentary evidence".

It is an inclusive definition and not an exhaustive one. That is why it is considered to be incomplete as it does not include the whole material on which the decision of the Judge may rest. Evidence means not only the oral and documentary evidence but it also includes other matters before the Court, like the weapon of offence, blood-stained clothes of the deceased etc., known as the material or real evidence. Other matters before the Court also include notes of inspection of the scene of offence, demeanour of the witnesses etc., apart from the matters of which a Court can take judicial notice. This position is deduced from the definition of the word 'proved' as set out in s. 3 of the Indian Evidence Act.

"A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under circumstances of the particular case, to act upon the supposition that it exists."

The test is of probabilities upon which a prudent man may base his opinion.¹ In other words it is the estimate which the prudent man makes of the probabilities, having regard to what must be his duty as a result of his estimate.²

"The true question, in trials of fact, is not whether it is possible that the testimony may be false, but whether there is sufficient probability of its truth; that is, whether the facts are shown by competent and satisfactory evidence".

Thus the definition of the word "proved" in the Indian Evidence Act may be said to sum up the pith and substance of our criminal jurisprudence as it (1) enlarges the area of evidence, (2) legalizes the concept of probability, (3) furnishes the norm of a prudent man for the Judge in assessing and acting upon the evidence before him, and (4) makes way for the principle of benefit of reasonable doubt. If we were to accede to this legal objection it may be seen that, we will have either to revise our fundamentals of criminal jurisprudence or to face not-too-convenient a position of having a double set of standards of proof for capital trials and non-capital trials. The latter alternative

1 *Pershad v. The State*, [1955] A.I.R. All. 443.

2 *Government of Bombay v. Samuel*, (1946)

48 Bom. L.R. 746, s.b.

3 Greenleaf on Evidence, 5th edn., p. 4.

cannot be considered feasible as the definition of the word "proved" does not admit of any such double dealing. Further, such step would undermine uniformity of ultimate standards which is looked upon as an asset for any legal system. If, on the other hand, we are to think of reorientation of our criminal jurisprudence it will have to be on realistic and rational lines and not on idealistic lines. We will have to consider, that if even under the present liberal legal system equipped with such effective safeguards like the presumption of innocence of the accused and the consequential saddling of the prosecution with the burden of proof of the guilt of the accused, the proof beyond reasonable doubt, the benefit of doubt, we are still apprehensive of the possibility of a miscarriage of justice, this lack of confidence cannot be restored by any amount of further liberalisation of the rules of evidence or the enlargement of the safeguards.

Despite the existing defensive safeguards the percentage of the guilty being acquitted in contested cases may be regarded as a rather high one by the State, and hence any further enlargement of these safeguards would perhaps jeopardise the enforcement of law and order which is the primary duty of a State. It is submitted that the present system is equal to the task of assuring a normal delivery of justice and preventing its miscarriage. As to the objection to the capital punishment on the ground of the working of the principle of vicarious liability as provided for in s. 149 of the Indian Penal Code, by and large, whenever evidence is found to fall short of establishing with certainty as to who had dealt the fatal blow, the lesser punishment is invariably imposed by the Courts on the guilty member of the unlawful assembly.

As to wrong conviction founded on an involuntary confession, sufficient safeguards are already provided in order to test whether a confession is true and voluntary. The dangers of mistaken identity and of false testimony due to personal vendetta are largely eliminated by the system of cross-examination of witnesses. Cross-examination often works as an Ithuriel's spear and exposes the tinsel of untruth and reveals the gold of truth. In the majority of cases it hits the heel of Achilles in the testimony of the witness.

Thus the legal objections to the capital punishment are of little consequence if we have an abiding faith in the rule of law and the machinery provided for enforcing it.

(B). *Sociological arguments for abolition.*

The main grievance of the abolitionists from the sociological point of view is that many civilised countries in Europe have abolished the death penalty as follows:—

1. Finland: last execution 1826 (except Revolution 1918).
2. Holland: last execution 1860 (abolished 1870).
3. Belgium: last execution 1863 (except war period).
4. Denmark: last execution 1892 (abolished 1930).
5. Iceland, 1944.
6. Italy, 1948.
7. West Germany, 1949.
8. Austria, 1950.

Besides some of the States of the U.S.A. have also eliminated capital punishment. It is, therefore, proper for India to fall in line with these advanced countries, and to scrap the death penalty.

It is contended by the abolitionists that man is a rational being and that the ultimate penalty is irrational. This is one of the most vulnerable arguments advanced by the abolitionists. The irrationality of the death penalty, according to them springs from its inhumanity. This argument is based more on sentiment than on reason. There is no room for sentimentality in rationalism. Now, only because some European countries and American States have thought it fit in their own circumstances to abolish the capital punishment and because England is on her way to scrap capital punishment it would be irrational

to argue that India should also follow suit blindly. Rationalism is rooted in the faith on one's own conviction. Hence, rationalism rules out arguments by analogy or precedent. Rationalism means to think right and to do right in response to one's own power of independent judgment. Shankaracharya, one of the most remarkable rationalists of India, said that he would not accept that fire is cold, despite a hundred texts of the Vedas. Imitation is an arch enemy of rationalism. Independence of judgment is the life breath of rationalism. Therefore, we will have to see whether the conditions obtaining in India at present justify such a step. It is submitted that Indian conditions do not justify such a step where illiteracy, ignorance and poverty mould the passions of men.

One of the arguments of the sociological thinkers is that the present mode of execution by rope is painful. The question of the mode of execution is one of detail which can be settled once we agree upon the retention of capital punishment.

It is urged that capital punishment is based on an unwholesome spirit of retribution which has no place in modern civilised society. It is true that *lex talionis* or the principle of an eye for an eye and a tooth for a tooth is an anachronism in a modern State. If capital punishment were to be meted out to every murderer indiscriminately without regard to the *mens rea* or the circumstances under which the murder is committed, this argument would have held some water. But it is well-known that Courts do not impose the death sentence in every case of conviction for murder. This fact alone would show that the death penalty is not a matter of retribution.

All homicides are not culpable. Some homicides are justifiable and are permissible and they are saved by the General Exceptions to the Indian Penal Code. (ss. 76 to 106). Death caused by accident is not punishable. Death caused by a person of unsound mind is also not punishable. Take the case of four surgeons A, B, C and D, who cause death under different circumstances and meet with different consequences. Surgeon A, while operating in good faith, with the patient's consent, to save the life of the patient causes his death as a result of the patient's failure to stand the operation, but not intending to cause his death. Here surgeon A commits no offence. He is exonerated under s. 88 of the Indian Penal Code as he has no intention to cause death. Surgeon B, on the other hand, who causes death of a patient by professional negligence in performance of the operation, say, by leaving the scissors inside the patient, will be liable for punishment under s. 304A, Indian Penal Code, which carries the maximum imprisonment of two years. Surgeon C causes death with intention or knowledge to cause death but while he is deprived of the power of self-control by grave and sudden provocation, would be guilty under s. 304, Indian Penal Code of culpable homicide not amounting to murder and may be awarded 5 to 10 years of imprisonment. Surgeon D, who intentionally causes the death of a person, say of his professional rival, will be guilty of murder under s. 302, Indian Penal Code, and would be liable to the death sentence or imprisonment for life-term. Thus, in the cases of surgeons B, C and D the homicides were culpable, but in the case of surgeon A it was innocuous. It will be seen that homicides are both permissible and prohibited. The graded consequences of a homicide as illustrated above nullify the argument that capital punishment is a product of an unseemly spirit of retribution. It is far from it. It is not in the case of every murder that the extreme penalty is imposed by the Courts. Capital punishment on the other hand is imposed only after anxious thought and exercise of judicial discretion; otherwise every case of murder would have brought in its wake a death sentence invariably. It is clear, therefore, that it is not blind retribution, but judicial discretion is exercised by the Courts in imposing the utmost penalty. Hence capital punishment cannot be condemned as legalised vengeance.

It is felt that capital punishment has failed to protect society and hence is infructuous as murders have not disappeared. If this argument were to be

taken seriously the whole body of penal laws would have to be scrapped. In spite of stringent punishments prescribed, robberies and rapes, assaults and abductions, misappropriations and murders are commonplace crime news. Doctors do not prevent diseases, they cure them. Despite the medical profession which is as old as the Aswinikumars, diseases are not obsolete. Crime and disease form a perennial part of the processes of life. Law can only curb crime and protect society from chaos. Law has never and will never root out crime so long as human nature remains what it is.

According to the sociologists the deterrent object of capital punishment is much magnified and that to a criminal, death penalty does not act as a deterrent. In other words death has no fear for the death dealer. It is argued that 80 per cent. of murders are committed in a fit of frenzy or upon sudden quarrel or on grave and sudden provocation and hence capital punishment has no fear for the majority of the murderers. Now, in the first place, this percentage is a guess work. Secondly, even in such cases death penalty has a deterrent effect because every miscreant knows the capital consequences of his extreme act of violence. It does deter him and others.

It is pointed out that murders have not increased in the countries which have abolished capital punishment, nor have they decreased in countries which stick to the gallows. Now it is conveniently ignored here that some countries have restored capital punishment after experiencing the unsocial results of abolition thereof. The latter contention is already answered, while as to the former it may be noted that many arguments of the sociological school are bolstered up by statistics, as for example, as to the ratio of premeditated to the provoked murders, of the shooting up or down of the murder rate as a result of abolition or retention of capital punishment. The utility of statistics in social sciences cannot be denied. But the accuracy of conclusions based on figures in a social science *qua* a physical science is a matter not free from debate. In physical sciences the hypothesis is that of uniform behaviour of natural phenomenon under a given set of circumstances. This cannot be said with the same degree of certainty regarding social-science-surveys as they are dealing with a material which is as vagarious and volatile as man. The theory of statistical data is grounded in the concept of probability, working through the law of averages. It is also based on the concept of frequency of recurrence of events. Our degree of belief is based on an estimate of situations founded on past experiences collected together. Besides, statistical data is likely to be vitiated by random selection of samples. The possible bias of the investigators in collecting the data on the one side is also a factor to be reckoned with. It is said that statistics have a knack, like a lady's skirt, to expose the extremes and to conceal the essential. Hence too implicit a reliance on statistics in social sciences like law may not be safe and may lead to misleading conclusions. That is perhaps the reason why the Royal Commission on Capital Punishment appointed in England, after considering the statistical data, concluded to the following effect:

"There is no clear evidence to prove that the abolition of capital punishment has led to an increase in the homicidal rate or that its re-introduction has led to a fall."

The abolitionists strenuously canvass that India is a Welfare State which has recognized the principle of probation of offenders long ago. Most of the criminals are illiterate people of indifferent understanding and hence they deserve rather to be cared for and cured than condemned. A murderer is a social misfit. A delinquent is like a diseased limb of society and hence society should not amputate it but should cure it and shape it into a limb useful to society. This argument is apparently unanswerable, but really fallacious. It is well-known that some diseases are incurable and amputation is the specific remedy. Take a case which happened some years ago in the Bombay State. Two brothers found six persons, men and women from a scheduled tribe, picking grain from their standing crops. They caught and tied the thieves to trees and hacked them to pieces. One of the brothers lodged a false complaint with the police that he

had come across six persons murdered in his field. Ultimately these barbarous brothers were tried for murder and hanged. Can it be maintained in the face of these facts that these two brothers could have been cured and redeemed, in the spirit of picking up blossoms from the dust? It would have been a case of misplaced mercy.

(C) *Ethical arguments for abolition*

The moralists take exception to capital punishment on the ground that it militates against human conscience. It is urged that life is sacred as it can be created by the Supreme Creator alone. Hence man has no right to take away something which he cannot create. Man i.e. the State has thus no right to take away human life. Now there are a number of things in nature which man cannot create and yet he destroys them. Further, in theory, the life of a citizen belongs to the State. That is why man has no right to put an end even to his own life. Attempt to commit suicide is made an offence on this principle. The State has a paramount right over the lives of its citizens and the land within its territory. Population and territory are, therefore, regarded as essentials of a State along with Sovereignty. How the State can be denied the right to take away something which belongs to it? In fact right to destroy a thing is the *sine qua non* of the right of ownership. Hence it is not correct to argue that the State has no right to take away human life by virtue of the rule of law. Thus in the face of the sovereignty of the State the conscientious objection to the death penalty loses much of its force.

Another argument is that the death penalty is irrevocable and a decision discovered to be wrong after the execution of the highest sentence cannot be rectified as the convict is then beyond the power of man. The flame of life once put out cannot be rekindled. With a number of judicial appeals and executive memorials cases of hanging of innocents are extremely rare in modern times. Secondly, on the question of restoration of the damage done by the execution of death sentence, it may be asked as to how the man who has suffered imprisonment can be restored to his own sense of self-respect, even if he is found to be innocent later on. His reputation and liberty are lost irretrievably; what compensations can wipe out his mental torture?

The ethical idealists contend that death penalty is a source of sin for the Judge and the State. It is the duty of the King i.e. the State to protect the subjects. No sin can attach to the Judge or the State for performing their duty. In fact they will incur sin if they fail to do their duty. Punishment is deemed to be a sort of expiation of sin. Manu says men who are guilty of crime and have been punished by the King go to heaven.⁴

It is further contended that the moral law requires that sin should be destroyed and not the sinner. Now murder is one of the Mahapatakas as regarded by the Hindu Dharma Shashtra. In case of a murder the sin and the sinner are inseparable like the body and its shadow, and hence the former cannot be destroyed without destroying the latter.

Capital punishment is condemned as the State murder or judicial killing. Now an individual has a right to voluntarily cause death in exercise of his right of private defence (ss. 96 to 106, Indian Penal Code). Section 100 of the Code prescribes that in case of apprehension of assault with the intention of committing murder, rape, kidnapping, abduction or wrongful confinement etc., a person can voluntarily cause death of the miscreant and yet the man is not guilty of any offence, much less of murder as the death of the wrong-doer is caused in the exercise of the right of private defence (s. 96, Indian Penal Code). Under s. 103 of the Penal Code the right of a person to voluntarily cause death of the wrong-doer is prescribed and it extends to cases of robbery, house-breaking by night etc. Now if a citizen can voluntarily cause death with impunity in defence of life, liberty or property, not only that of his own but that of any other person, what justifiable objection can there be for the State to

4 Manu, VIII 318, Vasistha 19, 45.

exercise the right to voluntarily cause death of the wrong-doer in defence of life, liberty and property of its subjects. Hence it is not open to the abolitionists to urge the scrapping of the capital punishment unless they succeed first in scrapping the right of private defence. Therefore, it is illogical to deny the right to voluntarily cause death with justification to the State which is a sovereign body, when that right is available to the citizen of the State.

It is pointed out that to err is human and to forgive is divine, and hence a murderer must not be hanged. Now even if he is sentenced to a life-term we do not forgive him but we are punishing him, though by a lesser degree of punishment. Forgiveness means freedom from punishment, it does not admit of any degree of punishment, it means absence of punishment. The only form of punishment based on the spirit of forgiveness is by binding over the accused. I do not think that even the abolitionists would go to the extent of approving of a probationary treatment to a murderer.

It is even urged that the principle of non-violence is the main feature of the moral and spiritual values of India. But the death sentence passed by the Court is in the discharge of the duty of the Judge. Duty is the most sanctified thing in the world. Wordsworth says that duty is the stern daughter of the voice of God.

There cannot, therefore, be any valid ethical objection to capital punishment. Thus, on a consideration of the legal, sociological and ethical arguments advanced by the abolitionists it will be seen that they are based more on sentiment and less on reason. They are more ideal than real, more psychological than logical and carry more heat than light.

The State is a sovereign body. The State has now taken the place of the ancient King. The Creator created the King for the protection of the world and it is the duty of a king to protect the subjects⁵. He is to punish the wrong-doer. Danda or punishment is one of the seven elements of sovereignty. It is out of the fear of punishment that people dare not swerve from their duty. Mahabharata says that people do not commit wrongs due to fear of punishment from the king⁶.

Kautilya and Manu say that if the King does not impose punishment it gives rise to a condition of anarchy viz., might is right.⁷ [*Matsyanyaya*] Kautilya warns that a King who metes out soft punishment is insulted by his people.⁸ Manu, Kautilya, Yajnyavalkya, Vishnu, Vriddha-Harita and other ancient law-givers prescribe the death punishment. It will be, therefore, seen that having regard to the present conditions of India as well as the fundamentals of the capital punishment it should not be done away with, for even in a Social Welfare State the police function of the State is indispensable, till we reach the ideal stage of the withering away of the State.

POWERS OF THE MANAGER: AN UNEXPECTED DICTUM IN THE SUPREME COURT.*

OBITER DICTA in the ordinary way are worth as much as the personal reputations of the Judges who utter them. But the *obiter dicta* of the Supreme Court are in another category. Inferior Courts are bound to treat them with the greatest respect, and indeed it has been held that they are actually bound by them.¹ An *obiter dictum* of J. R. Mudholkar, J. in *Balmukand v. Kamla Wati*,² an appeal from the High Court of the Punjab, will cause many eyebrows to be raised, when, as is inevitable, sooner or later an enterprising advocate uses the case as support. Otherwise, perhaps, this rather silly little case

5 Manu VII 3.

6 Mahabharata, Shantiparva (15, 5/6).

7 Kautilya 14; Manu VII 20.

8 Kautilya I, 4.

*By Dr. J. Duncan M. Derrett, London.

1 See *B. T. Bhosle v. M. S. Anoy*, [1961]

A.I.R. Bom. 29; *Kalyan Singh v. Baldev Singh*, [1961] A.I.R. H.P. 2; *Lalu Jela v. State of Gujarat*, [1962] A.I.R. Guj. 250. V. K. Sircar at [1962] A.I.R., Jour., 13-23.

2 [1965] 1 M.L.J. 6, S.C.

would never have been heard of. It was precisely because of this dictum that the editor of the Supreme Court Journal thought it worthwhile to print a report, and no doubt he was quite right, provided that a caveat is first entered from some other quarter.

The plaintiff had in stages bought what amounted to 17/20ths of a particular plot of land, and he wanted the remaining 3/20ths. This was owned by a joint Hindu family apparently governed by Hindu law, and so by Mitakshara law.³ The family consisted for practical purposes of several brothers, one of them being the manager. The plaintiff made an agreement with the manager, and paid a sum as earnest money, that he should buy that plot at an advantageous figure, an appreciable amount above the then market price of the land, evidently because of the convenience which such a purchase would afford him. But the manager did not execute the sale deed, either because he was rebuked by his brothers for what he had done, or because the value of the land was changing or because there had been a genuine misunderstanding—it remains unclear. The plaintiff instituted a suit for specific performance of the contract. All the coparceners objected. He failed, and his failure was confirmed ultimately in the Supreme Court.

The reasoning which constitutes the ratio is entirely acceptable and calls for no comment.^{3a} A manager has no power to sell joint family property, even at a good price unless certain conditions are fulfilled. In the absence of necessity, there must be positive benefit to the family or its estate: in other words some distinct inconvenience must be obviated, some loss averted, or some additional advantage obtained. Land in particular cannot be sold when there is no intention specifically to invest in other land or, if possible, in equally secure and more profitable sources of income. Though the manager has the freedom to act as a prudent owner, he cannot bind the family unless a distinct and certain advantage is thereby obtained. The cases cited in the Supreme Court judgment (*K. Subba Rao and Mudholkar, JJ.*)⁴ and others which could be called upon to illustrate the position,⁵ make it abundantly clear that though the manager is not confined to defensive acts, he cannot sell land belonging to the family merely because he can obtain a good price. In this family there was plenty of money, there was no necessity, there was no proposal to invest in a better security, and there was no detriment to the family by reason of its remaining in ownership of the land in question. The act of the manager was bad, and the plaintiff was reduced to a personal remedy against his alienor, who had acted without authority of law.

One of the cases discussed was that of *Sital Prasad Singh v. Ajab Lal Mander*,⁶ in which the learned Chief Justice approaches the rare but possible case where an irregular alienation may be authorised by the concurrence of the coparceners (there being, of course, no minor coparcener nor one in the womb at the time).^{6a} At pp. 9-10 of our present judgment his Lordship, Mudholkar, J., says:

"...Apart from that the adult members of the family are well within their rights in saying that no part of the family property could be parted with or agreed to be parted with by the manager on the ground of alleged benefit to the family without consulting them. Here...there is no allegation of any such consultation."

3 There is no trace in the judgment of any contention that the parties were governed by customary law.

3a *Hemraj Dattubawa v. Nathu*, (1935) 59 Bom. 525; *Sengoda v. Muthuvelappa*, [1955] A.I.R. Mad. 531, s.c. [1955] 2 M.L.J. 331; *Nirmal Singh v. Satnam*, [1960] A.I.R. Raj. 313.

4 *Jagat Narain v. Mathura Das*, (1928) 50 All. 969, s.c. [1928] A.I.R. All. 454 (F.B.); *Sital Prasad Singh v. Ajab Lal Mander*, (1930)

18 Pat. 306; *A. T. Vasudevan, In the matter of* [1949] A.I.R. Mad. 260 (relying on *Sellappa v. Suppan*, [1937] Mad. 906).

5 *Ram Nath v. Ohiranjil Lal*, [1935] A.I.R. All. 221, F.B.; *Medikenduri v. Venkatayya*, [1953] A.I.R. Mad. 210, s.c. [1952] 2 M.L.J. 484.

6 (1939) 18 Pat. 306.

6a In which case, of course, the alienation is not that of the manager but that of the coparcenary body itself.

This would appear to make it the law that even in cases where the manager sees that benefit would accrue to the family from the sale of family property (whatever its nature) the manager must consult the coparceners and obtain their agreement before his transaction, however much in accordance with the powers allowed to him by the Mitakshara law, will bind them and he can give a good title to strangers. This is not the Hindu law, and, so far as this writer knows, never has been the Hindu law during the British period and after, except in the State of Mysore:⁷ and it is not beyond doubt whether it is still the law in Mysore or any part of that State.

The whole point of having a manager is that his co-owners shall not be bothered with details of policy or business. If they are dissatisfied with his management they can separate from him; if they distrust him they must do this, or hold out to strangers that notwithstanding their distrust they will stand by his actions, provided, of course, that the latter are within the Hindu law. It is up to the manager to use his discretion properly, and, when he has done so, to act upon it, or he is no manager. If what is suggested in this *obiter dictum* is correct we should have introduced into Mitakshara law the dreadful mixture of insecurity and intrigue which has been eating up the Malabar joint family these many years. In Kerala the *karnavan* or manager is often deposed, and he could be reappointed subject to what is called a *karar*⁸ whereby his powers are delimited and defined. If he oversteps these—and a good example of such a restriction would be a power to alienate only with the prior consent of a two-thirds majority of his co-owners—the alienation may be upset, no matter how good the excuse for the act or how pressing the need. Alienees have to obtain information of the terms of the *karars* if they want to be safe in dealing with the *karnavan*, and they cannot deal with anyone else, unless the *karnavan* is deposed and another appointed. The present writer doubts whether anyone in Maharashtra would like to convert his family law into a Malabar-type system. On the contrary Maharashtrians will probably be reassured to be told that, notwithstanding this dictum, the power of manager to act, in proper cases, without consulting anyone survives in full vigour. The dictum was, it is submitted, not merely *obiter* but also *per incuriam*.⁹

GLEANNINGS.

THE DUTY OF CARE RE-EXAMINED

WHEN Lord Atkin propounded his famous "neighbour principle" in *Donoghue v. Stevenson* ([1932] All E.R. Rep., at p. 11), he was attempting to define the general criterion or test for determining whether or not a duty of care exists in a given fact situation. The attempt had been made earlier by Lord Esher, M. R., in *Heaven v. Pender* ((1883) 11 Q. B. D., at p. 509), and again in *Le Lievre v. Gould* ([1893] 1 Q.B., at p. 497). Indeed as Mr. Fifoot points out (*History and Sources of the Common Law*, pp. 164-165) Lord Ellenborough, C.J., referred to the existence of a duty of care as early as the beginning of the 19th century (*Glovett v. Radnidge*, (1802) 3 East at p. 69).

Lord Atkin's attempt was successful in that it quickly gained general acceptance, unlike those of his predecessors. It is now indisputable that the law imposes on each individual a general duty to avoid causing harm or injury to others through careless conduct. In *Donoghue v. Stevenson* a stone was cast on to the waters of the law, perhaps without realising the circles to which its outer ripples might reach. Undoubtedly there has been a continual extension of the ambit of the general duty of care, albeit that duty is not unlimited in scope. One of the most interesting post-War developments in the law of tort has

⁷ Derrett, *Introduction to Modern Hindu Law*, § 442.

⁸ Derrett, § 584.

⁹ Derrett, § 12.

been the way in which the principle of liability for negligence has been gradually extended. True it is that "there is still some uncertainty as to how far the neighbour principle does extend" (see *Salmond on Torts* (13th edn.), at p. 410), but the last few years have been a period of vigorous judicial development in this field.

The most recent case is *Haley v. London Electricity Board* ([1964] 3 All E.R. 185) where the House of Lords considered whether one has to adapt one's conduct so as to guard against dangers to the blind in general circumstances. The Court of Appeal (Lord Denning, M.R., Donovan and Danckwerts, L.J.J.) held that there was no such duty ([1963] 3 All E.R. 1003), and the kernel of the decision was summed up by Lord Denning, M.R., in these words:

The defendants do not have to cater for the man who walks with his head in the air and does not look where he is going. He is such an exceptional person that they need not provide for him. If he runs into (an obstacle) it cannot be helped. It is not their fault. Likewise, I am afraid I must say, the defendants do not have to provide for the blind, at any rate in places where they have no particular reason to expect blind persons to be. It would be too great a tax on the ordinary business of life if special precautions had to be taken to protect the blind".

The proceedings arose out of an accident which occurred in 1956. The appellant, a registered blind person, was accustomed to walk from his home in Woolwich, using his white stick, to an omnibus stop where he caught an omnibus to take him to work. The respondents had dug a trench some 60 feet long lengthwise along the pavement. To guard the trench the workmen had put a punner-hammer (a long-handled instrument used to ram down earth) across the pavement, with its handle resting on some railings. The other end of the trench was protected by a similar arrangement with a pick and shovel, the purpose of both obstacles being to prevent pedestrians from falling into the trench. There were sign-boards at each end of the trench stating that there were road works ahead. The appellant was using reasonable care, but his stick failed to detect the arrangement, and he tripped over the handle of the punner-hammer and fell, becoming completely deaf as a result of the fall.

The House of Lords (Lord Reid, Lord Morton of Henryton, Lord Evershed, Lord Hodson and Lord Guest) reversing the Court of Appeal held unanimously that the appellant was entitled to succeed in his action for negligence. Lord Reid was of opinion that Mr. Haley was entitled to succeed at common law. Indeed, he said, the respondents' precautions were only "just sufficient to attract the attention of ordinary people with good sight exercising ordinary care". The respondents contended that in carrying out works on the city pavement they were not bound to have in mind the needs of blind or infirm pedestrians, and they relied on *Pritchard v. Post Office* ((1950) 114 J.P. 370). There, Post Office workmen had surrounded a trench with a light fence, and a blind person had stumbled through the fence and was injured. The case was distinguishable because the sole cause of that accident was the plaintiff's contributory negligence, although both the county court Judge and the Court of Appeal based their decision on there being no special duty to protect the blind or infirm.

In any event, as Lord Reid pointed out, that was an *ex tempore* decision, and in any case was not binding on the House. He concluded with his characteristic forthrightness by saying,

"I can see no justification for laying down any hard and fast rule limiting the classes of persons for whom those interfering with a pavement must make provision. It is said that it is impossible to tell what precautions will be adequate to protect all kinds of infirm pedestrians or that taking such precautions would be unreasonably difficult or expensive. I think that such fears are exaggerated, and it is worth recollecting that when the Courts sought to lay down specific rules as to the duties of occupiers the law became so unsatisfactory that Parliament had to step in and pass the Occupiers Liability Act 1957. It appears to me that the ordinary principles of the common law must apply

in streets as well as elsewhere, and that fundamentally they depend on what a reasonable man, careful of his neighbour's safety, would do having the knowledge which a reasonable man in the position of the defendant must be deemed to have".

The fallacy in the respondent's argument that it was not reasonably foreseeable that a blind man might pass that way, or that the chance of that happening was too remote, lay in the fact that it is common knowledge that there were a great many blind persons throughout the country, and this fact had to be taken into account. In the same way, the appellant tendered evidence showing that other public undertakings, such as the Post Office, always take into account the needs of blind people in guarding their excavations.

The remaining four members of the House delivered concurring judgments, although Lord Evershed confessed to having greater difficulty in reaching the same conclusion as his brethren. He pointed out that there was a dearth of authority on the point, although the Scottish case of *M'Kibbin v. Glasgow Corporation* 1920 S.C. 590 gave support for the view that a duty exists to have regard to the needs of blind pedestrians. There, the plaintiff was nearly blind, and stepped into a water hydrant on the pavement, from which the cover had been removed. She was seriously injured by falling against a turn-key which protruded some three feet above the pavement, and was successful in her claim for damages. The Court of Session made observations about the duty of care towards the blind and infirm, and in particular Lord Salvesen said:

"The streets of any city are open to be used by persons of more or less defective eyesight, hearing, and capacity and I think, as a general proposition, that (the defendants) must take note of that fact and, if they are guilty of negligence, they cannot escape the consequences by saying that a more vigilant person than the one who was injured would in all probability have escaped injury".

Perhaps that was the crux of the matter there: the defendants had been guilty of negligence by any standard.

Too much must not be read into this decision of the House of Lords for *Haley* was ultimately decided on a question of fact. The punner-hammer was not an adequate or sufficient warning to a blind person, because of its position. The basic principle remains that in order to support an action for negligence, the plaintiff must show that he has been injured by the breach of a duty owed to him by the defendant to take reasonable care to avoid that injury. Mr. Haley was able to do that, for he could show (to use the jargon of jurisprudence) that a "duty situation" existed. As professor James has aptly observed, *Law of Torts* (2nd edn., p. 155), the concept of the duty of care "serves as a useful negative test by which the possibility of establishing negligence can be excluded", the standard of care required always being "reasonable care in all the circumstances" (*per* Lord Somerville in *Cavanagh v. Ulster Weaving Co., Ltd.* [1959] 2 All E.R., at p. 752).

A few months before *Haley* another aspect of negligence was considered by the House of Lords in *Hughes v. Lord Advocate* ([1963] 1 All E.R. 705) which shows that the test of reasonable foreseeability does not extend to a requirement that the precise way of causing the damage should be foreseeable. The tragic facts were that a child was seriously injured by burning after an explosion caused by a paraffin lamp left by an open and unguarded manhole, which the infant knocked or lowered into the hole. In an action for damages for negligence, the defendants were liable, because although the exact manner of the injury being caused and turn of events was not predictable, it was reasonably foreseeable that an accident of the type that did occur might happen. As Lord Jenkins said, "the distinction between burning and explosion is too fine to warrant acceptance".

The supposed *absence* of duty owed by an occupier of premises to a trespasser raises problems of its own. The matter was considered recently by the Court of Appeals in *Videan v. British Transport Commission* ([1963] 2 All E.R. 860), and more recently still by the Judicial Committee of the Privy

Council in *Commissioner for Railways v. Quinlan* ([1964] 1 All E.R. 897). In the latter case, the respondent was injured when trespassing on a private level crossing, his presence on the line being unknown to the appellant occupier. The long established principle has been that a person trespasses at his own risk, and in order for liability to attach to the occupier "there must be some act done with the deliberate intention of doing harm, or at least some act done with reckless disregard for the presence of the trespasser" (*per* Lord Hailsham, L.C., in *Robert Addie & Sons (Collieries) v. Dumbreck* [1929] All E.R. Rep., at p. 4).

Here the respondent contended that the extent of an occupier's duty towards a trespasser had been extended by *Donoghue v. Stevenson*. Viscount Radcliffe, delivering the opinion of the Board, dealt with that point quite shortly, when he said,

"what the law does not admit however is that a trespasser, while incapable of being described otherwise than as a trespasser should be elevated to the status of an ordinary member of the public to whom, if rightfully present, the occupier owes duties of foresight and reasonable care. It does not alter a trespasser's description merely to christen him a 'neighbour'".

On the other hand, in *Videan* a majority of the Court of Appeal (Lord Denning, M.R., and Harman, L.J.) suggested that "the circumstances may be such that (the occupier) ought to foresee the presence of a trespasser; and then the duty of care extends to the trespasser also". Pearson, L.J., preferred a more conservative approach:

"The trespasser is a neighbour, though an underprivileged neighbour. It must be said, both on principle and authority, that the duty of care owing to a trespasser by the person who knows of, or ought reasonably to anticipate, his presence is radically different from the duty of care owing to a lawful visitor... (the occupier) owes to the trespasser a duty of care which is substantially less than (that owed) to a lawful visitor, because the duty to a trespasser is only a duty to treat him with common humanity...".

The Judicial Committee reasserted the traditional view, and it would seem unrealistic to hold that an occupier owes the statutory "common duty of care" to trespassers. It may well be that liability for injury to trespassers does rest upon foresight, for Lord Hailsham's "reckless disregard" test may be regarded as merely another way of saying that there is *some* duty of care to trespassers based on foreseeability. This seems largely a matter of linguistic analysis.

To sum up, the appellate Courts in recent years appear to have adopted a very flexible approach in negligence cases. A conservative approach was at first discernible in applying Lord Atkin's *dictum* in *Donoghue v. Stevenson*, but it is now clear that the problems of duty, care, and breach and remoteness of damage are all at the forefront of judicial development. There are and always will be circumstances in which no duty of care exists, unless we move towards the insurance principle of liability in tort, but as Lord Evershed stated at the conclusion of his judgment in *Haley's* case the common law rules have "the characteristic that in general they can never be said to be fully limited by definition, but have rather the capacity of adaptation in accordance with the changing circumstances of succeeding ages."—*L.J.* (Vincent Powell-Smith).

CONNIVANCE AT ADULTERY

A HUSBAND who encourages his wife to commit adultery commits no less a matrimonial offence than the adulterers themselves, and can expect no relief from the courts. But does the initial wrong persist, so as to shut him out from the remedy of divorce for any subsequent act of adultery, however remote? Can he never repent of his connivance, offer his wife a reconciliation, and thus wipe out his matrimonial offence, so that any later adultery by her will give him grounds for divorce? The rigid attitude of the ecclesiastical courts seems to have been that nothing less than full reconciliation would wipe out the

connivance, but in *Godfrey v. Godfrey and Wall* [1964] 3 W.L.R. 524, the House of Lords has made it clear that the modern view is more relaxed. The facts are not very important—indeed they may be misleading—but from the judgments some guiding principles can be spelt out. First, connivance can spend itself, either by lapse of time or by the subsequent acts of the parties, and full reconciliation amounting to condonation is not the test. Secondly, since the conniver is a wrongdoer in the eye of the law, the burden is on him to show that his connivance has spent itself. Most important of all, each case depends on its own facts: the test to be applied is, was the connivance the cause of—or one of the causes of—the adultery in question, or would that adultery have taken place irrespective of the connivance? In other words, connivance is something like conduct conducing; to be a bar to relief it must be the *causa causans* of the adultery. If these tests are applied to the facts in *Godfrey*, many will no doubt feel that the petitioner was most unfortunate in failing to get a decree. Their lordships were sympathetic, but not prepared to interfere with the trial judge's finding that words spoken in a moment of great stress, and under the influence of drink, were sufficient encouragement to excuse the wife's adultery more than six months later. The relaxation of the law on connivance is in this case cold comfort for the petitioner.—S.J.

RES NULLIUS?

THE House of Lords decided last week (*Brown v. Inland Revenue Commissioners*, 108 S.J. p. 636) that deposit interest earned on a solicitor's clients' account does not belong to the solicitor, although they did not specify to whom it does belong. The Council of the Law Society gave an opinion in 1958 (55 *Law Society's Gazette* 210) to the effect that a solicitor may properly place clients' moneys on deposit with a bank and that it is permissible for him to retain for his own benefit the interest accruing from such deposit, provided that if he places on deposit a specific sum for a named client or clients, the interest arising therefrom must be credited to the client or clients and not to the solicitor. Lord Reid recognised that the decision (which affirmed the decision of the Court of Session: see 107 Sol. J. 705 and 718) might have rather wide repercussions and might give rise to some practical difficulties: this is the understatement of the week. We do not know how many solicitors place part of their clients' account on deposit, but three solutions to the problem suggest themselves. The first is to follow the example of many firms and keep the office account at a low level with the tacit agreement that no charge is made so long as the level of the client's account is kept correspondingly high. We believe that it is possible to run an overdraft at a cheap rate of interest on the same basis. The second is for a firm, which has so much clients' money in and out that this first suggestion does not appeal, to obtain the decision of the court as to whom the interest does belong, preferably with the financial backing of the Law Society. The third course is to devise some form of contract with each client whereby sums to a certain amount held by a solicitor for less than a certain time may be placed by him in his own deposit account. We think that this might well give rise to difficulties. The case reached the House of Lords on the narrow point of whether the interest was earned or unearned in the hands of the solicitor: they held that it was not his income at all. Sometimes it is simpler to let sleeping dogs lie. The ultimate solution may well be legislation to provide that to some extent solicitors the bankers.—S. J.

QUALIFIED PRIVILEGE

THE letter which was the subject of the action for defamation in *Egger v. Davies* (*The Times*, 22 July, 1964) had been written on a privileged occasion. It was the product of a committee. Some of those responsible were actuated by malice, others were not; and the question which confronted the Court of Appeal

(Lord Denning M.R., Harman and Davies L.J.J.) was whether or not the latter were in a position to rely on privilege. The court, reversing Marshall J. (*The Times*, 25 February), who had relied on *Smith v. Streatfeild* (109 L.T. 173; (1913) 3 K.B. 764), held that they were. The Master of the Rolls referred in the course of his judgment to the following passage in *Gayley on Libel and Slander*: "Where two or more persons are sued in respect of a joint libel, proof that one of the defendants was actuated by malice will defeat any plea of privilege on the part of the others." Such a rule, his lordship said, had no existence. *Smith v. Streatfeild* was wrongly decided and ought to be overruled. Supporting statements in *Adam v. Ward* (117 L.T. 34; (1917) A.C. 309) were obiter and in his lordship's view erroneous. Other authorities—e.g. *Longdon-Griffiths v. Smith* ((1950) 2 All E.R. 662) and *Meekins v. Henson* ((1962) 1 All E.R. 899)—were to the opposite effect.

The Master of the Rolls thought that the root of the trouble lay in the tacit assumption that if one of the persons concerned in a joint publication was a tortfeasor, all were joint tortfeasors and must stand or fall together, so that the malice of one was the malice of all. That rested on a fallacy. No tortfeasors could truly be described solely as joint tortfeasors; they were always several tortfeasors as well. In any joint tort the party injured had his choice whether to sue all of them together or any one or more of them separately. Even in a joint tort the tort was the separate act of each individual. Each was severally answerable for it and severally entitled to his own defence. If he was himself innocent of malice, he was entitled to the benefit of it. He was not to be dragged down with the guilty. By English law no one was to be pronounced a wrongdoer, or be made liable to pay damages for a wrong unless he himself had done wrong, or his agent or servant had done wrong and he was vicariously responsible for it. Save in the cases where the principle respondent superior applied, the law did not impute wrongdoer to a man who was in fact innocent.—*L.T.*

DAMAGES: COMPENSATORY OR EXEMPLARY?

LORD Devlin's speech in *Rookes v. Barnard* ((1964) 1 All E.R. 367) contains some very important observations on the subject of exemplary damages, which he distinguished from aggravated damages—a species of compensatory damages enlarged by the motives and conduct of the wrongdoer. The former differed essentially from ordinary damages, their object being to punish and deter. The exemplary principle operated only in the case of arbitrary or unconstitutional action by servants of the government or where the defendant's conduct had been calculated by him to yield a profit for himself which might well exceed the compensation payable to the plaintiff. Whenever exemplary damages were appropriate a jury should be directed that, if, but only if, the sum which they had in mind to award as compensation was inadequate to punish the defendant for his outrageous conduct, to mark their disapproval of such conduct and to deter him from repeating it, then they could award some larger sum.

The plaintiff, a doctor, in *McCarey v. Associated Newspapers Limited* (*The Times* 7 November, 1964) had been awarded by a jury £9,000 damages for libel against four newspapers which in their reports of an inquest suggested that he had attempted to shift responsibility for an accident and had been rebuked by the coroner for so doing. A man had died as a result of the plaintiff's injecting surgical spirit instead of saline, and the plaintiff stated that he had admitted his responsibility at the earliest possible stage of the proceedings. The Court of Appeal (Willmer, Pearson and Diplock, L.J.J.) held that the above-mentioned distinction applied to libel actions and ordered a new trial limited to the question of damages. Pearson L.J. observed that in this case no damage had been caused to the plaintiff by these libels other than that to his reputation. There was, for example, no evidence of what might be called "social" damage and the learned lord justice could not resist the impression

that the amount awarded went beyond a reasonable sum and must include an element of punishment for the defendants or of bounty for the plaintiff. There was no doubt that a substantial wrong had been done to the plaintiff, but the award of £9,000 should not be allowed to stand.—*L.T.*

REVIEWS.

Law in the Making. By SIR CARLETON KEMP ALLEN. Seventh Edition. BOMBAY 1: Oxford University Press, Oxford House, Apollo Bunder. Demi 8vo. Pages 649. Price 63s net.

THIS extremely interesting treatise on the sources of law which was first published over three decades ago has undergone much revision and re-arrangement in the light of recent changes and amendments and the case law is brought down to the end of 1962. Starting with custom as the raw material of law the author goes on to consider judicial interpretation as the source of law. The latter in turn leads to an absorbing discussion on the doctrine and operation of precedent. Equity which the author considers a constant and indispensable factor in legal development is next taken up and the book concludes with a dissertation on the constitutional organs of law making, namely, legislation original and subordinate. The chapter on the topic of subordinate legislation takes account of the report of the committee under the chairmanship of Sir Oliver Franks which culminated in the passing of the Tribunals and Inquiries Act, 1958. This is legal literature at its best and apart from its profundity and the depth of learning displayed, the book is a veritable mine of recondite information gathered from not easily accessible sources. Within the limited space of a short notice it is not possible to touch on the different aspects of the problems dealt with here but special mention must be made of the chapter dealing with the authority and operation of precedent wherein it is pertinently observed that "Courts of law exist not to adorn learning by the elaboration of legal subtleties, but to do justice between citizens on concrete issues". A book warmly to be recommended to all who are interested in the dynamics of the judicial process.

Principles of the English Law of Contract. By SIR WILLIAM R. ANSON, Bart., D.C.L. Barrister-at-Law. Twenty-second Edition by A. G. GUEST, M.A., Barrister-at-Law. BOMBAY 1: Oxford University Press, Oxford House, Apollo Bunder. Roy 8vo. Pages 635. Price Rs. 14.40.

ANSON'S classic work on Contract known to generations of law students, now makes a welcome appearance as a low-priced paper-back in the English language Book Society Series. The present editor who had carried out extensive revision of the original text in the last edition of this book so as to conform to modern requirements, has in this edition continued this process by re-casting material dealing with such topics as the Terms of the Contract, Incapacity, Misrepresentation, Illegality, Privity of Contract, Discharge by Agreement and Discharge by Frustration. In considering the present state of the law the editor has made some useful suggestions indicating where reform in the law of contract is necessary. The case law is brought down to June 1, 1964 and of particular interest is the discussion, on the far-reaching effects on the law relating to Misrepresentation, of the decision of the House of Lords in *Hedley Byrne & Co., Ltd. v. Heller & Partners, Ltd.*, [1964] A. C. 465. This authoritative work on an important branch of the law must find its place on the shelves of every well-equipped law-library. A word of praise is due to the publishers who have made it available at such a low price—an example which can well be emulated by some of our publishers of books printed on thick paper with heavily loaded matter.

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ARTICLE 31A(1)(a) AND THE SUPREME COURT.*

SEVERAL decisions of the Supreme Court have dealt with the meaning and scope of cl. (a) in art. 31A(1) of the Constitution. The two latest decisions on this subject,¹ can be said to have at last settled the law. It is proposed to examine in this brief article those two decisions in the context of the earlier decisions of the Court and the history of the enactment.

Article 31A was first inserted in the Constitution in 1951 in order to eliminate any challenge to agrarian reform measures. The reason underlying the insertion was explained by the Prime Minister, Mr. Nehru, thus²:

"Another Article in regard to which unanticipated difficulties have arisen is article 31. The validity of agrarian reform measures passed by the State Legislatures in the last three years has, in spite of the provisions of clauses (4) and (6) of article 31 formed the subject-matter of dilatory litigation, as a result of which the implementation of these important measures, affecting large numbers of people, has been held up.

The main objects of this Bill are, accordingly,...to insert provisions fully securing the constitutional validity of zamindari abolition laws in general and certain specified State Acts³ in particular."

Though the enactment of the Constitution (First Amendment) Act, 1951, ensured that certain agrarian reform measures were put beyond challenge, the extent of art. 31A, as enacted in 1951, was found insufficient. The Statement of Objects and Reasons to the Constitution (Fourth Amendment) Bill, 1955, explained that an extension of art. 31A (and the addition to the list of protected Acts in the 9th Schedule) was necessary in order, *inter alia*, to achieve the next objective in land reform, viz., "the fixing of limits to the extent of agricultural land that may be owned or occupied by any person, the disposal of any land held in excess of the prescribed maximum and the further modification of the rights of land owners and tenants in agricultural holdings." The other objects were to ensure the beneficial utilisation of vacant and waste lands in urban and rural areas and the clearance of slum areas; to ensure State control of mineral rights; to grant the State power to take over the temporary management of a company in the public interest; and to grant the State certain powers of amalgamation and transfer of companies⁴. This led to the enactment of the Fourth Amendment Act in 1955.

After 1955, therefore, any legislation authorising acquiring of an "estate" or extinguishing or modifying rights in an "estate" could not be challenged on the ground of violation of art. 14, 19 or 31. "Estate" was defined to mean in any local area what that expression meant in the local law relating to land tenures in force in that area, and included a *jagir*, an *inam*, a *muafi* or similar grant, and a *janmam* right.⁵ The Constitution (Seventeenth Amendment) Act, 1964, has further amended (with retrospective effect) this definition so as to

*By Atul M. Setalvad.

1 *Ranjit Singh v. State of Punjab*, [1965] A.I.R. S.C. 632 and *P. V. Mudaliar v. Spl. Dy. Collector, Madras*, [1965] A.I.R. S.C. 1017.

2 Statement of Objects and Reasons, *Gazette of India*, Pt. II, Sec. 2, p. 357, dated May 19, 1951.

3 All these Acts enacted measures of

agrarian reform. See the 9th Schedule to the Constitution, Items 1 to 13.

4 *Gazette of India*, 1954, Pt. II, Sec. 2, p. 746, dt. December 20, 1954.

5 This definition, with the exception of the reference to *janmam* rights, was inserted in 1951.

include land held under a ryotwari settlement, and land held or let for purposes of agriculture or for purposes ancillary thereto, including waste land, forest land, land for pasture or sites of buildings and other structures occupied by cultivators of land, agricultural labourers and village artisans.

After the Constitution (Fourth Amendment) Act, 1955, two interesting questions arose for consideration. The first was general: how was art. 31A to be construed. The second was narrower: was there anything in art. 31A to limit the very wide meaning the expression "estate" would have in several local areas. Both these questions remain of interest even after the enactment of the Constitution (Seventeenth Amendment) Act, 1964.

Article 31A is contained in the Part on "Fundamental Rights", even though it is in the nature of a limitation on the rights guaranteed by arts. 14, 19 and 31, and carries the marginal heading "Savings of laws providing for acquisition of estates, etc." Its inclusion in Part III of the Constitution as an independent fundamental "right" is itself somewhat odd. However that may be, there can be little doubt that it was intended to, and did, operate in the nature of a proviso or exception to arts. 14, 19 and 31, and the *non-obstante* clause with which it begins shows this to be so. One would have thought, therefore, that on settled principles of construction, it was to be construed narrowly⁶. Such an approach would also be justified on the broader ground that art. 31A which tends to reduce rights of citizens should, therefore, be narrowly construed. Yet, in *Atma Ram v. The State of Punjab*⁷, the Supreme Court observed:

"...Keeping in view the fact that Art. 31A was enacted by two successive amendments—one in 1951 (First Amendment), and the second in 1955 (Fourth Amendment)—with retrospective effect, in order to save legislation effecting agrarian reforms, we have every reason to hold that those expressions have been used in their widest amplitude, consistent with the purpose behind those amendments. A piece of validating enactment purposely introduced into the Constitution with a view to saving that kind of legislation from attacks on the ground of constitutional invalidity, based on Arts. 14, 19 and 31, should not be construed in a narrow sense. On the other hand, such a constitutional enactment should be given its fullest and widest effect, consistently with the purpose behind the enactment, provided, however, that such a construction does not involve any violence to the language actually used."

The judgment in *Atma Ram's* case was delivered by Mr. Justice Sinha (as he then was) on December 8, 1958, on behalf of a Bench of five Judges consisting of S. R. Das C.J., Bhagwati, Subba Rao and Wanchoo, JJ. (and himself). The question before the Court was whether a part of an estate was an "estate". The Court held that it was, applying the principle that the greater must include the less. It would appear, therefore, that a construction of art. 31A, based on the ordinary meaning of the words used in the article, would have resulted in the rejection of the Petition, and that no question directly arose as to whether the article should be construed strictly or literally. Strictly speaking, therefore, the observations quoted above were *obiter dicta*.

About a year and a half later, on May 4, 1960, the Supreme Court delivered its judgment in *Kavalappara Kottarathil Kochuni v. State of Madras*⁸. The majority, consisting of Sinha C.J., Subba Rao J., and Shah J. (Imam and Sarkar, JJ. dissenting) laid down the opposite rule. Subba Rao J., who delivered the judgment of the majority, observed that this article deprived citizens of fundamental rights, and ought not be extended to overreach the *object implicit* in the article⁹. Mr. Justice Subba Rao actually cited part of the passage in *Atma Ram's* case set out above¹⁰, but did not refer to the latter portion thereof.

6 See Maxwell, *Interpretation of Statutes*, 11th edn., p. 156; *Craies on Statute Law*, 8th edn., pp. 219-220.

7 [1959] Supp. 1 S.C.R. 748, at p. 763.

8 [1960] 3 S.C.R. 887.

9 At p. 900.

10 At p. 903.

It is clear that there is a conflict between the two observations. Whereas *Atma Ram's* case enjoins a construction giving the fullest and widest effect to it, consistent with the purpose behind the enactment, subject only to any limitations in the language of the article itself, *Kochuni's* case contemplates a limitation of the article not to its language, but to the object implicit in it. It is true that *Atma Ram's* case refers to the "purpose behind the enactment", but the passage as a whole makes it clear that it enjoins a liberal construction. The difference in approach is made clear by the premise; while *Atma Ram's* case looks upon art. 31A as a validating or ameliorative measure, and therefore to be liberally construed¹¹, *Kochuni's* case refers to it as an exception to fundamental rights, which occupy a transcendental position, and therefore, necessarily to be narrowly construed¹².

This divergent approach was not resolved until several years later, and that was not to last. In *Ranjit Singh's* case¹³, a unanimous Supreme Court, consisting of Gajendragadkar C.J., and Wanchoo, Hidayatullah, Das Gupta and Ayyangar, JJ., in a judgment delivered by Hidayatullah J. on August 20, 1964, politely buried *Kochuni's* case as a "special case", or so it seemed. As will be seen below, in an appeal decided by another unanimous Bench (Subba Rao, Wanchoo, Hidayatullah, Dayal and Sikri, JJ.) a bare two months later,¹⁴ the principles underlying *Kochuni's* case, and the decision itself, have been reaffirmed.

In order to appreciate the second question, it is easier to depart from the chronological order, and to begin with *Kochuni's* case. In that case, the Supreme Court was considering the validity of a Madras Act¹⁵ which merely enlarged the rights of junior members of certain tarwad properties, and the Court found this was unconnected with agrarian reform. If the expressions "estate", and "rights", as defined in art. 31A were construed literally, there could be no doubt that the Act was an Act providing for the extinguishment or modification of rights in an estate, and therefore within the protection of the article. And this was in fact found to be so by Mr. Justice Sarkar, who delivered the dissenting judgment for himself and Mr. Justice Imam¹⁶.

A similar question had arisen in a Bombay decision¹⁷, since reversed by the Supreme Court¹⁸. The Court was considering a Bombay amendment to the Land Acquisition Act providing, *inter alia*, that land could be acquired for a housing scheme without paying the 15 per cent. solatium usually provided, and by paying the market value of the land not on the relevant date but on January 1, 1948. A Division Bench of the Bombay High Court observed that the Act was protected by art. 31A as it provided for the acquisition of land; and as "estate" was defined by s. 3(s) of the Bombay Land Revenue Code—which was the relevant local law relating to land tenures—as "any interest in lands... vested in a person... capable of holding the same".

Had the Bombay view been accepted almost any statute acquiring, or interfering with rights of or in, immoveable property would be within the protection of art. 31A. Illustrations would be the Rent Acts as they merely modify rights in land; legislation dealing with mortgages; building regulations; Town Planning Acts, etc. And this is not a problem limited to Bombay; for many local laws dealing with land tenures contained a definition of "estate" as wide as that contained in the Bombay Land Revenue Code.

The problem before the Supreme Court in *Kochuni's* case was, therefore, this. If art. 31A was to be construed literally, it would mean that the protection of arts. 14, 19 and 31 would not be available to citizens in many parts

11 See *Craies on Statute Law*, 6th edn., p. 102.

12 See note (6) above.

13 [1965] A.I.R. S.C. 632, 638.

14 In *P. V. Mudaliar v. Spl. Dy. Collector*, [1965] A.I.R. S.C. 1017.

15 Madras Marumakkathayam (Removal of Doubts) Act, 1956.

16 *Kavalappara Kottarathil Kochuni v. State of Madras*, [1960] 3 S.C.R. 887, at pp. 948-949.

17 *Assistant Collector, Thana v. Jannadas*, (1958) 60 Bom. L.R. 1125.

18 *N. B. Jeejeebhoy v. Asst. Collector*, [1965] A.I.R. S.C. 1096.

of the country in respect of almost any legislation pertaining to immoveable property. Such a result ought to be avoided; but how? The Court resolved the problem by resorting to the well-settled rule of construction first laid down in *Heydon's case*¹⁹, and by relying on the use of the word "estate" in art. 31A. The Court cited the Statement of Objects and Reasons behind the Constitution (Fourth Amendment) Act, 1955²⁰; and observed that the Fourth Amendment was enacted to save measures of agrarian reform. It followed that the wide language of art. 31A(1)(a) was to be construed narrowly so as to cover only measures of agrarian reform. The Court found support for this view in two earlier decisions of the Court which contained observations stating that that article was enacted as a measure of agrarian reform²¹.

Though *Kochuni's* case was decided on May 4, 1960, in a later judgment delivered on April 25, 1961, a unanimous Court (Sinha C.J., Sarkar, Das Gupta, Ayyangar and Mudholkar, JJ.) without referring to *Kochuni's* case, held that Bihar legislation acquiring the right of a land-owner to hold a *mela* on his own land, was within the protection of art. 31A²², even though it was unconnected with agrarian reform.

This confusion was attempted to be set at rest in *Ranjit Singh's* case²³, in which the Court described *Kochuni's* case as a "special case", and observed that the rule laid down in that case was not to be applied where the general scheme of the legislation was agrarian reform, and that something ancillary thereto in the interest of rural economy was also attempted to be done thereunder. The Court observed that the scheme of rural development to-day envisages:

"not only equitable distribution of land so that there is no undue imbalance in society resulting in a landless class on the one hand and a concentration of land in the hands of a few, on the other, but envisages also the raising of economic standards and bettering rural health and social conditions. Provisions for the assignment of lands to village Panchayat for the use of the general community, or for hospitals, schools, manure pits, tanning grounds etc. enure for the benefit of rural population and must be considered to be essential part of the redistribution of holdings and open lands to which no objection is apparently taken."²⁴

In other words, the Court accepted *Kochuni's* decision as being correct; only legislation pertaining to agrarian reform would be protected by art. 31A, but the Court gave to that expression a wider meaning so as to include all matters ancillary thereto, and almost all matters pertaining to rural improvement were treated as ancillary matters. This position was reasserted by the Supreme Court in *P. V. Mudaliar v. Spl. Dy. Collector*²⁵. In the latter case, the Court held that a Madras Act providing for the acquisition of property for housing was not protected by art. 31A(1)(a).

Though it is difficult to be clear in view of the uncertainty and changes in the Supreme Court decisions discussed above, it is submitted that the law as it stands to-day may be stated thus:

I. The whole of art. 31A is to be strictly construed. In view of the *decisions* in *Kochuni's* case, and *P. V. Mudaliar's* case, the observations to the contrary in *Atma Ram's* case, and *Ranjit Singh's* case are not to be regarded as binding.

II. Even though there is nothing in the language of art. 31A(1)(a) to so limit it, it must be limited to measures of agrarian reform.

III. "Agrarian reform" must, however, be liberally construed, so as to include all matters leading to the improvement of rural life.

19 (1584) 3 Co. Rep. 7a, 76 E.R. 637.

20 But unfortunately omitted clause (ii) which specifically mentions the object of beneficial utilisation of waste and vacant lands, and clearance of slum areas.

21 *Sri Ram Ram Narain Medhi v. State of Bombay*, [1959] Supp. 1 S.C.R. 489; *Atma Ram v. State of Punjab*, [1959] Supp. 1 S.C.R. 748.

The Acts impugned in both these cases were, however, obviously measures of agrarian reform.

22 *State of Bihar v. Rameshwar Pratap*, [1962] 2 S.C.R. 382.

23 [1965] A.I.R. S.C. 632.

24 At p. 638.

25 [1965] A.I.R. S.C. 1017.

Can this approach of the Court be justified according to the settled principles of the interpretation of the Constitution? This is not an easy question to answer. It is respectfully submitted, however, that proposition I is undoubtedly correct for the reasons already indicated above. The article must be strictly construed because it is in the nature of a proviso or saving clause, and because it limits the fundamental rights of citizens and other persons.

Coming to the proposition II, the Court in *Kochuni's* case apparently found the limitation in the objects and reasons behind the Constitution (Fourth Amendment) Act, and also, as Mr. Justice Subba Rao made clear in *P. V. Mudaliar's* case, in the use of the word "estate". The reference to the Statement of Objects and Reasons in *Kochuni's* case was unfortunate, for the Court omitted the object of slum clearance, and the beneficial utilisation of vacant and waste lands in *urban and rural* areas. It is clear that the Government intended art. 31A(i)²⁶ to protect legislation for the beneficial utilisation of all vacant and waste lands, and for slum clearance. It is also clear that in several local areas, legislation providing for the acquisition of land even in urban areas for any of these objects would be within the clause, if the ordinary meaning of the language in the clause, and in art. 31A(2)(a), is to govern such legislation. If one looks at the objects and reasons even to ascertain the prevalent conditions when the Amendment was enacted, it is apparent that the problem of slums and the utilisation of all vacant and waste lands was one of the problems sought to be resolved by the Constitution (Fourth Amendment) Bill, 1955.

In *Kochuni's* case, the Supreme Court also referred to the use of the word "estate" in art. 31A(1)(a), and in the definition in sub-art. (2)(a), which the Court found emphasised the fact that the article dealt with land tenures. It was, therefore, "manifest that the said Article deals with a tenure called 'estate' and provides for its acquisition or the extinguishment or modification of the rights of the land-holder or the various subordinate tenure-holders in respect of their rights in relation to the estate"²⁷. The Court went on to observe that to hold otherwise would enable the State to divest a proprietor and vest his estate in another without any reference to agrarian reform. It is this reasoning which the Supreme Court itself described in *P. V. Mudaliar's* case as the "real basis" of the decision in *Kochuni's* case.

It must be confessed that this reasoning is not wholly satisfactory. Assuming that the use of the expression "estate" suggests land tenures, all that follows is that it was intended to cover all legislation pertaining to land tenures. Land tenure means the basis on which land is held from or under the State; and is applicable equally to rural and urban lands²⁸. All that necessarily follows from the use of the word "estate" is, therefore, the limitation of art. 31A(1)(a) to land. No reference to agrarian reform emerges from the use of the word "estate".

The argument based on the Statement of Objects and Reasons cannot stand if one considers the object of beneficial utilisation of vacant and waste lands, and slum clearance; and the argument based on the use of the word "estate" does not lead to a limitation based on agrarian reform. One is forced to conclude, with respect, that the reasoning of *Kochuni's* case, though expressly approved in *P. V. Mudaliar's* case, is not sustainable.

It is respectfully submitted, however, that the principle laid down by the Court in those two cases can be partly sustained by a slightly different approach. As has been seen, the principle that art. 31-A is to be strictly construed (pro-

26 It may be noted that the Bill contained a specific clause in art. 31A(1) dealing with a law for the acquisition of land, building or huts declared to be a slum or any vacant or waste land. That clause was dropped when the Bill was enacted. It is arguable, therefore, that the Legislature no longer desired this

object to be achieved through art. 31A.

27 [1960] 3 S.C.R. 887, at p. 900.

28 Even in the English Law of Real Property, lands are held on a tenure; "fee simple" or copyhold, etc., are all descriptions of different *tenures*.

position I above) is correct. The next step in the argument would be the simple fact that the Constitution (Fourth Amendment) Act, 1955, enacted a most complicated definition of "estate". The word meant what it, or its local equivalent, meant in the relevant law dealing with land tenures; it also included a *jagir*, an *inam*, a *muafi* right and a *janmam* right. Instead of this complex definition, all that the Legislature had to do was to define "estate" as meaning any interest in land. Had this been done, all doubts would be set at rest, and the clause would cover all legislation pertaining to land. The very fact that the Legislature having before it such a simple means available, did not adopt it, suggests that it was not intended to cover all legislation pertaining to land. The Legislature clearly had in mind something narrower than all land. What it had in mind was the acquisition of certain kinds of rights in certain kinds of land. The kind of rights, as well as the kind of land suggested by the language is rights of tenure in *agricultural* or *rural* land. The limitation which the word suggests is, I would submit, a limitation confining the article to agricultural lands. This does not, however, bring in the concept of agrarian reform.

If what is stated above is correct, it would follow that legislation dealing with agricultural lands would be protected under art. 31A(1)(a), whether or not it is a measure of agrarian reform. What lands would be protected would (under the Fourth Amendment Act) vary from local area to local area. The third proposition set out above does not survive if the view expressed here is correct.

Much support is given to this view by the subsequent enactment in 1964 of the Constitution (Seventeenth Amendment) Act. That Act adds to the definition of "estate" two further clauses:

(ii) any land held under ryotwari settlement—this sets at rest the uncertainty as to whether ryotwari lands were an estate in several local areas;

(iii) any land held or let for purposes of agriculture or for purposes ancillary thereto, including waste lands, forest land, land for pastures or sites of buildings and other structures occupied by cultivators of land, agricultural labourers and village artisans.

The very wide definition in cl. (iii) brings within it all non-urban land, but clearly does not include urban lands. When the Seventeenth Amendment was enacted, Parliament had before it not only the judgment of *Kochuni's* case, but certain other judgments in the High Courts applying that judgment. If it had intended to include urban lands, cl. (iii) could have been so drafted. It also follows that the object of utilisation of vacant land and waste lands, and slum clearance, mentioned at the time of the Fourth Amendment, was lost sight of; or, perhaps, Parliament in 1964 did not wish to have such measures protected by art. 31A.

The language of cl. (iii), as now enacted, also suggests that the test of agrarian reform is no longer sustainable unless the expression is given the very wide meaning of rural improvement suggested in *Ranjit Singh's* case. *Agrarian reform*, as commonly understood, would not relate to acquisition of forest lands, or building sites in villages, yet these are now expressly included by cl. (iii).

The correct interpretation, as submitted above, would not materially affect the law except in a few cases. The decision in *P. V. Mudaliar's* case, for instance, would be the same. The difference would arise in those few cases where rights in agricultural lands are sought to be interfered with by a legislation wholly unconnected with agrarian reform. One illustration would be the Madras Act struck down in *Kochuni's* case. Such an Act would, if the view expressed here is correct, be protected by art. 31A²⁹. Another would be the legislation relating to melas, upheld in *State of Bihar v. Rameshwar Pratap*³⁰.

²⁹ If the *Siknam* properties were agricultural land.

³⁰ [1962] 2 S.C.R. 582.

GLEANINGS.

ART OF CROSS-EXAMINATION

WHILE many of the books on cross-examination are of value to the reader and particularly to the young lawyer, it is well to bear in mind the following admonition. Each lawyer possesses his own peculiar characteristics and personality, including his own particular method of speaking, mannerisms, and thought. It does not follow that because one lawyer has been successful in the performance of a courtroom tactic that another lawyer will be successful by deliberately aping or mimicking the actions of the first lawyer. What may impress a judge or jury as fine work on the part of one attorney, may seem ludicrous when aped or mimicked by another. The basic tactic employed by an experienced and accomplished cross-examiner may be followed by another with equal success; but the latter must adapt the tactic to his own mannerisms and personality in order that it be impressive, forceful, and effective.

It has been correctly emphasized that the art of cross-examination is to know when not to question an adverse witness. This can best be illustrated by referring to a case that was tried some years ago. The matter involved the testamentary capacity of an old lady. The proponents of the will called many personal acquaintances of the testatrix, all of whom testified that the old lady was rational and possessed testamentary capacity. Those seeking to overthrow the will called a medical expert, who, on a hypothetical question, gave his opinion that the woman was irrational and did not possess testamentary capacity. The lawyer on the other side was one of San Francisco's leading trial lawyers, and the expert witness braced himself for a vigorous and searching cross-examination. The noted lawyer walked up and down in front of the expert and finally asked but one question—whether the expert had ever seen or known the deceased in her lifetime. When the expert answered the question in the negative, the lawyer said "that is all." Needless to state, the jury found the old lady to have been sane and capable of making a valid will.

The converse of the foregoing rule at time is the course that should be followed. Never forego a cross-examination if you believe that it will produce one or more facts in your favour.

In a recent case, a lawyer probating an estate was charged with stealing \$5,000. The complaining witness and her sister each testified that after the death of the complaining witness' husband they found \$5,000 in currency secreted in the home; that they went one morning to the lawyer's office and turned the money over to him without getting a receipt; that the lawyer never accounted for the money and denied that he had ever received it.

The cross-examinations were long and minute, not only as to the time and how long the ladies were at the lawyer's office, but as to what they had done, whom they had seen, and where they had been both before and after leaving the lawyer's office; also as to what each of the women had done the day before and the day after they claimed visit to the lawyer. By tracing down these facts, the defense was able to establish the exact time of the alleged visit as between 11 and 11:30 in the morning of a particular day; then the defense was able to prove by the records of the court that on that morning the lawyer was actively engaged in the trial of a case from 9:30 in the morning to well after noon.

It should be manifest that one should not cross-examine merely because he has the right so to do. Where a witness has given damaging testimony against your client and you have no expectation of causing the witness to change or alter his testimony, a futile cross-examination merely allows the jurors to again hear the damaging testimony against your client.

Never ask general questions that permit the adverse witness to give long explanatory answers and that may result in the witness giving testimony that otherwise would be inadmissible. Questions on cross-examination should be definite and certain, thus calling for a definite and certain reply.

In a case where the question had to do with the human brain, an expert brain surgeon was called and gave his testimony. On cross-examination, the attorney asked this general question: "Doctor, just what do you know about the human brain?" The witness then started a discourse on the brain and after talking for about an hour the judge interrupted him with the following question: "Doctor, how much longer is it going to take to complete your answer?" The doctor turned to the judge and said: "Your honor, I am a professor at such-and-such medical school, my course consists of 20 lectures on the human brain, and I have just finished giving the jurors my first lecture." The court and both counsel agreed that the doctor need not give the balance of his lectures. The answer to the simple, general question greatly enhanced the standing of the witness and strengthened his testimony.

Where one has cause to believe that the testimony given on direct examination is false and fabricated and the witness has learned his or her testimony by coaching or by heart, then the cross-examination should call for repeated repetitions of the testimony, particularly if it related to a conversation with the defendant.

It is well known that one may repeat the substance of a conversation, but it is almost impossible to give again and again the same words claimed to have been used in the conversation.

A witness had detailed a long conversation with the defendant; the cross-examination took place about two days later, a Saturday and Sunday having intervened. Counsel for defendant argued to the jury that the testimony was fabricated and that the witness had learned the testimony by heart or rote; that no one could relate and then reiterate word for word a lengthy conversation. In support of this contention, counsel read to the jury a comparison of the testimony of the witness on direct and cross-examination, portions of which were as follows:

- D. "Hi, Mrs. N., How are you?" I said "I can't complain."
- X. "Hi, Mrs. N., How are you?" and I said "I can't complain."
- D. Mrs. N., I'll come right to the point.
- X. Mrs. N., I will come right to the point.
- D. I'll give you enough money to squeeze your dad into cooperating with me.
- X. I'll give you enough money to squeeze your dad into cooperating with me.
- D. You owe me \$400 for services rendered. I'll give you \$4,600, and leave town and your dad can never find you.
- X. You owe me \$400 for services rendered, and I will give you \$ 4,600, and you can leave town and your dad won't find you.
- D. If you can do that I'll keep it confidential, and if you can't, somebody will get hurt.
- X. If you can do that I will keep it confidential, if you can't, somebody will get hurt.
- D. The money isn't mine, it is a legitimate expense.
- X. The money isn't mine, it is a legitimate expense.
- D. He said what have ethics got to do with saving my reputation? We all have to make a living.
- X. He said what have ethics got to do with saving my reputation? We all have to make a living.
- D. I said Too many things can go wrong. If dad ever found out he would disown me.
- X. I said Too many things can go wrong. If dad ever found out he would disown me.
- D. Mr. H. said You would have the money and be out of town.
- X. Mr. H. said You would have the money and be out of town.

The foregoing caused the jury to believe that the testimony on direct examination was false and that the witness had been coached and learned her testimony by heart.

Never, on cross-examination, gild the lily. Once you have the witness state a material fact in your favour, drop the subject. Otherwise the witness may get off the hook by weakening his prior answer or by explaining it away; besides, you may refer again and again to this admission in argument and stress it.

In defense of a man accused of being a confidence operator, by indulging in the handkerchief-switch trick, it came to counsel's attention that a witness had previously identified two other men as being the ones who had perpetrated this trick on him in another county. Counsel for the defendant questioned his client as to the occurrence before trial and was informed that there was no basis for the charge in the other county as, even though he had been arrested, the case had been dismissed. At the trial, the witness appeared and after testifying to the matters concerned in the accusation of grand theft (the handkerchief-switch), then admitted that he had previously identified two other persons as having perpetrated the crime. Defense counsel, not being satisfied to let the matter rest on such testimony, then asked the following additional question to which he received the following reply:

Q. Is it not a fact that after the defendant in this case was arrested in this other county, that the case against him was eventually dismissed?

A. That is true, the case was dismissed after the defendant gave me back my money.

Of course, this ended the case so far as a defense was concerned, and the defendant was promptly convicted.

The moral is—let well enough alone, the additional question merely tried to gild the lily and resulted in a conviction.

Never underestimate the knowledge and ability of opposing counsel. Never attempt to show that the opposing counsel has no legal learning and does not know the facts of his case.

Where one underestimates the ability of opposing counsel, he may eventually find out that his estimate of his opponent was wrong and, by being so cocksure awake to find that the case has gone against him. Far better it is to assume that the opponent has at least the legal knowledge and training that you believe you possess; thus, even though you believe the opponent has poor ability as a trial lawyer, you will not be caught napping and will be able to prepare to meet any issue raised in the case or theory or contention raised by the opposite side.

In cross-examination never browbeat an elderly person or a young child. Never make fun of a witness because he is uneducated, or speaks with an accent, or has difficulty making himself understood. Members of the American public and, therefore, jurors, resent such tactics. It is a trait of Americans to side with the underdog. This is evidenced by sport events; the people who attend generally pull for the weaker person or side and delight in seeing the champions defeated. Remember that one or more of the jurors may be poorly educated, or that the parents or relative of a juror may have come from some foreign country, and still speak with a pronounced accent or speak English poorly. Most people despise a smart aleck and have no use for one who tries to ingratiate himself by belittling another.

If the direct examination of an adverse witness is incredible on its face, or even smacks of incredulity, a long and meticulous cross-examination is called for to emphasize the absurdity thereof. In such circumstances, merely because the direct examination has been damaging to your client, you should not surrender the right to cross-examination at length to bring about a grave doubt as to the veracity of the witness or the truthfulness or accuracy of his testimony.

Never cross-examine on an issue that has no relevancy to the defense of your side of the case. Thus, in a prosecution for arson where the defense is that your client did not set the fire, it is futile to cross-examine the adversary witnesses on the issue of whether the fire was of incendiary origin. Stick to the defense that your client did not start the fire, irrespective of whether it was or was not of incendiary origin.

The most dangerous question that one can ask a witness on cross-examination is the simple word "WHY?" Such a question simply allows the witness to discourse at length on the issue involved. Questions should be phrased definitely and be certain and should call for answers exactly answering the question propounded.

Lastly, it should always be borne in mind that you must not adopt the attitude that you know all about the case, and the witnesses, and the facts involved. Better to adopt the attitude that you know but slightly more than the jurors about the case and that you are merely attempting, by cross-examination, to develop the truth.

Of course, it is necessary that you know about the case, the witnesses for the other side, and the issue to be met.

If you have acquired this knowledge by proper pre-trial preparation, you may not only conduct adequate and impressive cross-examinations, but you will be able to conduct the entire trial in such manner that no matter even if the verdict is against you, you can be comforted by the thought that you did all that was possible in the circumstances.—C & C.

AMOUNT OF WIFE'S MAINTENANCE

MANY are the disputes over wife's maintenance, and they are mostly over its amount. In determining that, each case must, of course, be decided on its own particular facts. Yet the approach to each case ought to be similar, and much turns on it. Recently the President of the Probate, Divorce and Admiralty Division (Sir Jocelyn Simon, P.) stated what was the right approach at the present day. He was giving judgment in an appeal from a magistrates' court's order for a wife's maintenance on her complaint of the husband's desertion. Counsel in that case had disclaimed the "one-third rule" as being discredited. Sir Jocelyn Simon, P. summarised the general principle in the following way. A wife, during cohabitation with her husband, shared with him a standard of living appropriate to his income, or, if she also were earning to their joint incomes. If cohabitation were destroyed by the wrongful conduct of the husband, her maintenance should be so assessed that her standard of living did not suffer more than was inherent in the circumstances of separation. Her standard of living might have to be lower after the end of cohabitation than it was before, since there would then be two households to be maintained in place of one. In general, however, she should not be relegated to a lower standard of living than that which her husband enjoyed. That did not mean that there was now a "one-half approach" in place of the discredited "one-third" rule, for not only was there a maximum beyond which justices could not go, but also there might be other circumstances to be taken into account such as obligations to support or contribute towards the support of a child at an appropriate standard. In the particular case (*Kershaw v. Kershaw*, July 14, 1964) the husband's earnings were £14 net weekly with an uncertain addition as a club artiste, which he put at £6 weekly and the magistrates found probably to be about £10 weekly. There was one child. The Divisional Court upheld an award of £7 10s. weekly for the wife and £2 10s. for the child, assuming, for the purpose, that the aggregate of the husband's earnings was £20 weekly, although the Court did not override the magistrates' finding of what the husband's earnings were.—L.J.

REVIEWS.

Chitty and Jacob's Queen's Bench Forms. Nineteenth Edition by I. H. JACOB, LL.B., A Master of the Supreme Court, Queen's Bench Division. BOMBAY: N. M. Tripathi Private Ltd., Princess Street. LONDON: Sweet & Maxwell, 11 New Fetter Lane, Royal 8vo. 1965. Pages 1184. Price Rs. 201.60. £ 12.12 sh.

THIS book, in the words of the editor of the 19th edition of Chitty's classic work, provides within the space of one volume the appropriate Forms, other than pleadings, which may be used at any stage in the course of any litigation undertaken in the Queen's Bench Division. The present day tendency of the English Courts as reflected in the Supreme Court Rules of 1962 not to be bound by formalistic technicalities does not however permit the irregular use of Forms which might delay and obstruct the work of the Courts and increase costs. As the editor rightly observes that if procedure lies at the heart of the law, Forms lie at the heart of procedure which provide lubrication for the smooth working of the machinery of justice. Therefore, the importance of the use of the correct Form cannot be minimised and this work goes a long way in providing Forms suitable and adequate for use at any stage of the diverse proceedings in the Queen's Bench Division. In this edition the editor has practically re-written the original text because of the extensive changes in the legal procedure made by the Supreme Court (Revision) Rules, 1962. There are in all 1720 Forms including Prescribed Forms, i.e. those prescribed by the Rules of the Supreme Court and Practical Forms, i.e. those others which have been sanctioned and approved by the relevant authorities. There are also Forms which are in every day current use and Forms which are used in special or exceptional instances. In addition to these, new Forms have been added to meet the requirements of the present practice prevailing in the Queen's Bench Division. A useful feature is the table of the Rules of the Supreme Court which provides a ready reference to each Rule mentioned in the text and so to the relevant Form relating to that Rule. A very comprehensive index is given at the end which will greatly facilitate the work of finding out the required appropriate Form. In view of what the Lord Chief Justice of England has said in his foreword about the merits of the book it will be unnecessary if not impertinent to say anything more in its praise.

Mew's Digest of English Case Law, 1964. Edited by PETER ALLSOP, M.A., BARRISTER-AT-LAW. BOMBAY-2: N. M. Tripathi Private Ltd., Princess Street. LONDON: Sweet & Maxwell Ltd., 11 New Fetter Lane. Roy 8vo. Columns 548. Price Rs. 50.40. £ 3.35 sh.

THIS extremely well produced and well edited digest comprises cases reported in 1964 in over a dozen legal periodicals including the Weekly Law Reports, the Law Reports, the Solicitors' Journal, the All England Law Reports and Lloyd's List Law Reports, from the latter five of which the headnotes are made use of. The matter is arranged subject-wise and in alphabetical order. At the beginning of the book a cumulative table of cases for the years 1961 to 1964 is given and at the end a table of statutes—Imperial, Dominion and Colonial—judicially considered. A section is devoted to cases reported during the years 1962 and 1963 which are affected by decisions of the Courts reported in the present volume. The book ends with an enumeration of cases followed, approved, overruled, questioned, explained, distinguished and commented on, and an Index of subject matter contained in the volumes of the Digest for 1961 to 1964. This publication eminently fulfils the requisites of a good digest which are accuracy, exhaustiveness and facility of reference. To the Indian lawyer who has occasion to refer to English decisions on Company law, the law of libel, the law relating to copyright and trade mark etc. this Digest will come in very handy.

Human Law and Human Justice. By JULIUS STONE. BOMBAY-2: N. M. Tripathi Private Ltd., Princess Street. 1965. Roy. 8vo. Pages 415. Price Rs. 45.

THIS sequel to the author's *Legal System and Lawyer's Reasonings* gives in his words "an analytical, historical and critical account of the growth of human ideals of justice as they bear on human legal orderings and in their relation to the legal, social and economic contents in which they have arisen." The book opens with a historical survey of the concept of justice in Greek mythology and philosophy and gives a detailed account of the Hebraic concept with an interesting side-light on the *lex talionis*. This leads to a consideration of natural law as the bearer of early criteria of justice into the main stream of Western thought in the 17th and 18th centuries. This is followed by an examination of the various forms of the individualist criteria which emerged concurrently with the early industrial and political democratic revolution of the 18th and 19th centuries, particularly the ethico-juristic teachings of Immanuel Kant, the utilitarianism of Jeremy Bentham, Rudolf von Ihering's social utilitarianism, Leon Duguit's notion of "social solidarity" and Rudolf Stammler's social idealism. The succeeding chapters are concerned with contemporary speculation about justice under the heads natural law or its reappraisal, relativism in modern theories of justice with particular reference to Gustav Radbruch and interest-pragmatism with a critical examination of Roscoe Pound's theory of justice. The concluding chapters take stock of theories of justice in general in relation to the realities of contemporary social life and includes the author's own position on the search for "absolute", "normative" elements of justice. This is a difficult book to read and the author's terse and allusive style does little to relieve the reader's burden but a little patience and concentration will be found highly rewarding. Though mainly addressed to students of the philosophy of law, the book can be studied with much profit by legislators and judges who are alive to the responsibilities of their high offices.

Of Law and Life & Other things that matter. By FELIX FRANKFURTER. Edited by PHILIP B. KURLAND. BOMBAY 1: Oxford University Press, Oxford House, Apollo Bunder. Published by the Harvard University Press, Cambridge, Massachusetts, U.S.A. Roy 12 mo. Pages 257. Price \$5.95.

THIS is a thought provoking collection of addresses and writings of the late Felix Frankfurter who till his retirement in 1962 was a distinguished Judge of the Supreme Court of U.S.A. These deal with a variety of subjects ranging from a discussion of the proper spelling of the principal character in *Daniel M'Naughten's* case (10 Cl. & Fin. 200) to a feeling reference on the passing of his friend Lord Brand, a distinguished economist and civil servant. In between there are tributes to such varied personalities as Mr. Justice Brandies and Mr. Justice Cardozo of the Supreme Court, Presidents Roosevelt and Wilson, Harold Laski, the political theorist, Robert Frost, the poet and the physicist Niels Bohr. Apart from these studies which bear witness to his varied interest in life, the reader will be particularly drawn to his reflections on some legal problems as these appear in his lecture on "The Supreme Court in the Mirror of Justices" and the talk as recorded in "The Profession of the Law." In the former of these, while showing that prior judicial service is not necessary for a Supreme Court Judge, he sums up the responsibilities facing the Supreme Court and the qualities needed in its Justices, in these memorable words:

"The Court sits in judgment, that is, on the views of the direct representatives of the people in meeting the needs of society, on the views of Presidents and Governors, and by their construction of the will of legislatures the Court breathes life, feeble or strong, into the inert pages of the Constitution and the statute books.

Such functions surely call for capacious minds and reliable powers for disinterested and fair-minded judgment. It demands the habit of curbing any tendency to reach results agreeable to desire or to embrace the solution of a problem before exhausting

its comprehensive analysis. One in whose keeping may be the decision of the Court must have a disposition to be detached and withdrawn. To be sure, these moral qualities, for such they are, are desirable in all Judges, but they are indispensable for the Supreme Court. Its task is to seize the permanent, more or less, from the feelings and fluctuations of the transient."

One could quote on endlessly but it will suffice to repeat here what he has said about Justice Cardozo, for the words must equally apply to him.

"Immense legal learning, wide cultivation beyond the bounds of law, a serene outlook and a tolerant view of his fellow men without mistaking tolerance for fuzziness of thought, intellectual courage, and a purity of heart that assured the almost automatic exercise of the two most important faculties called for in a justice—disinterestedness and humanity—equipped Cardozo to a rare degree with qualities that are the special requisites for the work of the Court in whose keeping is entrusted in no small measure the destiny of the nation."

In a nascent democracy like ours where the ruling party commands an absolute majority and the Courts are called upon to perform the delicate task of balancing the citizen's rights against the exigencies of the State, such weighty words will not only warm the hearts of the guardians of our freedom but must act as pointers in the direction from which one can swerve only at one's peril.

Mulla on the Code of Civil Procedure. Thirteenth Edition by T. L. VENKATARAMA AIYAR, B.A., B.L. Vol I. BOMBAY-2: N.M. Tripathi Private Ltd., Princess Street, 1965. Roy. 8vo. Pages 947. Price Rs. 80 for 2 volumes.

SINCE Sir Dinshah Mulla revised the 10th edition of his classical commentary, a succession of eminent jurists have brought the book up to date. The distinguished present editor, a former Judge of the Supreme Court, has brought to bear upon it his deep scholarship and long experience on the Bench. He has strictly confined himself to revising the text without altering the original framework and broad features of the work. Over a decade has passed since the last edition was published and this has necessitated considerable modifications and additions in the light of legislative changes and the new rules framed by the different High Courts and the newly established High Courts. This volume contains commentaries on the Code and Orders I to XX. The second volume will contain the remaining Orders, table of cases, index etc. This being mainly a practitioner's book some new features are introduced which will be of great practical use to the busy lawyer, namely, synopsis for the commentaries for important sections and rules and incorporation of rules of the High Courts in the body of the Code under the particular rules of which they are amendments. In a standard work which is of daily use to the profession an addenda incorporating important last minute decisions would have been welcome, in which event reference could have been made to the decision of the Supreme Court in *Gulabchand v. State of Gujarat* which deals with *res judicata* in relation to a writ petition under art. 226 of the Constitution of India. This white book on the Code which for nearly half a century has come to be recognised as an authoritative exposition of the subject will continue to instruct and inform both the Bench and the Bar. A word of praise is due to the publishers for the excellent get up of the book and its handy format.

Law of Crimes in India. Vol. I. By R. C. NIGAM, LL.B., LL.M., M.A., PH.D. BOMBAY-1: Asia Publishing House, Calicut Street, Ballard Estate. Roy. 8vo. Pages 538. Price Rs. 32.

THE author of this treatise who is Dean of the Faculty of Law, Lucknow University, has made a specialised study of criminal law and criminology. For over two decades he has lectured and written on this subject and the present work is the outcome of his study and research in this field of law. The first part of this work contains a rapid historical survey and under the rubric prin-

ciples of criminal law are dealt with such topics as elements of crime, theories of criminal liability, principles and theories of punishment and executive clemency. Part two is concerned with general defences under the heads, excusable, justifiable and partial defences and a last chapter in it is devoted to some rights and protections conferred on the accused under the criminal law and the Constitution of India. A notable feature of this book is the comparative method of treatment whereby the provisions of the Indian Penal Code are considered *vis-a-vis* the principles obtaining under Anglo-American criminal jurisprudence with an extensive reference to English and American decisions. There are, however, a few points which need looking into when the book goes into a new edition. Explaining the meaning of life sentence the author has overlooked a decision of the Supreme Court of India in *Gopal Vinayak Godse's* case decided early in 1961, in the light of which his discussion of the Privy Council decision in *Kishori Lal's* case is now of academic interest only. Some of the statutes referred to in the book like the Indian Merchandise Marks Act, 1889, and the Bombay Children Act, 1924, are repealed by Act XLIII of 1958 and Bom. Act LXXI of 1948, respectively, and the reference to the Indian Children Act, 1952, must presumably be to the Children Act, 1960, which latter Act applies only to Union territories. Apart from this the book can be recommended as a fairly comprehensive study of the general principles of criminal law in India.

Sarkar's Specific Relief Act. Tenth Edition. By DURGA DAS BASU, M.A., B.L. CALCUTTA-12: S. C. Sarkar & Sons (Private) Ltd., 1-C College Square. Demi 8vo. Pages 494. Price Rs. 17.

THE Specific Relief Act, 1963, which came into force on March 1, 1964, has not only recast statutory law relating to specific relief in India but has incorporated some new provisions necessitated by judicial pronouncements. The editor who is the author of a standard commentary on the Constitution of India has not only explained the scope and object of each important provision of the statute but has laid bare the principles involved therein in the light of all the relevant decisions. The commentary though comprehensive is lucid, brief and to the point and by way of illustration to the provisions summaries of decided cases are given. The Addenda brings down the case law up to date and a comparative table showing the provisions of the old Act of 1877 and the new Act is included. This handy yet authoritative exposition of the Act will be of great help to the profession.

Delegated Legislation in India. Prepared under the auspices of the Indian Law Institute, New Delhi. BOMBAY: N. M. Tripathi Private Limited. Royal 8vo. Pages 253. Price Rs. 15.

THE genesis of this informative and timely publication is the suggestion made at the Seminar on Administrative Law held under the auspices of the Indian Law Institute for carrying out research in the area of delegated legislation. This study incorporates the material contained in the draft prepared on the subject by Dr. V. N. Shukla, Dean of the Faculty of Law, Lucknow University, and the thesis prepared by Mr. P. L. Shrivastava on the same subject for his doctorate degree of the London University. After dealing with forms and classification of delegated legislation the study proceeds to consider the procedural safeguards subject to which the power of delegated legislation is to be exercised, wherein a suggestion is made for separate publication of such legislation. Next to be dealt with is the important topic of the constitutionality of legislative delegation in which the implications of *In re Delhi Laws Act* case and the subsequent decisions of the Supreme Court are fully discussed. In this context are also considered the law and practice relating to the permissible limits of delegated legislation in U.S.A., Australia, Canada and South Africa. The enquiry ends with a discussion of the control exercised by the Courts and Par-

liament over the exercise of the law-making power of the delegate. This publication which high-lights the problem of control of delegated legislation should be pondered over by legislators who, in the words of the compilers, "seem to be indifferent to, and even unaware of, the dangers involved in giving legislative powers to the executive without keeping a watch on the way in which those powers have been exercised."

The Bombay Court Fees Act, 1959. By B. K. AMIN, Bar-at-Law. AHMEDABAD: Gujarat Law House, Bhadra. Demi 8vo. Pages 228. Price Rs. 15.

THIS is yet one more commentary on an overworked piece of legislation which has its justification in the fact that it deals with matters which are of daily reference to the lawyers. The present book is compiled with a view to making it useful to practitioners in the States of Maharashtra and Gujarat and, therefore, decisions of the High Courts at Bombay and Ahmedabad are fully discussed. The summary of the Act given in the opening pages of the book gives a bird's-eye view of its provisions. To add to its utility a table of rates of *ad valorem* fees prescribed by art. 1 of Sch. I is prepared, the text of the Suits Valuation Act, 1887, is given and there is a comprehensive subject-index which will facilitate reference to the required point. This book will prove itself useful to the practitioner as a *vade mecum* on the law of Court-fees as obtaining in the two States.

Mulla on the Sale of Goods Act and the Indian Partnership Act. Sixth Edition by KAIKOBAD SORABJI SHAYAKSHA, B.A. (OXON), of the Middle Temple, Barrister-at-Law. BOMBAY: N. M. Tripathi Private Ltd., Princess Street. Roy 8vo. Pages 166. Price Rs. 7.50.

THIS book dealing with two important branches of the law of contract which has proved itself useful to generations of law students since its first appearance, incorporates the latest decisions on the subjects. The comments though brief are lucid and are supplemented with illustrations and charts for easy comprehension of the points discussed. This is *par excellence* a beginner's book which will give him a clear conspectus of the provisions of the Acts.

Delegated Legislation. By K. CHANDRASEKHARAN, M.A., B.L. Advocate. MADRAS: The Madras Law Journal Office, Post Box 604. Roy. 12 mo. Pages 109. Price Rs. 7.50.

IN recent years the ambit and scope of delegated legislation in India has come under much scrutiny and the result of a research conducted at the instance of the Indian Law Institute has been noticed above. The present book is based on two lectures delivered under the auspices of the Sundaram-Aiyar-Krishnaswami Aiyar Endowment donated to the Madras University by the late Alladi Krishnaswami Aiyar. The author has given a rapid survey of the development of delegated legislation in India and has shown how in England and the U.S.A. excessive executive action has been met by safeguards such as "laying" of rules and judicial control. In his exposition the author has referred to a number of important decisions bearing on the subject and has wherever necessary quoted the opinions of eminent jurists to further elucidate the points under discussion. As a lucid and brief survey of the entire field of delegated legislation this book will commend itself to serious students of law.

The Hindu Marriage Act. By A. N. SAHA, LL.B. CALCUTTA-12: S. C. Sarkar & Sons Private Ltd., 1-C College Square. Demi 8vo. Pages 183. Price Rs. 6.

CERTAIN statutes seem to attract commentators more and the Hindu Marriage Act, 1955, is one of these which to date has been dissected by not a few. The present commentary follows more or less the pattern of its predecessors. The sections are explained in the light of decided cases, Indian and English, and an

appendix contains Rules made by the various High Courts under the Act. As a concise statement of the law on the subject the book will be useful to the practitioner.

Hand Book of Criminal Laws. Vol. II (Minor Acts) (Central). Edited by P. C. SARKAR, Advocate, High Court, Calcutta. Third Edition. CALCUTTA-12: S. C. Sarkar & Sons (Private) Ltd., 1-C, College Square. Demi 8vo. Pages 1154. Price Rs. 20.

THIS book which is received about a year after its publication gives the text of some 124 important minor criminal Acts of the Central Legislature bringing these down to the year 1962. Amendments to these made during the preparation of the book have been given in an Addenda. Some of the State amendments to the various Acts are noted under the relevant sections of the Acts. In a publication of this kind a subject index would have increased the utility of the book. This collection of criminal Acts which also includes Acts containing penal provisions within the covers of a handy volume will be very useful to the lawyer practising in the criminal Courts.

The Hindu Succession Act, 1956. By K. M. PANDA, LL.B., Advocate, Sambalpur CALCUTTA-12: S. C. Sarkar & Sons Private Limited, 1-C, College Square. Demi 8vo. Pages 165. Price Rs. 6.

THIS is yet one more book published about a year ago and just received. It has added to the many other commentaries on an Act which looking to its recent enactment and shortness has caused more divergence of opinion about some of its provisions than any other newly enacted statute. Within a small compass the author has not only explained the provisions of the Act with an adequate reference to the case law but has dealt with points which are yet open to judicial pronouncement. An appendix gives a list of Scheduled Tribes in the various States to whose members the provisions of the Act are not applicable. There is also an addenda containing case law reported during the preparation of the book. This book should prove a handy and reliable guide to the law on the subject.

BOOKS RECEIVED.

The New Year Book, 1965. Edited by P. C. SARKAR, B.A., LL.B. CALCUTTA-12: S. C. Sarkar & Sons Private Limited, 1-C, College Square. Demi 8vo. Pages 504. Price Rs. 3.75.

THIS is the 22nd year of publication of a year book which contains various aspects of the developments in India and the world and gives the latest information, facts and figures relating thereto. This is excellent value for money.

The Law Review. April 1965. Edited by PARAS DIWAN, LL.M. CHANDIGARH-3: Punjab University Law College, Section 14. Roy. 8vo. Pages 504. Price Rupee One.

THIS is a half yearly publication which contains some interesting articles on legal topics by scholars like Dr. J.D.M. Derrett and lecturers and readers of some law colleges. There is also a section devoted to contributions from students.

The Young Lawyer. Edited by Prof. B. T. SADHWANI.

THIS well-produced magazine of the Kishinchand Chellaram Law College contains articles on the various aspects of law by some well-known lawyers, professors and students and deals with the varied activities of a leading law college in Bombay.

The Bombay Law Reporter. JOURNAL

September 15, 1965.

LITERATURE AND OBSCENITY*.

"We are always striving for things forbidden and coveting those denied to us."—Ovid.

PART I.

THE object of this article is a limited one: it is an endeavour towards a critical appreciation of the law of obscenity with regard to literature (obtaining in India) after the decision of the Supreme Court in *Ranjit D. Udeshi v. The State of Maharashtra* (In re *Lady Chatterley's Lover*, by Lawrence). In order to avoid distraction caused by foot-notes for each and every assertion made, a bibliography and citation of cases are appended at the end of the article.

Before discussing the law as laid down in *Ranjit Udeshi's* case by the Supreme Court a few preliminary remarks seem to be apposite. This branch of law is one of absorbing interest both to the lawyer and the layman. The writer, the artist, the sculptor, the painter, the vendor of the book, the publisher—all evince interest in this branch of law: so too does the general public. This branch of law also lends itself to curious results: a book which is eulogised in one country may be found condemned in another; the scenes of a cinematographic film which are considered to be the very essence of the theme in one country may be rigorously censored in another; dance which is an everyday ritual in one land, may be taboo in another. There is no universality in human conception of obscenity and so there is no universal standard of value judgment in this field.

It is rather difficult to admit—but, unfortunately, the fact remains—that many a time the result reached regarding the same matter will be different depending on the race and the language of the participating artists. Indeed, it is true, that the censoring authorities will not look at the matter from the point of view of language and race; they are more concerned with the impact of the scene on a receiving mind. Later on we shall see that one of the questions that agitated the mind of the Supreme Court was the repercussion of the permission given to a book written by an Englishman in English language on the regional language literatures. It cannot but be emphasized that the value judgment in this branch is of a subjective character; it necessarily consists of many variables; and the result may not always lend to uniformity.

The second point to be noted is the freedom of the writer vis-a-vis the social control necessary in any organized society. No society, whatever the political creed it may adhere to, has ever given to the individual an absolute freedom in respect of speech and expression. On one side lies the right of the artist to articulate himself—a primary human urge out of which the civilised society has received all that is of enduring benefit to humanity; on the other, over-riding all individual considerations, there is the concept of social interest for subserving which all social institutions—and the State is one such—come into being. The freedom of thought and expression will necessarily include non-conformist thought, and revolutionary ideas, ideas that are antagonistic to the current trend. How far this freedom of expression should be curbed "in the interests of...public...decency or morality" or, to put it differently, where will the

*By A. K. Sarkar, M.A., LL.B., Advocate.

dividing line be drawn between permissible and impermissible expression of thought, is not an easy thing to settle.

The third preliminary point that may be stated is that the characteristic of good law is precision; it must speak unequivocally. A citizen should know beforehand what are the permissible limits of his action. If the infraction of any rule of conduct is to be visited with penalty, that rule of conduct must be laid down in precise terms. To state the law that you may write whatever you like so long as it is not obscene, and to say that what is obscene in a given case is what the Court will deem to be obscene, may be anything, but it is not a prior statement of permissible limitation.

The three preliminary points may be summed up thus:

(1) Human conception of obscenity is a variable one: in a given society at a given point of time it ought to be fairly ascertainable.

(2) An individual's right to the freedom of speech and expression is a sacred one, but overriding all his rights there lies a conception of social interest which necessarily curbs such freedom.

(3) Law which impinges upon an individual's right must be specific; it must be ascertainable today on the spot and not through a painful process of judicial determination.

PART II.

We shall now try to read the various implications of the judgment of the Supreme Court of India in the case of *Ranjit D. Udeshi v. The State of Maharashtra*. The judgment of the Supreme Court is important in many respects. It is the first case of its kind to reach the Supreme Court. The book impugned, *Lady Chatterley's Lover* and its author, *D. H. Lawrence*, are well-known in the literary world. It was for the first time that the constitutional validity of s. 292 of the Penal Code was challenged as infringing the freedom guaranteed in art. 19(1)(a). The judgment is notable for erudite scholarship and broad human sympathy towards the writer and the artist. Yet, with all this, the law laid down by the Supreme Court has not been that clear-cut as it generally is in the judgments of this Court.

The test of obscenity.—The main headache in this branch of law arises because of the absence of any definition of the word "obscene" in the Penal Code. This lacuna was supposed to have been made good by the Courts in India by importing the now famous definition laid down by Cockburn C. J. in *Regina v. Hicklin* as follows:

"...the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall..."

The test, it may be stated, has been uniformly applied in India. It now stands condemned in America, and in England, its native place, it has been replaced by a more sober and accurate definition contained in the Obscene Publications Act, 1959.

The test is vulnerable from many angles. No one will admit that he himself will be corrupted by reading any sort of book—he is, indeed, too sane for that! But the puritanical urge is that it must not corrupt others; and who are these "others"? According to the Lord Chief Justice Cockburn they are "those whose minds are open to such immoral influences". In India, this test has varied: sometimes he (the person whose mind is open to such immoral influences) is an ordinary individual, a person neither of exceptional susceptibility nor without any susceptibility at all. In others, adolescents have been roped in on the specious ground that such persons are also likely to read the impugned book and, if so, the effect of the publication on their minds cannot be eliminated.

The test talks of the 'tendency' and when this is judged not by jury but by the Magistrates or the Judges, it becomes the 'tendency' which they in their wisdom think the book will have on the average person or even on the

adolescent. Accordingly, there is no scope for determination of any contemporary community standard. The subjective opinion, therefore, dominates the field. Its weakness is the non-availability of prior ascertainment.

The Supreme Court held that the test of obscenity laid down by Cockburn C. J. in *The Queen v. Hicklin*, should not be discarded. Their Lordships said:-

It makes the Court the judge of obscenity in relation to an impugned book...and lays emphasis on the potentiality of the impugned object to deprave and corrupt by immoral influences. *It will always remain a question to decide in each case and it does not compel an adverse decision in all cases.* (Italics are mine).

In another context the present writer pointed out that so long as the law remains as it is, ultimately it will be for the Judges to say whether a particular book is obscene or not. The exercise of the judicial function, it was stated, will have to be discharged on a case-by-case basis, and howsoever onerous or ungrateful the task, the Judge cannot escape an instance-by-instance examination of cases. There is no talismanic formula of general applicability.

Unfortunately, this does not meet the charge so ably made by Mr. Justice Black in *Kingsley Corporation v. Regents of University of New York*, in connection with the same book, *Lady Chatterley's Lover*, but in respect of a motion picture of it. Said he:

So far as I know, judges possess no expertise providing exceptional competency to set standards and supervise the private morals of the nation...Under these circumstances, every member of the Court must exercise his own judgment as to how bad a picture is, a judgment which is ultimately based at least in large part on *his own standards of what is moral*. The end result of such decisions seems to me to be a purely personal determination of individual justices as to whether a particular picture viewed is too bad to allow it to be seen by the public. (Italics are mine).

The remarks apply with equal force in the case of books and the case by case determination, which, in their Lordships opinion, "does not compel an adverse decision in all cases". The attack is not that the judicial determination will always compel an adverse decision, but that the judicial determination of obscenity may not coincide with the general public notion or, to put it in other words, the contemporary community standard and judicial determination may not square. Be it noted, however, that it is no fault of the Judges that they are saddled with this thankless task. The duty, however unfortunate, falls on them until the Legislature deems it fit to change the law.

Had the Supreme Court stopped after agreeing with the test as laid down by Cockburn C. J. nothing much could be said against it, howsoever one might have regretted such concurrence on the part of the Supreme Court. But the Supreme Court laid down two other points which deserve careful study and analysis. The first point is as follows:

The test of obscenity to adopt in India (regard being had to community mores) is that obscenity without a preponderating social purpose or profit cannot have the Constitutional protection of free speech and expression and *obscenity is treating with sex in a manner appealing to the carnal side of human nature, or having that tendency*. Such a treating with sex is offensive to modesty and decency but the extent of such appeal in a particular book etc. are matters for consideration in each individual case. (Italics mine).

According to the present writer the following propositions are deducible from the foregoing test:

(1) In a book where there is found a treatment of sex in a manner appealing to the carnal side of human nature or having that tendency, it will be considered obscene. Such a treating with sex is offensive to morality and decency.

(2) The extent of such appeal should be judged case-wise.

(3) To claim constitutional protection in such a case it must be shown that there was a preponderating social purpose or benefit.

It is submitted, with respect, that the test has become unduly harsh. All treatment of sex which appeals to the carnal side of human nature or which

has such a tendency has come into the net. To claim constitutional protection, only a preponderating social purpose or benefit will avail. This will undoubtedly protect literature on medical or social sciences, but will it protect novels, dramas, short stories and the like? Are we now to have a new dimension in literary writing and that is that it must subserve some social purpose, or must look at some social interest or be motivated by some public good. Will a writer's own urge signify nothing: Does the social purpose become so paramount that deeply felt convictions cannot be articulated? George Meredith said: If it is deeply conceived it cannot be immoral. And who will be the arbiter of the fact that the particular work—novel, poem or drama—does possess a preponderating social purpose? Undoubtedly, a writer is free so long as he does not tread in the field of sex—indeed he may eliminate sex from his writing. But even a cursory look at the post war literature will show how unpleasantly dominated it has become by themes on sex, with all its perversions, and of terror and violence. No reasonable person can look with equanimity on the continuous inroads these themes are making today: the world has become a much less pleasant place and the realities of life much too harsh. Will it come to this then that the Court will stop all such writings? If so, something will be gained, but alas, something will also be lost in the process.

Another thing to be noted is that "treating with sex in a manner appealing to the carnal side of human nature" is too vague a term. In a literary work sex, generally speaking, is interwoven with other human passions and sentiments, senses and sensibilities. What type of dealing with sex will be appealing to the carnal side of human nature is difficult to speculate; it will vary from person to person. Some may dislike any reference to sex at all; others may not mind even candid delineations. It will again lead to the same subjective determination by the magistrate in the first instance: Is this book really dealing with sex in a manner appealing to the carnal side of human nature?

Let us now go to consider the second passage:

In this connection (i.e. in connection with judging the matter impugned) the *interests of our contemporary society and particularly the influence of the book etc. on it* must not be overlooked. A number of considerations may here enter which it is not necessary to enumerate, but we must draw attention to one fact. Today our *national and regional languages* are strengthening themselves by new literary standards after a deadening period under the impact of English. *Emulation by our writers of an obscene book under the aegis of this Court's determination is likely to pervert our entire literature because obscenity pays and true art finds little popular support.* (Italics mine).

The above passage goes to emphasize the incidence of the subjective element in determination of obscenity. The Supreme Court has done nothing startling: it has only stated categorically some of the grounds which necessarily go into the Court's value judgment.

We began with *Hicklin* test which asked the judge or the jury to consider the effect of the impugned book on persons whose minds are open to immoral influences in depraving or corrupting them. This was also a subjective determination dependent upon many variables. But the test itself was rather simple. The Judge, the Magistrate or the jury had to read the book, and if, in their opinion, it would tend to deprave or corrupt those into whose hands it would be likely to fall, they would condemn it. Now if we read the two passages quoted above from the judgment of the Supreme Court what do we get? The process today will be as follows:

The Magistrate

(a) will have to see whether the book treats with sex in a manner appealing to the carnal side of human nature and ascertain the extent of such appeal or tendency;

[Any two magistrates may differ whether the book appeals to the carnal side of human nature or not.]

(b) will have to take cognisance of the interests of the contemporary society by ascertaining the influence of the work on it;

[The fashionable society of Bombay, Delhi or Calcutta may wink at many things which will not pass muster in a mofussil town and the findings of the authorities as regards the effect of the book on contemporary societies may be different regard being had to the locale and the social climate.]

(c) will have to take note of many other considerations;

[The Supreme Court does not mention all these considerations, but emphasises one of them. This is a dangerous innovation and a prehensile one too; no one can now state what other points the magistrate may take into consideration.]

(d) will have to ascertain whether the passing of the book by him may have the effect of evoking emulative spirit in the regional language or Hindi literature to their detriment; and

[This is not only an imponderable but it also creates other difficulties. Will a Bengali authority pass a book thinking that its effect on Bengali literature would not be harmful whereas an authority in the Punjab may think it otherwise with regard to the Punjabi literature? By the way, will the authorities be at all cognisant about the growth of the regional literatures or, for the matter of that, of the national language literature?]

(e) will have to see whether it has a claim to a preponderating social purpose or interest.

One would almost surely say that the previous test was, in fact, much better. It was not satisfactory, but, at least, it was simple. The present test is neither satisfactory, nor is it simple.

Dominant theme test.—The defence on the ground of dominant theme has scarcely been advanced in India but the argument of part obscenity has always been rejected by the Courts here. The general nature of the argument is that the Court should not be astute enough to rest its judgment on some stray passages here and there in the book. In other words incidental intrusion of obscenity should not invite judicial stricture on the whole book.

On this aspect the Supreme Court again has not been very clear. There has been a noticeable softening of attitude in that it was stated that a stray word or an insignificant passage will not suffice. But the real rule was laid down as under:

An overall view of the obscene matter in the setting of the whole work would, of course, be necessary, but the obscene matter must be considered by itself and separately to find out whether it is so gross and its obscenity so decided that it is likely to deprave and corrupt those whose minds are open to influences of this sort and into whose hands the book is likely to fall.

This is an improvement from the previous state of affairs, though the law remains still harsh.

Mens rea.—As usual, *mens rea* was negatived and the rule of strict liability invoked. This was done on the ground of the difficulty to obtain legal evidence of the offender's knowledge and also on the ground that s. 292, Indian Penal Code, did not make knowledge an ingredient of the offence. The argument that a bookseller may be just an innocent vendor, he having neither the time nor any ability to go through numerous publications, was negatived stating that the Court had to administer the law as it found it, and if there was any exception to be made, it was for the Parliament to do so. The law against obscenity has always imposed strict liability and their Lordships confirmed the old view in this respect. Their Lordships were also in agreement with the view that such absence of knowledge may be taken into consideration in mitigation of sentence.

In this aspect the law remains the same as before.

The problem of *scienter*, that is knowingly doing an act, was only slightly referred to but no statement of law was made.

Expert evidence.—As for expert evidence the Court said that on behalf of

the accused Mr. Mulkraj Anand, a writer and art critic, gave evidence, and in a detailed analysis of the novel, he sought to establish that inspite of its apparent indelicate theme and the candidness of its delineation and diction, the novel was a work of considerable literary merit and a classic and not obscene. Their Lordships then stated that the question did not altogether depend on oral evidence because the offending novel and the portions which were the object of the charge had to be judged by the Court in the light of s. 292, Indian Penal Code, and the provisions of the Constitution.

There is nothing sacrosanct about expert evidence and, in any event, it is for the Court to come to its conclusion whether a particular book is obscene or not. But what is objected to by the present writer is not the rejection of the analysis made by Dr. Anand—the Court had every right to reject it—but the arrival at its own conclusions after an elaborate study of many critics of Lawrence. In *Regina v. Penguin Books Ltd.* (the same book, *Lady Chatterley's Lover* was involved there), before Mr. Justice Byrne at the Old Bailey were arrayed 70 experts for the defence—eleven of them were from the world of education, ten were editors or art critics, four were clergymen including one bishop, three were writers, three were publishers, one was a psychologist, one a barrister-editor, one a Member of Parliament (author of the Act of 1959) and various others. They supported the book unanimously, a striking thing considering the divergence of opinion that generally prevails in the literary world and specially with regard to obscene matters. It will be wrong to state that their Lordships of the Supreme Court should have taken into consideration these opinions. But, it is respectfully submitted, that their Lordships should also not have considered the opinions quoted by them in the body of the judgment. If one was irrelevant, so was the other. Particularly unfortunate is the reference to Middleton Murray.

Nor is it understood what purpose is served by diagnosing the motive of Lawrence in writing the book. Their Lordships stated that Lawrence had a dual purpose in writing the book. It is respectfully submitted that motive or purpose of an author is an extraneous consideration. If the book be in fact obscene, the purpose of the author, howsoever laudable, will not save it; on the other hand, if the book is innocuous, the purpose of the author, howsoever reprehensible, will not affect it. Lawrence undoubtedly had his detractors, probably still he has some. But he had also people who appreciated his writings and still do. The opinions of neither are relevant.

Plea of public good.—This plea unfortunately was not raised and their Lordships consequently did not opine on the subject as to whether the book could claim exemption on the ground of public good. The categories of exemption in England runs thus: "If it is proved that publication of the article in question is justified as being for the public good on the ground that it is in the interests of science, literature, art or learning, or of other objects of general concern" then no one should be convicted with regard to such publication. To be frank, in India such a broad category of exemption is not statutorily available nor has the judicial determination been so flexible. But the statement made by their Lordships may presage a better deal in the future if, and only if, 'public good' is construed broadly. The Court stated:

It may, however, be pointed out that one may have to consider a plea that the publication was for public good. This bears on the question whether the book etc. can in those circumstances be regarded as obscene. It is necessary to bear in mind that this may raise nice points of the claims of society to suppress obscenity and the claims of society to allow free speech. No such plea has been raised in this case but we mention it to draw attention to the fact that this may lead to different results in different cases.

It is rather unfortunate that this point was not raised, particularly as the contention of the defence in England was exactly on that ground.

Art and obscenity.—Some remarks of the Court are both interesting and instructive on this point. The Court said:

The laying down of the true test is not rendered any the easier because art has such

varied facets and such individualistic appeals that in the same object the insensitive sees only obscenity because his attention is arrested, not by general or artistic appeal or message which he cannot comprehend, but what he can see, and the intellectual sees beauty and art and nothing gross... where obscenity and art are mixed, art must be so preponderating as to throw the obscenity into a shadow or the obscenity so trivial and insignificant that it can have no effect and may be overlooked.

Such a brave statement on the appreciation of art in the former part and the statement of the law in the latter brings out the inner conflict: Whether art is preponderating or obscenity, is a determination of the receiving mind, the mind which their Lordships themselves state may be sensitive and, therefore, receptive of the aesthetic values, or insensitive and, therefore, receptive of the gross. The nemesis of subjective appreciation is always there. Yet, the sentiments are admirably stated and the problem is not minimised.

Constitutional validity of section 292, Penal Code.—This was upheld on the ground that the restraint imposed by the section did not travel outside the limitations of reasonable restriction put on the exercise of the right of freedom in the interests of public decency and morality as envisaged in art. 19(2) of the Constitution.

Pornography and obscenity.—Incidentally their Lordships brought out the difference between obscenity and pornography. The latter, according to the Supreme Court, denoted writings, pictures, etc. *intended* to arouse sexual desires, while the former may include writings etc. not intended to do so but which have that *tendency*. Both offend against public decency but pornography is obscenity in a more aggravated form.

We have seen above the law as it now stands after the judgment pronounced by the Supreme Court. It cannot but be stated that the state of law is unsatisfactory and the decision of the Supreme Court has not improved matters much. Reform in any branch of law is a tedious and time consuming affair. It becomes necessary for many over a period to think, discuss and agitate matters so that the Legislature may move in reforming the law. It is always easy to let things run their course: it is always difficult to bring in a new approach. Yet, all changes worth having are also worth the sacrifice that they entail.

PART III.

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NON-LIABILITY OF THE STATE FOR ITS TORTS.*

Two years after the Supreme Court in *The State of Rajasthan v. Mst. Vidhyawati*¹ unceremoniously rejected the theory of sovereign immunity of the State for tortious actions as "feudalistic" and inapplicable to our Republican Constitution, the Court in *Kasturi Lal v. State of U.P.*² has held that the State is not liable for the tortious actions of its employees if such actions are the exercise of sovereign powers of the State. In *Vidhyawati's* case the Court held that:

"Viewing the case from the point of view of first principles, there should be no difficulty in holding that the State should be as much liable for tort in respect of a tortious act committed by its servant within the scope of his employment and functioning as such as any other employer. The immunity of the Crown in the United Kingdom, was based on the old feudalistic notions of Justice, namely, that the King was incapable of doing a wrong and, therefore, of authorising or instigating one, and that he could not be sued in his own courts. In India, ever since the time of the East India Company the

*By Tehmtan R. Andhyarujina.

S.C. 933.

1 [1962] Supp. 2 S.C.R. 989, [1962] A.I.R.

2 [1965] A.I.R. S.C. 1039.

sovereign has been held liable to be sued in tort or in contract and the Common Law immunity never operated in India. Now that we have by our Constitution established a Republican form of Government and one of the objectives is to establish a Socialistic State with its varied industrial and other activities, employing a large army of servants, there is no justification, in principle, or in public interest, that the State should not be held liable vicariously for the tortious act of its servant." (p. 1007).

Justifiably, counsel for the appellant in *Kasturi Lal's* case, relying on *Vidhyawati's* case, contended that his claim against the State for damages for the loss caused by the misappropriation by a police constable of gold seized from him could not be defeated on the plea that the seizure was an action in exercise of Sovereign powers. The Supreme Court, whilst conceding that there were certain observations made in *Vidhyawati's* case which supported counsel's submission, reviewed the position in law and held that, subject to any law which the competent legislature may make hereafter, Government could be sued for the tortious actions of its servants only where such actions could not be attributed to the exercise of Sovereign powers of the State. Such a result in the Court's opinion followed from art. 300 of the Constitution which read with similar provisions in the previous Constitutional Acts governing India down to s. 65 of the Government of India Act, 1858, equated the liability of Government to be sued to like cases in which the East India Company could be sued. The historical accident of the East India Company, being a company to whom Sovereign powers were delegated and which was engaged in transactions partly for the purpose of Government and partly on their own account without any delegation of Sovereign powers, gave rise to a two-fold distinction in its liability to be sued viz: for acts done in the exercise of what are termed Sovereign powers and acts done in the conduct of undertakings which might be carried on by private individuals without having such powers delegated to them. The same dual nature of liability attached to the State under our Constitution by reason of the "pedigree" of art. 300, with the result that the State could not be sued for the tortious acts which were carried out in exercise of its Sovereign powers. To the extent of this finding in *Kasturi Lal's* case the decision of the Court in *Vidhyawati's* case must now no longer be considered good law. The ghost of the East India Company thus stalks the Republican Constitution of India of 1950.

In arriving at this conclusion, the Supreme Court placed exclusive reliance on the decision of Peacock, C. J. of the Calcutta Supreme Court in *P. & O. S. N. Co. v. Secy. of State for India*³ decided in 1861 and on a "few representative decisions" which in the opinion of the Court had followed this decision. The *P. & O.* case made a distinction in liability of the E. I. Co. between its trading activities and its activities for the purposes of Government and it held that in respect of the former the E. I. Co. was always liable to be sued and in respect of the latter the E. I. Co. could not be sued. The crucial dicta in the *P. & O.* judgment which received from the Supreme Court the tribute of being a "classic statement" was the following (p. 14):

"...where an act is done, or a contract is entered into, in the exercise of powers usually called sovereign powers, by which we mean powers which cannot be lawfully exercised except by a sovereign, or private individual delegated by a sovereign to exercise them, no action will lie".

In *Kasturi Lal's* case the Supreme Court held that in the case before it the appellant could not maintain a suit against the State for the recovery of gold seized from him whilst he was arrested by police officers, as his arrest and seizure of gold were under statutory powers which "in the last analysis" were powers which could properly be characterised as Sovereign powers. The Court thus stated an unqualified proposition that the E. I. Co. and its successors would only be liable (in tort) if their actions were not in exercise of Sovereign powers. Finally, the Court observed that this doctrine of immunity was based on the common law principle that the King could do no wrong and even in England that principle had been abrogated by the Crown Proceedings Act,

1947. The Court felt oppressed that such an immunity should prevail now in India under the Constitution and exhorted the legislatures in India to seriously consider whether they should not pass legislative enactments to regulate and control the state's claim from immunity on the same lines as the Crown Proceedings Act, 1947.

It is unfortunate that the Court accepted the above-mentioned dicta in the *P. & O.* case as the principle enunciated in that case. It is also unfortunate that the Court was influenced by a mistaken belief that the principle which it had extracted from the *P. & O.* judgment had been uniformly followed in India. It is submitted that had the Court critically examined the *P. & O.* decision it would have found that the dicta was without foundation in constitutional law, and in the form in which the proposition was stated in the *P. & O.* judgment and approved by the Supreme Court it was contrary to earlier and later judgments of the Privy Council and had been dissented from by later decisions in India.

First, no immunity for actions of the Crown which are attributable to the exercise of sovereign powers *simpliciter* exists or ever existed in the U.K. The immunity of the Crown (till the Crown Proceedings Act, 1947) for the tortious actions and breaches of contract by its employees was based not on any theory of sovereign powers but on the theory that the King could do no wrong and could not authorise another to commit a wrong. The *P. & O.* judgment did not state that the basis of the immunity of the E.I. Co. for actions in exercise of its sovereign powers was the theory that the King can do no wrong as the Supreme Court in *Kasturi Lal's* case mistakenly assumes.⁴ On the contrary the *P. & O.* judgment expressly repudiates that this is the basis of the immunity of the E.I. Co. and rejects cases based on this theory as apposite for the case under its consideration. Nothing can be clearer than repeated statements to this effect in the judgment, the most striking of which is,

"In determining the question whether the East India Company would, under the circumstances, have been liable to an action, the general principles applicable to Sovereigns and States, and the reasoning deduced from the maxim of the English law that the King can do no wrong, would have no force ... the fact of the Company's having invested with powers usually called sovereign powers did not constitute them sovereigns" (p. 9).

This mistaken assumption of the Supreme Court of the basis of the immunity of the E.I. Co. for its actions in exercise of sovereign powers accounts for its finding that the E.I. Co. was not liable for all of its actions in the exercise of its sovereign powers. Further, closer examination of the *P. & O.* judgment would reveal that though Peacock C.J. made a distinction between the class of acts which a private individual or a trading corporation can perform and those which can be performed by a sovereign power, what the case actually decided was that the particular act which the Court was considering fell within the former category. Whether the Company or its successor could be sued in cases not connected with the conduct of a business or commercial undertaking was not in issue before the Court.⁵

It is submitted that the only valid basis of the immunity for acts of the E.I. Co. and its successors in the *P. & O.* judgment is for acts done in the exercise of sovereign powers which do not profess to be justified by municipal law i.e. acts of State. The expression "act of State" is defined for general purposes as an act done by the State as a matter of policy in relation to a foreign State or in relation to an individual who is not within the allegiance of the State. In truth, as one text book puts it, all that the State does in the sphere of foreign affairs falls within the category of acts of State.⁶

4 [1965] A.I.R. S.C. 1039, at pp. 1048-49, para. 30.

5 *The Secretary of State for India v. Hari Bhanji*, (1882) 5 Mad. 273, at p. 278; *Secretary of State for India in Council v. Shreegobinda*

Chaudhuri, (1932) 59 Cal. 1289, at p. 1299; *Rao v. Advani*, (1949) 51 Bom. L.R. 342, at p. 397.

6 Keir & Lawson : *Cases in Constitutional Law*, 4th Ed., p. 106.

There can, therefore, be no act of State between the State and a person within its allegiance.⁷ The cases cited in the *P. & O.* judgment in support of the non-liability of the E.I. Co. viz., *Nabob of Carnatic v. East India Co.*⁸ and *Elphinstone v. Bedreechund*⁹ are typical cases of acts of State. In cases of acts of State the doctrine that the King can do no wrong has no application. The non-liability of the State arises not because the act was not actionable in law but because a municipal Court can have no jurisdiction to declare it as such.

If the *P. & O.* case is an authority for the proposition that the E.I. Co. was only liable for such of its acts as were outside its sovereign powers, then (apart from the fact that, as stated above, this theory is unfounded in constitutional law) the proposition is manifestly contrary to earlier and later Privy Council cases which have explained the liability of the E.I. Co. in the exercise of its sovereign powers. In *The Secretary of State in Council of India v. Kamachee Boye Sahaba*,¹⁰ a leading case on the nature of an act of State, the Privy Council was concerned with the seizure of the Raj of Tanjore by the E.I. Co. The Privy Council posed the question before it thus (p. 77):

"The next question is, what was the real character of the act done in this case? Was it a seizure by arbitrary power on behalf of the Crown of Great Britain of the dominions and the property of a neighbouring State, an act not affecting to justify itself on grounds of Municipal law? or was it, in whole or in part, a possession taken by the Crown under colour of legal title of the property of the late Rajah of Tanjore ... If it were the latter the defence set up, of course, has no foundation."

The Privy Council further stated (p. 76):

"...The careful and able review of the several Charters and Acts of Parliament bearing upon the subject which they had the advantage of hearing at the Bar, has satisfied them that the law as it stood in the year 1839, is accurately stated in the following passage in the judgment of the Chief Justice Tindal in the case of *Gibson v. The East India Company*" in which after referring to various legislative enactments he observes that from these—"It is manifest that the East India Company have been invested with powers and privileges of a twofold nature, perfectly distinct from each other; namely, powers to carry on trade as merchants ... and power to acquire and retain and govern territory, to raise and maintain armed forces by sea and land, and to make peace or war with the native powers of India." That acts done in the execution of these Sovereign powers were not subject to the control of Municipal Courts, either of India or Great Britain, was sufficiently established by the cases of the *Nabob of Arcot v. The East India Company* in the Court of Chancery in the year 1793 and the *East India Company v. Syed Ally* before the Privy Council in 1827."

The Privy Council held that the property had been seized by the East India Company acting as a sovereign power and the act so done with its consequences was an act of State over which the Court had no jurisdiction.

Next, the case of *Forrester v. Secretary of State for India in Council*¹² decided in 1872 is clear authority that not all acts of the East India Company in exercise of their sovereign powers are outside the jurisdiction of Courts. There, the plaintiff sued to recover an estate which had originally belonged to Begum Sumroo and to which the plaintiff claimed title. The Company resisted the suit on the ground that the Begum was an independent or quasi-independent sovereign and the resumption and seizure were acts of State whose propriety was not cognizable by any Municipal Court. The Privy Council, having found that the Begum was not a Sovereign, overruled the plea holding that the resumption was taken under colour of legal title, the title being the undoubted right of the sovereign power to resume lands held rent free.

The clearest exposition and correction of the scope of the non-liability of the East India Company and its successors was given in 1882 in an admirable

7 *Walker v. Baird*, [1892] A.C. 491; *Johnstone v. Pedlar*, [1921] 2 A.C. 262.

8 4 Bro. Rep. 179 & 2 Vesey 56.

9 (1830) 1 Knapp. P. C. C. 316.

10 (1859) 13 Moo. P.C. 22.

11 (1839) 5 Bing. N.C. 262, at p. 275.

12 (1872) L.A. (Supp. No. 1) 10.

judgment by Chief Justice Turner in *The Secretary of State for India v. Hari Bhanji*¹³ where the Madras High Court dissenting from the Calcutta High Court in *Nobin Chunder Dey v. The Secretary of State for India*¹⁴ held that where an act complained of is professedly done under the sanction of Municipal law and in the exercise of powers conferred by that law the fact that it is done by the sovereign power and is not an act which could possibly be done by a private individual does not oust the jurisdiction of civil Courts. The Madras decision in *Hari Bhanji's* case has been followed subsequently, and was endorsed by Mukherjea J. of the Supreme Court in *Province of Bombay v. Kushaldas Advani*¹⁵ with these words:

"The liability of the East India Company to be sued was not restricted altogether to claims arising out of undertakings which might be carried on by private persons but other claims if not arising out of acts of State could be entertained by Civil Courts, if the acts were done under sanction of Municipal law and in exercise of powers conferred by such law."

From the aspect of contracts by the State the Privy Council in *Venkata Rao v. Secretary of State for India*¹⁶ expressed a *prima facie* view that "it did not think s. 32 of the Government of India Act, 1915 had

"an effect to limit or bar the right of action against Government which would otherwise be enforceable by action against it merely because an identical right of action did not exist at the date when the East India Company was the body, if any, to be sued."

The proposition that the liability of East India Company to be sued was restricted to actions in exercise of non-sovereign powers was not adopted in other cases also.¹⁷

This formidable body of legal opinion finds no mention in *Kasturi Lal's* case. On the contrary the Court erroneously believed that the principle of the *P. & O.* judgment had been uniformly followed. The Supreme Court relied on a single Privy Council case, viz: *Secretary of State for India v. Moment*¹⁸ and six High Court cases¹⁹ as "representative decisions" in India. As to *Moment's* case, contrary to the Court's statement, there is no "express approval" of the principles in *P. & O.* case at all. In that case the Privy Council held that s. 41(b) of the Burma Act IV of 1898 which deprived a Civil Court from having jurisdiction to determine any claim to any right over land against Government was *ultra vires* as being in contravention of s. 65 of the Government of India Act, 1858, as a suit of that character would have lain against the East India Company for the reasons explained in the *P. & O.* judgment. There was no discussion at all on the liability of the East India Company *qua* its sovereign and non-sovereign functions. Indeed, the reported arguments show that the liability of the East India Company to be sued for a claim over land was not at all disputed and, therefore, there was no question at all as to what were the actions for which the East India Company could not have been sued. As for the six High Court decisions, it is difficult to say that they subscribe to the proposition that the E. I. Co. and its successors could only be sued for its non-sovereign functions with the possible exception of *The Secretary of State v. Cockcroft*.²⁰ These decisions can hardly be called "representative" in view of the above mentioned Privy Council decisions, the observations of Mukherjea

13 (1882) 5 Mad. 273.

14 (1875) 1 Cal. 11, which is the earliest case in which the dicta in the *P. & O.* case is fully applied as a principle to both actions in tort and in contract.

15 [1950] S.C.R. 621, at pp. 693-696, [1950] A.I.R. S.C. 222, at pp. 248-249, 53 Bom. L.R. 1. See also the observations of the trial Court (per Bhagwati J.) and of the Appeal Court (per Chagla C. J. and Tendolkar J.) 51 Bom. L. R. 842, at pp. 868-873, and 893-397, 409-412, respectively.

16 (1936) 64 I.A. 55, at p. 65.

17 *Rup Ram v. The Punjab State*, [1961]

A.I.R. Punj. 336, F.B.; *Union of India v. Murlidhar*, [1952] A.I.R. Assam 141; *Prem Lal v. U. P. Govt.*, [1962] A.I.R. All. 232.

18 (1912) 40 I.A. 48.

19 *Shivabhanjan v. Secretary of State for India*, (1904) 28 Bom. 314; *The Secretary of State v. Cockcroft*, (1914) 39 Mad. 351; *Secretary of State for India in Council v. Shreegobinda Chaudhuri*, (1932) 59 Cal. 1289; *Uma Parshad v. Secretary of State*, (1936) 18 Lah. 380; *Mohammad Murad Ibrahim Khan v. Government of United Provinces*, [1957] 1 All. 94, [1956] A.I.R. All. 75.

20 (1914) 39 Mad. 351.

J. of the Supreme Court on the point and other decisions of High Courts in India.

It is most likely that had the correct basis of the non-liability of the East India Company been highlighted in *Kasturi Lal's* case, and the above mentioned decisions of the Privy Council and several High Courts and the observations of Mukherjea J. in *Advani's* case been cited, a different view of the State's immunity would have been arrived at, viz. that the State is only immune in municipal Courts for its acts of State. In the result, the Court's invitation and exhortation to the legislatures to step in would have been quite unnecessary. It is learnt that Parliament is shortly introducing a bill to remedy the situation arising from *Kasturi Lal's* case. Such a law will inevitably result in further litigation as it is likely to contain a large number of reservations of non-liability in favour of the State. One cannot help feeling that the citizen might conceivably have been spared this result if *Kasturi Lal's* case had been presented in all its aspects before the Supreme Court. Is it, one may hazard to ask, too late for a reargument?

GLEANNINGS.

TRADITIONS OF THE BAR

It has been the practice in our Courts, though honoured more in the breach, for an advocate to appear in a friendly capacity on behalf of a brother advocate in a litigation in which the latter is personally involved. There is also the common spectacle of the desperate struggles made to get rid of such a reluctantly accepted assignment on the ground of a last minute materialisation of a part-heard matter or the sudden appearance of a case on Board. One dreads to think what chance a poor litigant has in such a set up. The following incident culled from the life of Norman Birkett by H. Montgomery Hyde will at least provide to the victim of such unprofessional conduct, a heartening thought, albeit a poor consolation, that in some quarters the ethics of the profession are not forgotten in the rat race after lucre.

A prisoner was put up at the Lincoln Assizes on a charge of shooting with intent to kill a gamekeeper who had caught him poaching. On entering the dock, the poacher, who apparently had the sum of £1 3s. 6d. with him, asked the judge if he could have a 'dock defence'.

The judge, who was Mr. Justice Sankey, signified his assent, whereupon the prisoner looked round the court room and promptly picked out Birkett. 'I'd like him', he said.

'Mr. Birkett', said the judge, 'I know you are very busy. Would you like to be excused?'

'No, my Lord', Birkett replied. 'I think it is my duty in accordance with the traditions of the Bar to accept'.

When Birkett later telephoned his clerk, Bowker, in London to say that he would not be returning next day as he was staying on in Lincoln for a 'docker', Bowker was furious, since they were snowed under with work in chambers at the time, and the clerk had to cancel various appointments.

The case lasted the rest of the day and the best part of the following day. But Birkett had the satisfaction of getting the charge reduced to one of unlawful wounding, so that his client received a sentence of six months' imprisonment instead of a term of penal servitude.

PRISONER'S RIGHT TO A SEAT AT HIS TRIAL

PRISONERS of all kinds often showed signs of great emotional stress when they went into the dock, and Birkett (later Lord Birkett of Ulverston) took the humane view that as a rule they ought to be allowed to be seated except at certain solemn moments in the trial such as when they were called on to

plead to the charge and during the giving of the verdict and passing of sentence. While this is the general rule today, at the time in question the more old-fashioned among His Majesty's judges opposed it. On one occasion, when Birkett was defending a railway time-keeper charged with forgery at Nottingham Assizes, and the case had proceeded for some time, he asked the judge, Mr. Justice Horridge, if his client might be seated in the dock.

'Why?' inquired his Lordship sharply.

'I think the prisoner is under some strain', Birkett replied.

'Not unless there is some special reason', the judge rejoined. 'We are getting really too delicate in our habits towards people who are being tried'.

The result was that, when the judge came to pass sentence—six months' hard labour—the prisoner fainted in the dock and had to be revived and assisted below.

This incident had an interesting sequel at the next assize town, which was Derby. Here another circuit member, Maurice Healy, made a similar application on behalf of the prisoner, which the judge again refused. But he allowed Healy to argue it, which that witty and urbane Irishman did with courage as well as courtesy. Birkett was greatly impressed by Healy's masterly argument, as indeed was the whole Circuit Mess including the Clerk of Assize.

The prisoner comes to the bar as an innocent man and is to be regarded as an innocent man. He is entitled not only to every right but to every privilege which is granted to every other person in court. When your Lordship comes into court we all stand up because your Lordship represents the Majesty of the King, and when your Lordship sits down we are all allowed, by that courtesy, to resume our seats in such ease as enable us to perform our respective duties, and I submit that that courtesy should be extended as much to an unconvicted prisoner as to anybody in court.

I am extremely sorry that I should make a demand which is unpleasant to your Lordship, but there is something which all counsel must do, and that is that they should have courage in defending the rights and in defending the liberties of their clients, and the constitution of this country has never been more jealous than in pruning all relics of harsh and cruel treatment of prisoners. For these reasons I submit that as a matter of right the prisoner, unless there is danger of his escape, should be allowed to be seated. At first Mr. Justice Horridge was adamant, but after Healy had opened his case and called one or two witnesses, the judge relented and allowed the prisoner to have a chair. Nor, it must be admitted, did he bear any malice in the matter, either towards Healy or Birkett. And the fact remains that from the date of these incidents, which received fairly wide publicity, the invariable practice of every trial judge has been to direct that the prisoner be seated immediately after he has been 'given in charge' of the jury. (*Norman Birkett* by *H. Montgomery Hyde*).

REVIEWS.

Lord Nottingham's 'Manual of Chancery Practice' and 'Prolegomena of Chancery and Equity'. Edited by D. E. C. YALE, Fellow of Christ's College and Lecturer in Law in the University of Cambridge. BOMBAY-1: Macmillan & Co., Ltd., 276 Dr. Dadabhoy Naoroji Road. LONDON N. W. 1: Cambridge University Press, Bentley House, 200 Euston Road, 1965. Roy. 12 mo. Pages/385. Price 57s. 6d. net (Rs. 46).

LORD Nottingham, known as the Father of Modern Equity and who was Lord Chancellor from 1673 to 1682, had besides his *Chancery Reports* prepared two treatises, one on Chancery practice in his day and the other an exposition of rules of Equity as they existed when he first held the Great Seal. These latter which Lord Nottingham prepared for his private use and study now see the light of day after nearly three centuries of neglect. In a scholarly introduction,

the editor, who has made a specialised study of the noble Lord's processes of thought, has discussed at some length the procedure and process in the Chancery Court against the historical background so as to offer an account of some of the significant features of the exposition in the treatises. This recent addition to the Cambridge Studies in English Legal History will be invaluable to students of the history of English Equity and must find a place on the shelf of every well-equipped law library.

The Law of Specific Relief. By Prof. G. C. VENKATA SUBBARAO, B.SC., M.L., Advocate. First Edition. 1965. MADRAS 4: The Madras Law Journal, Post Box 604. Roy. 8vo. Pages 720. Price Rs. 25.

THE Specific Relief Act, 1963, which replaced the Act of 1877, was passed as a result of the recommendations made by the Law Commission in 1958. By this Act many vital changes have been effected apart from clearing up doubts and difficulties in the pre-existing law. A reappraisal of the law in the light of statutory changes and judicial decisions was therefore necessary and the present book eminently supplies that desideratum. The author who is a well-known jurist with nearly two decades of teaching experience behind him is well fitted for his task in dealing with a complex subject which intersects different branches of substantive law. After setting out the bare text of the Act, the author has critically examined its provisions topicwise under different headings and sub-headings. The Indian case law is dealt with exhaustively and for a clearer exposition of the principles underlying the sections of the Act liberal extracts are given from the judgments of the English and Indian Courts. To add to the utility of the book some very useful material is provided in the Appendix which includes a discussion on the validity of s. 42 of the Act, recent Indian and foreign case-law bearing on the subject and Forms of Pleadings and Decrees. This book which has been highly commended by Mr. Koka Subbarao, an eminent Judge of the Supreme Court of India, will take its place as a standard work on this difficult branch of law.

The Law of Hire-Purchase in India and England. By BHAWANI SHANKAR CHOWDHURY, M.A., LL.B., Advocate. CALCUTTA-13: Eastern Law House Private Ltd., 54 Ganesh Chandra Avenue. Demi 8vo. Pages 332. Price Rs. 15.

THE English Hire-Purchase Acts of 1938 and 1954 came to be passed *inter alia* "to establish a minimum standard of fair dealing between owners and hirers". In India with the rapid growth of industry hire-purchase transactions are coming to the fore and in the absence of any statutory law on the subject, the law applicable to such transactions has to be gathered from different sources. This book provides a reliable guide to the study of hire-purchase law in India with a detailed examination of the English law on the subject. Of particular interest to lawyers will be reports of some dozen leading English decisions bearing on the subject, model form of a hire-purchase agreement and other forms and pleadings based on standard English precedents and the texts of the English Acts. For the high standard of a Tagore Law lectureship aspired to by the author and the suitability of the book for "some academic distinction" as recommended in a foreword by the Chief Justice of West Bengal, he would have been well advised to include the decision of the Supreme Court in *Damodar Valley Corporation v. State of Bihar*, (1961) 12 S.T.C. 102, where the Court at some length has considered the essential features of a hire-purchase agreement. There is also an illuminating recent decision of the High Court at Bombay in *Commercial Credit Corp. Ltd. v. State* (67 Bom. L.R. 138) which lays down tests for the determination of a hire-purchase agreement. This however is a commendable effort to present in a refreshingly original manner the law on a subject of ever-growing importance and some of the author's suggestions deserve serious consideration.

First Steps in Advocacy. By LEO PAGE of the Inner Temple, Barrister-at-Law.
LONDON: Faber and Faber Limited, 24 Russell Square. Crown 8vo. Pages 132.
Price 12s. 6d. net.

ADVOCACY or the art of persuasion is of ancient lineage deriving as it does from the great orators of antiquity. In more recent times this art had come to full fruition in British Courts where the names of such eminent advocates as Carson, Birkenhead and Marshall Hall are still fresh within living memory. Perfection is rare in such an art but as in other arts there is always an endeavour to attain the ideal. This little book which has established itself as a standard work for nearly two decades, puts the neophyte on the right path to the attainment of such an ideal. The author does not lay claim to more than this, for as he observes of the beginner:

"however great his legal knowledge, until he can think, and think fast, while on his feet he will never have the composure or alertness of mind to enable him to take full advantage of the inspiration of the moment. It is that inspiration, amounting to a sort of intuition, which is the secret of successful advocacy."

There are, however, rules and principles of advocacy which could be acquired and this book supplies that need in ample measure. The tone is set in the opening chapter dealing with the ethics of advocacy where the author states that the high traditions of the Courts can be maintained only if those who practise in them appreciate and respect the principles of professional conduct which promote not only the dignity but the integrity of the administration of law. After stating in broad outline the ethics of advocacy, the application of the principles deduced therefrom are next considered, stress being particularly laid on simplicity, sincerity and moderation in the presentation of a case before the Court. This is followed by useful hints on the preparation of a case and a chapter dealing with conduct in Court which is enlivened with interesting Court anecdotes involving some distinguished advocates of the English bar. This leads to the important subjects of examination, cross-examination and re-examination of witnesses where by way of illustration excerpts from some notable cross-examinations are given. Within the short compass of this excellent book the beginner in the profession will find all that he needs to know about the art of advocacy at its best and to the seasoned lawyer it will provide much entertainment and stimulation. A book like this could well be recommended as a side study for students going up for the Bar Council examination, so as to, in the words of the author, effectively help the new-comer to the Courts to avoid much early disappointment and in later days to attain the more surely the end which he has in view.

The Importance of Muhammadan Law in the Modern World. By Asaf Ali Asghar Fyzee, M.A. (Cantab), BARRISTER-AT-LAW. AHMEDABAD-9: Published by the Registrar, Gujarat University. 1965. Pages 24. Price 50 Paise.

THIS is the script of a lecture delivered under the auspices of the Board of Extramural Studies of the Gujarat University. The importance of the subject of the lecture can be gauged when one considers that it deals with the law relating to a group of Muslims numbering about a hundred and ten million who are governed by the Hanafi school of Sunnite law. After discussing the relevancy of the Islamic law to the problems of the twentieth century and the importance of its study in India, the lecturer, a one time principal of a law college, advocates the institution of chairs of Hindu and Muhammadan laws by introducing the study of comparative law and makes some suggestions concerning the adequate study of Muhammadan law in Indian universities with a view to "improving the farcical system of instruction in legal subjects in our schools of law". Altogether a thought provoking dissertation, lucidly and forcefully expressed.

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PROTECTION TO THE STATE AND OTHER PUBLIC AUTHORITIES: SECTION 80 OF THE CIVIL PROCEDURE CODE.*

Section 80 of the Civil Procedure Code¹ provides as follows:

“*Notice.*—No suit shall be instituted against the Government, or against a public officer in respect of any act purporting to be done by such officer in his official capacity, until the expiration of two months next after notice in writing has been delivered to, or left at the office of—

(a) in the case of a suit against the Central Government, except where it relates to a railway, a Secretary to that Government;

(b) in the case of a suit against the Central Government, where it relates to a railway, the General Manager of that railway;

(c) in the case of a suit against a State Government, a Secretary to that Government or the Collector of the District;

and, in the case of a public officer, delivered to him or left at his office, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims; and the plaint shall contain a statement that such notice has been so delivered or left.”

There are analogous provisions in a large number of Central and State Acts, as the following illustrations will show: (1) Section 273 of the Cantonments Act, 1924²: Two months' notice re. cantonments. (2) Section 527 of the Bombay Municipal Corporation Act, 1888³: One month's notice re. the Bombay Municipal Corporation. (3) Section 206-A of the Bombay Municipal Boroughs Act, 1925⁴: One month's notice re. Municipal Boroughs. (4) Section 280 of the Maharashtra Zilla Parishads and Panchayat Samitis Act, 1961⁵: One month's notice re. Zilla Parishads and Panchayat Samitis. (For a fuller list, see App. I to this Report). All these provisions relate to acts done or purported to be done in an official capacity and, except as to the period of notice, are substantially the same as s. 80 of the Code. The discussion below is directed specifically to the problems created by s. 80, but is generally applicable to these and other similar provisions.

HISTORY AND INTERPRETATION OF SECTION 80.

Section 80 is not a new provision for it is substantially a reproduction of s. 424 of the Code of Civil Procedure, 1882⁶, which itself reproduced s. 424 of the Code of Civil Procedure, 1877.⁷ In a sense, when it was first enacted, it was a radical and reformatory provision, for it enabled the citizen in India to sue the State—a right which was not conferred in other countries until very much later.⁸ In modern times, however, the aspect of s. 80 which attracts attention is the fact that it requires every citizen who wishes to commence legal proceedings against the State to give a notice in the manner provided for by the section; such a notice is a necessary pre-condition to the filing of the suit, and if it has not been given, or if it is not in compliance with the section, the suit is bad under O. VII, r. 11(d), of the Code.

*The Law Reform Group, Bombay, is formed to study and publish reports on problems relating to laws in force. It is concerned with the maintenance of democracy and the rule of law. This Report No. 1 was prepared by Atul M. Setalvad and is finalised after discussion by the Group.

1 Act V of 1908.

2 Act II of 1924.

3 Bom. Act III of 1888.

4 Bom. Act XVIII of 1925.

5 Mah. Act V of 1962.

6 Act XIV of 1882.

7 Act X of 1877.

8 See the observations of Batchelor, J., in *Secretary of State for India v. Gulam Rasul*, (1916) I.L.R. 40 Bom. 392, 396-7, 18 Bom. L.R. 243. In England, such a right was conferred for the first time by the Crown Proceedings Act, 1947: 10 & 11 Geo. VI, c. 44.

Prior to the decision of the Privy Council in *Bhagchand Dagadusa v. Secretary of State for India*⁹ in 1927, the precise effect of s. 80 had not been definitely settled. Several decisions of the High Courts, and particularly those of the Bombay High Court, had attempted to mitigate the harshness of the provision, and construed it so as to avoid grave hardship to the citizen. It would be useful to consider these decisions as they bring out some of the unfortunate consequences of the section which are the subject matter of this report.

In *Shahebzadee Shahunshah Begum v. Fergusson*¹⁰, Mr. Justice Cunningham held that s. 424 had no application to a suit brought against the Official Trustee where the subject-matter was not a wrong committed by him, but the rights of the *cestuis que trustent*. In *Secretary of State v. Gajanan Krishnarao*¹¹ both Mr. Justice Chandavarkar and Mr. Justice Heaton observed that s. 80 would not prevent a citizen from obtaining an urgent injunction against an imminent public action which would cause irreparable injury. These observations were followed by Mr. Justice Batchelor in *Naginal Chunilal v. The Official Assignee, Bombay*¹² in which he held that the section had no application to a suit to restrain a public officer (other than the Secretary of State) from doing an act, and in *Secretary of State for India v. Gulam Rasul*,¹³ in which he held that it did not apply where a Mamlatdar threatened to immediately demolish the suit premises. In the latter case, Mr. Justice Batchelor pointed out that (p. 396):

"...it appears to me undesirable to extend the meaning and scope of the section so as to produce this result, that although a private person is empowered to sue the Secretary of State after two months' notice, yet the Secretary of State's agent during the currency of the two months is to be permitted to destroy the material object which is the very subject matter of the suit."

In *Bhagchand's* case, however, the Privy Council expressly disapproved of the Bombay decisions referred to above in a matter where an injunction was sought, and approved the views of the Allahabad, Calcutta and Madras High Courts that the section must be strictly construed. Viscount Sumner, who delivered the judgment of the Judicial Committee, pointed out that the provision had been law for forty years, and observed (353):

"...How far-reaching such protection ought to be is a matter of policy; how far it actually extends is a question of judicial construction."

This principle was followed by the Privy Council itself in *Al. Ar. Vellayan Chettiar v. Government of Madras*,¹⁴ in which a suit filed by two plaintiffs was held to be bad as the notice had been given by only one of them, and in *Government of the Province of Bombay v. Pestonji Ardeshir Wadia*,¹⁵ where in the case of a suit filed by a trust, a notice given by the trustees then in existence was held insufficient to justify a suit later when one of the earlier trustees had died and been replaced by two other trustees.

The Supreme Court first had occasion to consider s. 80 in 1958 in *Dhian Singh Sobha Singh v. The Union of India*¹⁶. In that case Mr. Justice Bhagwati observed that though s. 80 was to be strictly followed, it did not mean that the terms of the notice should be "scrutinised in a pedantic manner or in a manner completely divorced from common sense." Any hopes that this decision marked a beginning of a trend to limit the application of the section were short lived, for in *S. N. Dutt v. Union of India*,¹⁷ Mr. Justice Wanchoo pointed out that though the observations of Mr. Justice Bhagwati might be relevant in considering whether the notice adequately set out the cause of action or the relief claimed, they could have no application where the question was the name of the plaintiff for in such a case "either the name of the person suing is there in the notice or it is not. No amount

9 (1927) 54 I.A. 338, s.c. 29 Bom. L.R. Bom. L.R. 243.
1227.

10 (1881) I.L.R. 7 Cal. 499.

11 (1911) I.L.R. 35 Bom. 362, s.c. 13 Bom. L.R. 273.

12 (1912) I.L.R. 37 Bom. 243, s.c. 14 Bom. L.R. 1148.

13 (1916) I.L.R. 40 Bom. 392, s.c. 18

14 (1947) 74 I.A. 223, s.c. 49 Bom. L.R. 794.

15 (1949) 76 I.A. 85, s.c. 51 Bom. L.R. 635.

16 [1958] S.C.R. 781, 795.

17 [1962] 1 S.C.R. 560, s.c. [1961] A.I.R. S.C. 1449.

of common sense will put the name of the plaintiff there, if it is not there." The facts of the case bring out how strict (or pedantic) was the approach of the Supreme Court. The notice was by "Messers S. N. Dutt & Co.", which the Supreme Court held suggested a partnership firm. It was held that a suit filed subsequently by S. N. Dutt, as sole proprietor of a business carried on under the name and style of "S. N. Dutt & Co." was bad under this section. The latest decision of the Supreme Court on this point is *Amar Nath v. Union of India*,¹⁸ in which Mr. Justice Ayyangar reaffirms that the section is imperative and must be strictly complied with.

CONSTITUTIONALITY OF SECTION 80.

The constitutional validity of s. 80 under art. 14 of the Constitution was challenged in a case before the Andhra Pradesh High Court in *State v. Venkata Durga*.¹⁹ The Court held that the classification was rational and further pointed out that as it had the effect of merely postponing the right of a person to sue the State, it could not be said to be unreasonable.

In view of the decisions of the Supreme Court which have upheld the preferential position of the State for limitation²⁰, and for revenue recoveries²¹, it is probable that the validity of s. 80 would also be upheld by the Supreme Court. That has also been the case in the United States.²²

To sum up the effect of what has been said above :

(1) Section 80 applies to all suits against the State or a public officer in respect of acts done or purported to be done in an official capacity, including suits to obtain injunctions restraining the State or a public official from doing an imminent act which may cause irreparable injury.

(2) There is a conflict of authorities as to whether the section affects suits against public officials regarding *ultra vires* acts, or *mala fide* acts.²³ Though the position is not free from doubt, the section may well be held to protect even such acts as they come within the class of acts purportedly done in an official capacity.

(3) The section is express, explicit and mandatory, and admits of no implications; it must be strictly construed. It follows, therefore,

(a) there must be a notice of two months in all such suits;

(b) the notice must set out with *substantial accuracy* the cause of action and the reliefs claimed;

(c) the notice must be given by all the plaintiffs to the suit; and the description and the designation of the plaintiff(s) must be *absolutely accurate*.

(4) If no notice has been given, or if the notice failed to comply in all details with s. 80, the suit is bad.

(5) These principles presumably apply in all their rigour to the analogous statutory provision set out above, and similar other statutory provisions.

OBJECTIONS TO SECTION 80.

The first objection to s. 80 is theoretical or abstract, and this is that no case can be made out to-day in any event for the retention of such a statutory protection in favour of the State or public officials. The general approach in all countries devoted to the maintenance of the rule of law is to equate the citizen with the State, to curb bureaucratic excesses, and to enable the citizen to obtain cheaply and expeditiously any reliefs against the State or public agencies or officers that he may be entitled to. This general approach has been followed in India, the most successful examples being arts. 32, 226 and 227 of the Constitution. It necessarily follows that any impediment whatever to the citizen obtaining such a relief, whether procedural or substantive, is most undesirable unless it can be justified on very strong grounds of public policy.²⁴ It will be seen later that there are in fact no valid grounds

18 [1963] A.I.R. S.C. 424.

19 [1957] A.I.R. A.P. 675.

20 *Nav Rattanmal v. State of Rajasthan*, [1961] A.I.R. S.C. 1704.

21 E. g., *Shri Manna Lal v. Collector of Jhalwar*, [1961] 2 S.C.R. 962.

22 See *American Jurisprudence*, vol. 38,

s. 674.

23 See Mulla's *Civil Procedure Code*, 12th edn, pp. 307-8.

24 Cf. Street, *Governmental Liability*, at p. 165 : "...no Crown immunities are tolerable unless their retention can be affirmatively proved to be necessary in the public interest".

justifying this impediment, and the purpose of the section, even if it be valid at all, can be achieved by a provision as to costs as in England.

Is it, however, an impediment at all? And if it is, is it a serious impediment?

That the section, particularly as interpreted by the Courts, is an impediment can hardly be disputed. The practical aspects of the impediment, and the grave prejudice caused by it to any person who may have occasion to sue the State or a public officer, are known to almost every legal practitioner. Broadly speaking, the prejudice arises in two ways:

(1) Where the notice is given, but it is held not to comply with the requirements of the section. The non-compliance may be substantial, as in *Amar Nath v. Union of India*, where in a suit for damages, the notice mentioned the total amount claimed without specifying the various heads under which it was claimed. The Supreme Court found that the failure to specify the various heads of claims with sufficient particularity meant that the authorities had no effective opportunity to consider whether the claim should be admitted or not. Whether this argument has any practical validity or not is besides the point. What is pertinent is that the unfortunate plaintiff who instituted the suit claiming approximately Rs. 75,000 in May 1953, was told in April, 1962, that he could not succeed, not because his case was bad on merits but because the notice he had given even earlier failed to specify the cause of action with sufficient particularity. As it is, it is difficult for most citizens to litigate against the State with its vast resources. To add to those difficulties by such procedural impedimenta is unjust.

The injustice is particularly gross and unjustifiable when the non-compliance is formal, as when the parties named in the notice are not identical with the plaintiffs. This is a field where, as Mr. Justice Wanchoo points out in *S. N. Dutt's* case, there is no scope for commonsense. If the advocate of the plaintiff commits the mistake of addressing the notice on behalf of "Messrs S. N. Dutt & Co." instead of "S. N. Dutt, Sole Proprietor of a business carried on in the name and style of S. N. Dutt & Co.", or if after a notice is sent naming correctly the then existing trustees, one of them dies and is replaced by two others, and the parties fail to send another notice, (and wait for a further two months),²⁵ the suit is bad. This fatal defect of form is discovered several years later. The unfortunate plaintiff who, it must be remembered, wants something from the State, and (presumably) believes that he is entitled to it, must, of course, pay all the costs of the proceeding, and reflect how wrong Shakespeare was in saying "What's in a name?"

It must also be remembered that these consequences arise merely by reason of s. 80. In none of these cases was it alleged, let alone proved, that any real prejudice was caused to the State by such non-compliance. This is important, for the grave prejudice to the unfortunate plaintiff, which is easy to see, is caused by a formal defect and not because such a defect has caused any prejudice to the State in the facts of the case. Penalising parties to litigation for formal defects was a defect in the Common law which brought it into contempt and disrepute. Extensive reforms in the 19th century corrected most of these evils, and our own Codes adopts the modern, progressive outlook, allowing parties to amend pleadings freely and in general looking at the substance of things, not the form.

Two other aspects merit attention. The drafting of pleadings, and of s. 80 notices, is the work of lawyers. If a lawyer commits a mistake, and that a mistake of a formal nature, the person who suffers directly is the unfortunate plaintiff. To penalise so severely a plaintiff for the formal mistakes of his legal adviser is itself unjust. This situation is aggravated by the fact that the bulk of our population lives outside the major towns and cities. Illiteracy and ignorance of such fine points of law is common not merely among the people but even (it must be admitted) among many lawyers. A provision such as s. 80 would be harsh and unjust in any country; its effect is even worse in a large and relatively backward country such as India.

It is true that it has been held in some cases²⁶ that the period spent in pursuing

²⁵ *Government of the Province of Bombay v. Pestonji Ardeshtir Wadia*, (1949) 76 I.A. 85.

²⁶ See, for example, *G. G. in Council v. Gouri Shankar Mills*, [1951] A.I.R. Pat. 382.

a suit which is held to offend against s. 80 may be excluded for the purposes of computing limitation. The position cannot, however, be said to be concluded as the point has not been considered by any final Court. But even assuming that this view is correct, it is poor consolation to a litigant who has spent many years in a fruitless litigation that all is not lost; he can start all over again.

(2) The other class of cases where grave prejudice is caused by s. 80 is cases where the very necessity of giving such a notice results in the plaintiff suffering irreparable harm. Instances of such cases are the Bombay cases discussed above where the plaintiff seeks to restrain the commission of an illegal act such as occupation of premises or demolition of property. If the plaintiff has to wait two months before taking legal proceedings, in many cases his right will be lost for the threatened action would already have been taken. It is noteworthy that in England, even when similar provisions existed, they were construed as limited to actions for damages. Otherwise, as the Master of Rolls pointed out in *Flower v. Local Board of Low Leyton*,²⁷ "it would amount to a licence to every local board to do what injury they pleased while the month's notice was running." In India, however, it is settled that s. 80 applies to any kind of suit.

The injustice of this position is too obvious to require elaboration. Fortunately for the citizen, however, the existence of arts. 32, 226 and 227 of the Constitution (which are not affected by s. 80) has meant that in appropriate cases he can obtain interim relief against imminent official acts. This has proved to be a substantial safeguard for the citizen, but its limitations must be recognised. To begin with, there are well-defined classes of cases where writs are not available at all. No writ would be available, for instance, to restrain a breach of contract, however imminent it may be, and even if the consequences are irreparable. Secondly, it is settled law that the granting of a writ is discretionary, and a writ may be refused on any number of grounds, such as a few months' delay or improper conduct. No such factor would affect the citizen's *right* to file a suit. Finally, Courts have generally refused to entertain writ petitions where the issues involve questions of fact. In such cases the citizen is deprived of any interim relief for it has been held that it is not proper to admit a writ petition merely to grant interim relief, and thus circumvent the provisions of s. 80.²⁸

It is also important to note that many Judges, faced with the gross injustice of such a provision, have taken to turning a blind eye to the provisions of s. 80, and analogous provisions, at least in order to stave off threatened governmental action by an interim injunction. Such an attitude, though perhaps commendable in spirit and intention, and productive of justice, can hardly be regarded as desirable, and only brings out the unfortunate and onerous nature of the provision.

It would be easy to multiply examples of the hardships and injustice caused in so many cases by the application of s. 80, and analogous provisions, but it is unnecessary to do so.

JUSTIFICATION OF SECTION 80.

The purpose behind s. 80, and analogous provisions, may be stated thus: The State or any public authority or officer would never knowingly or deliberately commit an illegal act or deny a person a relief to which he is entitled. It is only right, therefore, to give the State or public officer concerned a chance to redress the wrong, or grant the relief, before any legal proceedings are commenced. The same idea has been expressed by Mr. Justice Cunningham in a passage which has been repeatedly cited.²⁹ The object of such a provision is to give the public officer an opportunity of setting himself right, making amends, restoring what he has taken, or paying for the damage he has done.

Nobody would dispute the admirable intentions underlying the section. Two questions, however, arise. First, is this admirable object ever realised? If there are many occasions when a s. 80 notice has resulted in relief being granted without the party having to go to Court at all, it could be said that the section

²⁷ (1877) 5 Ch. D. 377.

²⁸ *The State of Orissa v. Madan Gopal Rungta*, [1952] S.C.R. 28, 35.

²⁹ *Shahebzadee Shahunshah Begum v.*

Fergusson, (1881) I.L.R. 7 Cal. 499, 503. See also *State of Madras v. C. P. Agencies*, [1960] A.I.R. S.C. 1309, 1310, *per* Das, C.J.

serves at least some useful purpose. It is, of course, not possible to be dogmatic in the absence of statistics which only the Governments concerned can supply, but the general experience of most lawyers is that this admirable result is rarely achieved. In fact, it would be true to say that none of us are aware of a single case where this has occurred. Whether this is because the Government is indifferent to the issue or because the prescribed period of two months is too short for any definite action to be taken by the Government is irrelevant. What is relevant is that it is rare for the Government or a public officer to make amends, or grant the relief claimed, without driving the party to litigation.

It is also significant that few Government officers these days are willing to decide on their own an issue which might result in a citizen being awarded a sum of money. This is in part due to a fear of being accused of being corrupt or showing favouritism. The result is an attitude of leaving everything to the Court. Whatever the reason, such an attitude only increases the futility of such a provision.

The object underlying the section is hardly, if ever, realised; what survives is the impediment to the citizen. It follows that the section not only serves no public purpose but is the source of wholly unnecessary hardship to the citizen.

Even if the first question could be answered in the affirmative, the second, and more fundamental question would survive, and that is: even assuming that the object of the section is to give the State or public officers an opportunity to redress the wrong or make amends without driving the party to litigation, is it necessary that the failure of the party to give such notice should be met with such grave consequences *to the party*? The object of the section is at least in part to assist the aggrieved citizen. It is difficult to reconcile that with the severe prejudice caused to the aggrieved citizen for a failure to comply with the section.

It is true that the question may be approached in another way. It may be said that the section is enacted in furtherance of a public policy to prevent needless litigation and save unnecessary expenses and costs. If this is the correct point of view, it may be desirable to compel parties contemplating litigation against the State to give the State such a notice and such an opportunity. It would, therefore, be necessary to impose some sort of sanction to ensure that such notices are given. Even so, it is unnecessary that the sanction should be so severe. This object could be achieved by providing that where legal proceedings are commenced against the State or public officials without such a notice, and if within two months of the service of notice of such a suit upon the State or public officer concerned, the State or public officer grants the necessary relief, or makes amends, the party shall pay to the State or the public officer all the costs incurred by the latter.

In any event, it is wholly unnecessary to insist upon a strict or technical compliance with the section. The purpose of ensuring accurate notices could equally be achieved by providing that the consequence of a notice being inaccurate or imprecise should be that the party should pay the costs of the State or public officer *attributable to such inaccuracy or imprecision*.

POSITION IN ENGLAND

The position in England in filing suits against the State (through the relevant department) is now governed by the Crown Proceedings Act, 1947.³⁰ Prior to the passing of that Act, the subject had a very limited right to obtain legal redress against the State. Under the Crown Proceedings Act, however, suits can be filed against the State through the relevant department and the procedure governing such suits is substantially the same as that governing ordinary suits. It is also possible to obtain preventive relief by a declaration.³¹

Proceedings against public officers or public authorities are now governed by the Public Authorities Protection Act, 1893.³² It is interesting to trace the history of the law on the subject prior to 1893.³³ Prior to 1842, there were many Acts of Parliament both public and private designed to protect those who exercised public

30 10 & 11 Geo. VI, c. 44.

31 Section 21 of the Crown Proceedings Act, 1947.

32 56 & 57 Vict., c. 61; *Halsbury's Statutes*,

2nd. edn., Vol. 18, p. 750.

33 The following account is taken from *Halsbury's Statutes*, 2nd edn., Vol. 18, pp. 703-4.

powers or performed public duties against legal proceedings in respect of things done by them in their official capacity. Such Acts provided, *inter alia*, for the giving of notice before the action was brought.

The first reform in this field was the Limitation of Actions and Costs Act, 1842.³⁴ Section 4 of that Act provided that in all such Acts where notice of action was required, the notice was to be of one calendar month, and that one month's notice was to be sufficient notwithstanding what was provided in any Act passed prior to 1842 to the contrary.

The second reform was the passing of the Act of 1893, which repealed altogether all such protective provisions in some 109 different Acts and substituted instead the following provision :

1. *Protection of persons acting in execution of statutory or other public duty.* Where any action, prosecution or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty or authority, the following provisions shall have effect :

(a) ...

(b) ...

(c) Where the proceeding is an action for damages, tender of amends before the action was commenced may, in lieu of or in addition to any other plea, be pleaded. If the action was commenced after the tender, or is proceeded with after payment into Court of any money in satisfaction of the plaintiff's claim, and the plaintiff does not recover more than the sum tendered or paid, he shall not recover any costs incurred after the tender or payment, and the defendant shall be entitled to costs, to be taxed as between solicitor and client, as from the time of the tender or payment ; but this provision shall not affect costs on any injunction in the action :

(d) If, in the opinion of the Court, the plaintiff has not given the defendant a sufficient opportunity of tendering amends before the commencement of the proceeding the Court may award to the defendant costs to be taxed as between solicitor and client :

The effect of these provisions may be stated as follows :—

(a) No notice need be given before filing a suit.

(b) If no notice, or other opportunity to tender amends was given before the taking of proceedings, the plaintiff may be penalised by being asked to pay the costs of the defendant. But this can be done only if it is the *opinion of the Court* that such opportunity was not given.

(c) In *actions for damages*, the plaintiff is made to pay the costs if he commences or continues legal proceedings after a tender of amount is made, or after an amount is paid into Court, and if he fails to recover a larger amount.

(d) Costs are taxed on the highest scale, viz. as between solicitor and client.

It will be seen that from as far back as 1893 it was found unnecessary in England to provide for the giving of a notice as a condition precedent to the filing of a suit against a public authority. The public policy involved in giving such an authority an opportunity to make amends, and to avoid needless litigation and expense, was satisfactorily achieved by the machinery of costs.

CONCLUSIONS

In our opinion this study shows :—

(1) That there is no justification whatever for the protection conferred by s. 80, and other analogous statutes.

(2) That the purpose that s. 80 is supposed to achieve can be easily achieved, if necessary at all, by some provision similar to that contained in s. 1 (d) of the (English) Public Authorities Protection Act, 1893.

(3) That s. 80, and analogous provisions, work grave hardship upon the citizen because they expose him to the risk of being non-suited merely because of a defect in the notice served prior to the suit.

(4) That s. 80, and analogous provisions, make it difficult for the citizen to obtain urgent interim relief against threatened governmental action and this causes him grave prejudice.

RECOMMENDATIONS

We would recommend without hesitation the repeal of s. 80, and analogous provisions in other statutes for the reasons discussed above.

If, however, such a repeal is thought undesirable, it is imperative that s. 80 (and other analogous provisions) be amended by adding thereto a proviso in the following terms :

"No suit shall be held to be not maintainable in law by reason only of the fact that this section has not been complied with. If, however, a suit is filed without giving a notice, or if the suit is filed before the expiry of the said period of two months, or if the notice is not in accordance with the provisions of this section, and if the Court is of opinion that the failure to give such notice, or the filing of the suit before the expiry of the said period of two months, or the fact that the notice is not in accordance with the provisions of this section has caused any prejudice to the defendant, the Court may make the plaintiff pay the costs of the defendant."

If s. 80 is repealed, and it is thought desirable to ensure that such notices be given, a provision such as that contained in s. 1 (d) of the (English) Public Authorities Protection Act, 1893, may be inserted.

It may be noted that the Law Commission made substantially the same recommendations in its 14th Report on the Reform of Judicial Administration at pages 475-6.

A private member bill being Bill No. 15 of 1965 was introduced in Parliament on April 30, 1965 by Mr. Nath Pai proposing the repeal of s. 80. The Bill has not yet been debated.

APPENDIX I.

PART I.

INDIAN ACTS.

Municipal and Local Authorities.

- (1) Cantonments Act, 1924 (II of 1924), Sec. 273 : 2 months.

Transport.

- (1) Carriers Act, 1865 (III of 1865), Sec. 10 : a notice within 6 months.
- (2) Indian Railways Act, 1890 (IX of 1890), Sec. 78B: (no period).

Port Trusts.

- (1) Bombay Port Trust Act, 1879 (Bom. Act. VI of 1879), Sec. 87 : 1 month.
- (2) Madras Port Trust Act, 1905 (Mad. Act II of 1905), Sec. 110 : 1 month.

Note :—The Calcutta Port Trust Act, 1890, contains no such provision.

Land Acquisition.

- (1) Land Acquisition Act, 1894 (Act I of 1894), Sec. 52 : 1 month.

PART II.

BOMBAY AND MAHARASHTRA ACTS.

Municipal and Local Authorities.

- (1) Bombay Municipal Corporation Act, 1888 (III of 1888), Sec. 527 : 1 month.
- (2) Bombay District Municipal Act, 1901 (III of 1901), Sec. 167-A : 1 month.
- (3) Bombay Municipal Boroughs Act, 1925 (XVIII of 1925), Sec. 206-A : 1 month.
- (4) Bombay Provincial Municipal Corporations Act, 1949 (LIX of 1949), Sec. 487 : 1 month.
- (5) Bombay Village Panchayats Act, 1958 (III of 1959), Secs. 180, 181 : 3 months, and 1 month.
- (6) Maharashtra Zilla Parishads & Panchayat Samitis Act, 1961 (V of 1962), Sec. 280 : 1 month.

Housing Board.

- (1) Bombay Housing Board Act, 1948 (LIX of 1948), Sec. 64 : 2 months.

Co-operative Societies.

- (1) Maharashtra Co-operative Societies Act, 1960 (XXIV of 1961), Sec. 164 : 2 months (to Registrar).

Police.

- (1) Bombay Police Act, 1951 (XXII of 1951), Sec. 161 : 1 month.

GLEANINGS.

INTRUSIVE PHOTOGRAPHS

"Unless a man's photograph...be published in such a context that the publication can be said to be defamatory of him...it cannot be the subject of complaint."

THIS proposition, taken from the report of the well known case *Tolley v. J. S. Fry & Sons Ltd.* [1931] A.C. 333, is undoubtedly still correct. The picture of Mr. Tolley, the famous amateur golfer, with a carton of chocolate protruding from his pocket and a ridiculous ditty penned beneath was, the House of Lords finally held, capable of being defamatory, and a new trial was ordered. But Mr. Tolley succeeded only because, as he was an *amateur* golfer, people seeing the advertisements might think he had damaged his amateur status. Had he been a professional he would, apparently, have had no remedy in defamation.

English law gives no general right to privacy and in the age of the telephoto-lens the traditional action for trespass to land may lose some of its potency. An Englishman's home may be his castle but the mass media intrusion into domestic life has increased enormously. Anyone may be the victim of a candid camera or the subject of "This is Your Life," with disturbing effects.

Unless, like Mr. Tolley, he can plead defamation it seems that the victim of the candid camera is obliged to rely on a possible breach of copyright. The Fine Arts Copyright Act, 1862, first extended copyright to photographs, and in the Copyright Act, 1911, it was made to cover cinematograph film. The Copyright Act, 1956, deals in specific terms with copyright in television and sound broadcasting. When may a plaintiff claim that the publication of a particular photograph involves breach of copyright? Photographs may be taken voluntarily by the photographer—possibly in the hope that if they are satisfactory a client will later be found to buy them—or may be commissioned. The distinction is important. If a photograph (or painting, or drawing) is made for a person "for good and valuable consideration" the copyright in it belongs to the person who commissioned it and not to the photographer, unless the client makes an agreement to the contrary. This, the law since 1862, has recently been affirmed in the 1956 Act which, incidentally, makes it plain that if, for example, a photographer is employed by a newspaper or other periodical and, in the course of employment, takes a photograph for publication in the paper, it is the proprietor of the paper who, for all purposes concerned with publication, is entitled to the copyright.

It has not always been easy to determine when a photographer is working for "valuable consideration" and when he may claim the copyright himself. Generally when a person goes to a photographer and orders a photograph there is an implied contract that he will pay for the original if no copies are ordered. This photograph will therefore be made for valuable consideration and the copyright rests in the client.

Pollard v. Photographic Co., (1888) 40 Ch. D. 345, was a case where a photographer, having, by arrangement, taken and sold the plaintiff some photographs of herself, at a subsequent date, without her knowledge, used the negative to have her likeness inserted in Christmas cards. She applied for an injunction to restrain this. She had not, as was then necessary, registered any copyright in the negative, but contended that there was an implied condition in her contract that the negative should not be used for any other purpose than to supply photographs of herself. The learned judge accepted this submission and held that a photographer was not justified in striking off copies of a photograph for his own use unless, expressly or impliedly, he had authority from his client. He stated:—

"I say expressly or impliedly because a photographer is frequently allowed, on his own request, to take a photograph of a person under circumstances in which a subsequent sale by him must have been in contemplation of both parties though not actually mentioned."

The court considered that an abuse of a confidence—analagous to the misuse of information obtained in confidential employment—arose in this case and granted the injunction prayed for. It was said that, though failure to register the copyright deprived the plaintiff from enforcing a remedy for breach of copyright, she was still entitled to relief on the ground of breach of a contract. Reference was made to *Tuck & Sons v. Priester*, (1887) 19 Q.B.D. 629, where the plaintiffs, unregistered owners of copyright in a picture, employed the defendant to make copies. He wrongfully made some copies for himself and sold them at low prices. Lord Esher declared:—

“that was a plain breach of contract and I cannot doubt that, quite irrespective of the Act of 1862, a court of equity, would grant an injunction and damages against the defendant.”

In a subsequent case, *Stackemann v. Paton* [1906] 1 Ch. 774, a firm of photographers were allowed to go to a private school and take photographs. Some were then sold to persons at the school, but the school authorities also sent copies to a journal advertising lists of schools. The photographers then sued this journal for breach of copyright, but the court held that permission to take the school photographs, with the very likely result that some would be sold, was a valuable consideration tendered to the photographic firm. Therefore it was the school which had the copyright and the photographers' action failed.

The importance of photographic copyright was vividly illustrated at Westminster County Court in December, 1959, in a decision in the case of *Williams v. Settle*, which was later upheld by the Court of Appeal [1960] 1 W. L. R. 1072. The defendant was there found liable for infringing the copyright in a wedding photograph which he had taken and was ordered to pay £1,000 and the costs of the proceedings. He had, the learned county judge found, been commissioned by the bridegroom to take a wedding photograph in 1956 (although it was actually the bridegroom's father-in-law who had later paid for it). In 1958 it happened that the father-in-law was found murdered and, shortly afterwards, the defendant sold, for £15, copies of the wedding photograph to two national newspapers, which then published them so that their readers could gratify their curiosity about the murdered man. “Anything more calculated to wound and hurt bitterly the feelings of all members of the family I can hardly conceive,” declared the learned county judge, referring to the newspapers.

The bridegroom satisfied the court that, since the photographs had been commissioned for valuable consideration, copyright in them vested in him alone and that the photographer was in breach of copyright in disposing of them without leave to others. As well as being ordered to pay damages he was ordered to deliver up the negatives, and an injunction was granted restraining further publication. The damages were heavy, but the Court of Appeal felt that the case called for punitive damages. Sellers, L.J., observed:—

“The power to do so is expressly given in the Copyright Act, 1956, and it was the flagrancy of the infringement which gave the right to heavy damages in this case.”

A defence raised in the proceedings was that it was the deceased himself who had had copyright of the photographs. Even if the evidence had justified such a finding it is still the law that copyright in any work, on the death of the owner, vests in his personal representatives as part of his estate. As well as the automatic transfer of copyright on death it may be assigned, wholly or in part, during the lifetime of whosoever is entitled to it. In such a case, however, the transfer, which must be in writing, must refer to some work which is in existence at the time.

The Right to Privacy Bill, 1961, carried on the second reading in the House of Lords by seventy-four votes to twenty-one, but dropped for lack of Parliamentary time, did not, in terms, refer to intrusive photographs but it is possible that English law could yet develop means of protecting personal privacy without legislation. Other countries have been more ready to protect the indivi-

dual's intangible interests. Thus in the United States in *International News Service v. Associated Press* (1918), 248 U.S. 215, "broadcasting rights" were protected as part of a quasi-property created by skill and labour. Again, under the Indian Easements Act, 1882, an easement of privacy may arise upon proof of local custom restricting, e.g., the opening of new windows: and, apart from this Act, a right of privacy can even arise by the customary law of India. It is of interest to note that in a leading case, *Gokul Prasad v. Radho* (1888), I.L.R. 10 Allahabad 358 the right was upheld to safeguard the seclusion of *parda-nashin* women.

There are two possible ways in which our courts could extend existing principles of tortious liability. *Wilkinson v. Downton* [1897] 2 Q.B. 57, established the rule that whenever a person wilfully does an act to cause physical harm, and harm is caused, then the plaintiff has a remedy. In that case a practical joker wrongly told a woman that her husband had been injured in an accident, with the result that she became ill. She recovered £100 for emotional distress, and the principle under which she recovered does seem logically capable of extension.

Secondly, the law of negligence generally provides that if I do an act which a reasonable man could foresee might injure another, and it does so, then an action will lie. If a photograph is published in circumstances where a reasonable man would know that much distress must be caused, it would only seem necessary for the courts to jump the barrier from actual harm to serious mental distress in order to provide a remedy.

Meanwhile, plaintiffs must rely on defamation or breach of photographic copyright, and, although, in *Williams v. Settle*, *supra*, the plaintiff could show that copyright belonged to him, if his wife had tried to sue the photographer she would, presumably, have been denied a remedy.—(A.P.) S.J.

RE MOTENESS AND PRECEDENT

ANOTHER decision on remoteness of damage in tort (*Doughty v. Turner Manufacturing Co., Ltd.* [1964] 1 Q.B. 518) occasions a re-examination of the main cases on remoteness since the Court of Appeal's decision in *Re Polemis and Furness, Withy & Co., Ltd.* [1921] 3 K.B. 560. Can these decisions be reconciled with the rules of precedent in English law? The case which laid down the relevant rules is *Young v. Bristol Aeroplane Co.* [1944] K.B. 718, where it was said that the Court of Appeal were bound by their own decisions except (1) where previous decisions were given *per incuriam*; (2) where previous decisions were opposed to general principles subsequently laid down by the House of Lords; and (3) where there were previous conflicting decisions of the Court of Appeal. The difficulty has really been created because one of the principal decisions, *Overseas Tankship (U.K.), Ltd. v. Morts Dock and Engineering Co., Ltd. (The Wagon Mound)* [1961] A.C. 388, was decided in the Privy Council. The decisions of the Privy Council are persuasive authority, and there is no case laying down that English courts must follow their decisions. However, it is well established that courts of first instance will only decline to follow the Privy Council when their decision is inconsistent with the English authorities.

In *Re Polemis* the Court of Appeal decided that the test of liability for damage caused negligently was whether that damage was a *direct consequence* of the negligent act. Such a test is clearly beneficial to a plaintiff, as is illustrated by *Polemis* itself. There, shipowners were held entitled to recover for the loss of a ship after stevedores, the servants of the charterers, negligently knocked a plank into the hold in which petrol was stored, resulting in the destruction of the ship by fire. In *The Wagon Mound*, where the damage was equally remote from the negligent act, the Privy Council preferred the test that there is liability only for the *foreseeable consequences* of a negligent act. Strict application of this rule will favour a defendant. The Privy Council considered that the Court of Appeal, in formulating the direct consequences

rule, had misunderstood the old authorities. Lord Parker, C.J., was faced, in *Smith v. Leech Brain & Co., Ltd.* [1962] 2 Q.B. 405, with the problem of following either *Polemis*, which counsel for the plaintiff submitted he was bound to do, or *The Wagon Mound*, which he in fact preferred. Lord Parker neatly avoided the apparent conflict by saying (at p. 414):—

"I am quite satisfied that the Privy Council did not have what I may call, loosely, the thin skull cases in mind."

He continued (at p. 415):—

"I would follow, sitting as a trial judge, the decision in *The Wagon Mound* case; or rather, more accurately, I would treat myself... able to follow other decisions of the Court of Appeal prior to the *Polemis* case, rather than the *Polemis* case itself."

In spite of academic and judicial criticism of *Polemis*, was the Lord Chief Justice not bound by that decision? Bankes, Warrington and Scrutton, L.JJ., who decided *Polemis*, hardly constitute a weak court, especially when supported by Cohen, Asquith and Birkett, L.JJ., in *Thurogood v. Van Den Berghs & Jurgens, Ltd.* [1951] 2 K. B. 537. *Smith v. Leech Brain & Co., Ltd.*, did not go to the Court of Appeal, and one can only guess whether that court would have been able to reiterate the words of the Lord Chief Justice quoted above, or whether they would have held themselves bound by their distinguished predecessors.

Hughes v. Lord Advocate [1963] A. C. 837, was an appeal from the First Division of the Court of Session to the House of Lords. A manhole in an Edinburgh street was covered with a tent and left unguarded by workmen, but surrounded by paraffin warning lamps. On entering the tent, an eight-year-old boy knocked one of the lamps into the hole, causing an explosion, as a result of which the boy fell into the hole and was severely burned. Their lordships held that the accident to the appellant was reasonably foreseeable although the particular source of danger which caused the injury acted in an unpredictable way. The *Wagon Mound* test was clearly applied, although application of the *Polemis* test of direct consequences would have achieved a similar result. The difference between the two tests is not so striking once it is agreed that "it is particularly hard to foresee with precision the exact shape of the disaster that will arise," per Lord Pearce, at pp. 857-8, and still allow the plaintiff to recover damage. From dicta in *Hughes's* case, one might have been led to believe that penumbral situations, i.e., damage which falls somewhere between a direct and a foreseeable consequence, would be decided in favour of the plaintiff, also bearing in mind that behind the defendant there is most often an insurance company.

In the most recent case, *Doughty v. Turner Manufacturing Co., Ltd.*, *supra*, the Court of Appeal, alas, did not adopt this attitude. The facts were that a cover made of asbestos and cement fell into a cauldron of molten liquid cyanide. After about two minutes an explosion occurred, as a result of which the plaintiff was splashed by the molten liquid. It must be appreciated that the plaintiff was injured after the explosion and not after the immersion of the cover in the liquid. The Court of Appeal reversed the decision of Stale, J., whose sympathies were with the plaintiff. They held that, even if the inadvertent immersion of the cover into the cauldron was a negligent act, the defendants were not liable for the damage resulting from the explosion because it was not damage of such a kind as could reasonably have been foreseen, and was altogether different from a foreseeable splash of the liquid in the cauldron. Again, presuming the original immersion to have been negligent, if the *Polemis* test had been applied, the plaintiff, it is submitted, would have been able to recover damages. At last, however, the Court of Appeal have dealt with the problem of remoteness without expressly denying the existence of a duty of care. It might be thought that the defendants could have been held liable on the same basis as the defendants in *Hughes v. Lord Advocate* were held liable, where Lord Reid said that the type of accident and the injuries, "though perhaps different in degree, did not differ in kind from injuries which might have

resulted from an accident of a foreseeable nature" (at p. 845). In *Doughty's* case, however, their lordships came to the conclusion that "it would be quite unrealistic to describe this accident as a variant of the perils from splashing" per Lord Pearce, at p. 527.

Any misgivings about the correctness of Harman, L.J.'s dictum that "whether [*The Wagon Mound*] is or is not binding on this court, we ought to treat it as the law" can be dispelled. The rules laid down in *Young v. Bristol Aeroplane Co.*, *supra*, can be considered rules of practice rather than rules of law, and *Polemis* can clearly be said to be opposed to the principles laid down by the House of Lords in *Hughes v. Lord Advocate*. But can *Smith v. Leech Brain & Co., Ltd.*, *supra*, be disposed of quite so easily, since it was decided before *Hughes v. Lord Advocate*? To answer this, one has to consider the nature of the rules of precedent. It is submitted that the rules are sufficiently flexible to allow decisions to be departed from which have been consistently criticised as out of tune with modern principles of imposing liability. To adopt this attitude, as Lord Parker, C.J., impliedly did in *Smith v. Leech Brain & Co., Ltd.*, is surely correct.—(Anthony Glass.) *S.J.*

POLICE LIABILITY IN TORT

WHAT was stated to be the first claim in tort under the new Police Act, was reported in the Press on August 21, 1964. Four men, whose convictions had been quashed by the Court of Criminal Appeal in one of the so-called Challenor cases, were said to have made claims against the Commissioner of Police of the Metropolitan Police based on the grounds of conspiracy, false imprisonment, trespass and malicious prosecution. The men's cases were referred to the Court of Criminal Appeal by the Home Secretary after Detective-sergeant Challenor had been declared insane and unfit to plead to a charge of conspiracy to prevent the course of justice (Hansard, House of Commons, July 2, 1964, col. 1547). Thus s. 48 of the Police Act 1964 has not had long to wait before being called in aid, for it came into operation only on August 1, last. It provides that the chief officer of police for a police area is liable in respect of torts committed by constables under his direction and control in the purported performance of their functions, in the same way as a master is liable in respect of the torts committed by his servants in the course of their employment, and the chief officer of police is by the statute declared to be a joint tortfeasor. If damages are recovered against him, the damages come out of the police fund; so do his costs, unless recovered by him in the proceedings. Any damages and costs awarded against the police constable may be paid out of the police fund, if the police authority think fit. The reason for expressly assimilating, for the purpose, the relationship of chief officer and constable to that of master and servant is, of course, that the relationship of master and servant does not prevail throughout the police hierarchy. A constable is the holder of a public office; he and his superiors alike may be regarded as servants of the State, but his superior officers are not in the position of master nor he in that of a servant (see, e.g., *A.-G. for New South Wales v. Perpetual Trustee Co. Ltd.* ([1955] 1 All E.R. at p. 852).—*L.J.*

TRADE UNIONS AND *ROOKES* v. *BERNARD*

SINCE the time of the decision of *Rookes v. Barnard* ([1964] 1 All E.R. 367) the trade union attitude has begun to crystallize. They say that they ask a "simple act of justice", to quote the general secretary of the Trades Union Congress as reported in *The Times* of August 25, 1964, last, to put them back where they were before. The simple act of justice is, it seems, the passing of immediate legislation to restore the position "as it was thought to be before the judgment". The first difficulty, of course, is to understand exactly what *Rookes v. Barnard* did decide. On that the trade unions have taken advice. One does not know what they were advised. The general secretary is reported as having said, "so far as I can see any threat to strike is actionable". If that is the effect of the advice which they received, it seems to represent a remarkable

reading of the case. Not long ago *Rookes v. Barnard* was considered by the House of Lords in *J. T. Stratford & Son, Ltd. v. Lindley*. It is worth looking at what Lord Pearce said ([1964] 3 All E.R. at p. 114). Speaking of *Rookes v. Barnard* he said that it was suggested that it withdrew the protection of s. 3 of the Trade Disputes Act 1906 from threats by a trade union official to an employer to call a strike in breach of the contract of employment. This suggestion seems to be in accord with the trade union view. Lord Pearce went on: "It certainly does not do that". A trade union official is not liable to an employer for inducing a breach of the contract of employment with the employer. Neither is he liable for threatening to induce such a breach. The distinction comes in when a third party (not the employers) is deliberately injured by the making of unlawful threats to the employer. The liability is to the third party not the employer, and the justice of the liability lies in the union's having used its power and having used unlawful means (i.e., threats of breaches of contract by employees acting in concert) to compel someone, the employer, to act so as to injure a third person. That was the position in *Rookes v. Barnard*.—L.J.

REVIEWS.

Magna Carta. By J. C. HOLT. BOMBAY 1: Macmillan & Co. Ltd., 276, Dr. Dadabhai Naoroji Road. LONDON, N. W. 1: Cambridge University Press, Bentley House, 200 Euston Road. 1965. Demi 8vo. Pages 378. Price 60s. net (Rs. 48).

To those who are familiar with the dramatic picture of King John at Runnymede on a fateful day in June 1215 sealing or signing the Magna Carta, it will come as a surprise to be told by the author of this fascinating book that,

"King John did not sign Magna Carta; there is no evidence that he could write. He did not even seal it; sealing charters was the task of the spigurnel, a member of the Chancery staff. Furthermore, there is no evidence at all that the Charter figured in the ceremonies at Runnymede either on 19 June or on any other day."

This book which was timed to appear on the 750th anniversary of Magna Carta presents the Charter of 1215 in the context of political thought of England and Europe in the 12th and 13th centuries. The author's approach is historical and he has traced the various factors which led to the formation of the Charter and its later history. The book opens with a detailed study of the interpretations which Magna Carta received within a generation of its sealing, down to the 17th century interpretation which Sir Edward Coke typified, for whom it was an affirmation of fundamental law and liberty of the subject. The origins of Magna Carta are then traced in the history of the English kingdom in the 12th century and this leads to a consideration of the politico-social currents and cross-currents culminating in the Articles of the Barons which were the basis of Magna Carta. Of particular interest to the lawyer will be the discussion of the Charter's claim to permanent legal stature, a problem which is still occupying the minds of modern jurists like Vinogradoff and Powicke. This brings us to the final assessment of the Charter thus expressed by the author:

"The assumption of 1215 is not dissolved by demonstrating that the Charter was conceived in baronial interests or that it reflected particular social conditions which changed with the passage of time. Later generations may have differed on what the community was and on who was entitled to represent it, but they were rarely in any doubt that authority should be subject to law which the community itself defined. Magna Carta could not ensure this would always be so, but it endured as an example. It set no mean standard."

This well documented and scholarly treatise will fill a gap in the study of English history and will be of much practical help to those concerned with the development of English law and administration.

The Law of Taxes on Wealth, Gift & Expenditure. By KHARAG RAM CHARTURVEDI, B. L., Advocate. CALCUTTA-12: The Eastern Law House Private Limited, 54 Ganesh Chandra Avenue. Roy 8vo. Pages 610 + 176. Price Rs. 25.

THE author of this book who has already published two very useful studies dealing with Sales Tax laws now, in this single volume, presents the tax laws relating to wealth, gift and expenditure. In an out-spoken preface he sums up the incidence of direct taxes thus:

"As the rupee comes in, it constitutes somebody's 'income' and the income-tax grabs a sizable portion therefrom. The saved bits constitute the 'wealth' of the one who thoughtfully tightened his belt and lived much below his means and standard to save it; but there is a wealth-tax awaiting. If the rupee tries to go out by way of expenditure, there is an expenditure-tax threatening. If given gratis—even to the nearest and dearest ones—there is a gift-tax glaring with its much too high incidence. And when at last the inevitable happens to the mortal coil of the human individual, it becomes his 'estate', leviable in the hands of the accountable person with an estate-duty."

The book is divided into four parts. The first three parts deal with the Wealth-tax Act, 1957, the Gift-tax Act, 1958 and the Expenditure-tax Act, 1957, respectively. The Rules and Notifications issued under the three Acts are also included in the different parts and wherever necessary Administrative Circulars issued by the Central Board of Revenue are also reproduced. The last section of the book is devoted to a consideration of the law of Annuity Deposits as contained in Chapter XXII A of the Income-tax Act, 1961 and the Annuity Deposit Scheme, 1964. A very useful feature of the book is the Direct Tax Reckoner (1965-66) which gives rates, rebates and tables of taxes payable under the direct taxes. The various provisions of the Acts are critically analysed and examined in the light of decided cases and legislative changes effected therein. The book is a veritable mine of information relating to the three important fiscal statutes and will be invaluable not only to lawyers but also to income-tax practitioners as a handy and up-to-date statement of the law,

The Law Relating to Foreign Exchange. By SHIAVAX R. VAKIL, B.A., LL.B., Attorney-at-Law, High Court, Bombay. Third Edition. BOMBAY: N. M. Tripathi Private Ltd., Princess Street. Roy 8vo. Pages 486. Price Rs. 25.

SINCE the last edition of this book was published in 1958 among the important changes effected in the substantive law relating to foreign exchange were those made by the Amending Act 55 of 1964. Apart from this there have been periodic issuance of Rules and Notifications which have an important bearing on the administration of the law. All this has necessitated a revision of the book which the author has carried out with commendable thoroughness. All the relevant case law has been extensively referred to and analysed, including some unreported decisions. The commentaries under the different sections of the Foreign Exchange Regulation Act, 1947, contain the appropriate Notifications and Orders and deal exhaustively with the provisions of the Act which are examined *vis-a-vis* the provisions of statutes which impinge on the Act. An appendix contains much useful material, e.g. the Foreign Exchange Regulation Rules, 1952, Adjudication Proceedings and Appeal Rules, 1957, the Imports and Exports Control Act, 1947 and the Imports (Control) and Exports (Control) Orders and the Customs Act, 1962. A table of cases would have further enhanced the utility of the book. In his general discussion on the law relating to territorial waters the author seems to be unaware of the President's Proclamation of March 22, 1956, wherein for purposes other than those mentioned in the Proclamation quoted by him, the territorial waters of India were declared to extend to a distance of six nautical miles into the sea. Altogether this pioneering effort to comprehensively present the entire law on a subject of much complexity will not only be welcome to the profession but will provide a reliable guide to the laymen, especially the business community, through its mazes.

Review of Contemporary Law. Managing Editor: Pierre Cot. Brussels 19 (Belgium): 49, Avenue Jupiter. Roy 8vo. Pages 175. Price 100 Belgian francs or \$ 2.00.

THIS biannual is published by the International Association of Democratic Lawyers. This No. 1/1964 contains a number of articles on "peaceful co-existence"

contributed by professors of the Universities of Paris, Dijon (France), Japan and Prague and the Director of International Law Section of the Czechoslovak Academy of Sciences and the Professor of International Law, U.S.S.R. The editor feels that the actual concept of co-existence needs considerable investigation and study if any agreement is to be reached on its character and content and, therefore, lawyers from all parts of the world are invited to participate in the discussion with a view to "contribute to the development of international law, functioning without stop in the service of peace, the peoples of the world, and human progress." A laudable venture but in the present *zeitgeist* of doubtful utility.

Executive Action and the Rule of Law. International Commission of Jurists. 2, Quai Du Cheval-Balnc, Geneva, Switzerland.

THIS is a report on the proceedings of the International Congress of Jurists held at Rio De Janeiro (Brazil) in December 1962. One of the principal objects of the Congress was the examination of the role of judges, lawyers and teachers of law in striking a correct balance between the freedom of the Executive to act effectively under modern conditions on the one hand and the protection of the individual and of the community on the other and thus adjusting the Rule of Law to the needs of social and economic development. The first part of this Report deals with the concept of the Rule of Law in modern society as developed at the various Congresses and Conferences held under the aegis of the International Commission of Jurists. The second part deals with the proceedings of the Rio de Janeiro Congress in which some three hundred jurists from seventy-five countries participated. The pace was set by Vivian Bose, President of the Commission, who in his inaugural address, exhorting the establishment of the Rule of Law, observed :

"Old values are crumbling and are being forgotten, hallowed traditions are toppling down. Petty colloquialism and narrow regionalism are raising their ugly heads internally within nations and externally between nation and nation. Freedoms are being trampled on, dictators are rising again, human worth and human dignity are being destroyed. These evil things must be fought and conquered, not with bullets and machine-guns but with the forces of the spirit, with the armour of righteousness, for ideas will penetrate into the hearts and minds of men, they will go where bullets never can, they will bring life where bullets only bring death and destruction."

This report makes very interesting and instructive reading.

The Dynamic Aspects of the Rule of Law in the Modern age. International Commission of Jurists. 2, Quai Du Cheval-Blanc, Geneva, Switzerland.

THIS is a report on the proceedings of the South-East Asian and Pacific Conference of Jurists held at Bangkok (Thailand) in February 1965. The Conference was convened to examine and consider the factors which impede the full application and advancement of the concepts of the Rule of Law in parts of the South-East Asian and Pacific areas. This conference was attended by one hundred and five jurists from sixteen countries and its conclusions are embodied in what is known as the Declaration of Bangkok.

The Collegian. Edited by V. M. POTDAR. Sholapur: D.A.V. Law College.

This is the first issue of a well produced magazine published by the Dayanand Evening Law College of Sholapur which started functioning from July 1, 1964. It contains contributions in English and Marathi on legal and other topics by students of the College.

BOOK RECEIVED

The "Yearly Digest," of 1964, of Indian and Select English Cases. Edited by N. RAMARATNAM, M.A., B.L. MADRAS 4: Madras Law Journal Office. Price Rs. 24.

The Bombay Law Reporter.

JOURNAL

November 15, 1965.

SUMMARY SUITS UNDER THE BOMBAY RENT ACT—RECENT JUDGMENT OF THE SUPREME COURT OF INDIA*.

UNDER r. 8 of the Rules made by the Government of Bombay in exercise of the powers conferred on it by s. 49 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (Bom. LVII of 1947), the suits and proceedings other than those referred to in rr. 5 and 7 are governed as far as may be and with the necessary modification by the procedure prescribed by the Code of Civil Procedure for the Court of first instance including O.XXXVII as modified in its application to the State of Bombay. Rule 5 prescribes procedure for suits, the value of the subject matter of which does not exceed Rs. 3,000 and r. 7 prescribes procedure for applications for fixation of standard rent. Accordingly, O.XXXVII of the Civil Procedure Code has been made applicable to all suits for ejectment the value of which exceeds Rs. 3,000, the same being not governed by rr. 5 and 7. The validity and appropriateness of summary procedure to the suits for possession under the provisions of the Bombay Rent Act was challenged before the Supreme Court and the Supreme Court held in its recent judgment in *Ramkarandas v. Bhagwandas*¹ that the said rule was *intra vires* the Act and was valid.

With the greatest respect to the highest Court of the country, it may be stated that the decision requires reconsideration or the law requires complete amendment in the said connection. The anomaly of the said decision and the anomaly arising from the applicability of the summary procedure to such suits is explained and discussed hereinbelow :

Under O. XXXVII of the Code of Civil Procedure, a defendant has no right to defend the suit unless he obtains leave to defend the suit. If the leave to defend the suit is refused to the defendant or such leave is granted conditionally and the defendant is not able to comply with the conditions, the allegations in the plaint are deemed to be admitted and the Court proceeds to pass a decree or consider the claim made in the plaint on the basis of such constructive admission. Such procedure is ordinarily applied to the suits of negotiable instruments or other admitted claims where *prima facie* there is an actual admission of the claim on the part of the defendant. Under s. 13 of the Bombay Rent Act, a landlord is entitled to recover possession of the premises only if the Court is satisfied that any of the grounds mentioned in s. 13 exists. The satisfaction of the Court must depend upon actual evidence and legal proof and not on constructive admission. In a tenancy suit, the notice to quit has to be proved as a condition precedent to the grant of any relief and in the summary procedure, in the absence of the defendant being able to obtain leave to defend the suit, it shall be presumed that the notice was duly served.

Section 12 (3) (b) of the said Act confers discretion on the Court not to pass a decree for ejectment against a tenant on the ground of arrears of rent for less than six months on the day of the statutory notice under s. 12 (2) of the Act even if the said arrears are paid at any time before the judgment along with the costs if circumstances justify exercise of discretion. Assume that a defendant is not able to pay the arrears as a condition of leave to defend the suit but is able to pay the same before delivery of judgment and offers satisfactory explanation for the delay, will it be possible for the Court to allow the defendant even to appear at the hearing of the suit when the leave to defend the suit has been refused to the defendant or the same is granted conditionally and the condition has not been complied with?

*By D. R. Dhanuka, Advocate, Supreme Court. 1 [1965] A.I.R. S.C. 1144.

Section 13(hh) of the Bombay Rent Act allows eviction on the ground that the premises are required reasonably and bona fide for the purpose of demolition and such demolition is to be made for the purpose of erecting new building. Reasonableness and bona fides are not matters of averment in the plaint but matter of opinion to be based on evidence.

Section 13 (g) of the Rent Act permits eviction on the ground of reasonable and bona fide requirements of the landlord for occupation of the premises by himself or by any person for whose benefit the premises are held. Section 13 (2) of the Rent Act imposes a mandatory duty on the Court not to pass a decree for eviction on this ground if the Court is satisfied that having regard to all the circumstances of the case including the question whether other reasonable accommodation is available for the landlord or the tenant greater hardship would be caused by passing a decree than by refusing to pass it. Assume that in a given case the tenant is not permitted to defend the suit, how the Court is going to perform its duty of deciding the questions of rival hardships without evidence on the side of the defendant which evidence the defendant is not permitted to lead? In any event a rule of procedure precluding the defendant to appear at the hearing of a suit involving such issues as a matter of right is hardly fair and consistent with the scheme of the Act. Similarly, there are various grounds under s. 13 which require clear evidence and the satisfaction of the Court on evidence is the condition precedent to the passing of the decree.

It has been held in *Middleton v. Baldock (T.W.) : Same v. Baldock (G.B.)*², while construing similar provisions, that the Court ought not to make the order for possession of the premises even by consent without enquiry or investigation in such matters.

It is vehemently argued by some lawyers that the Court is bound to grant unconditional leave to defend the suit in the cases of the type mentioned hereinabove, and if such leave is wrongfully refused, that is no ground to hold that the summary procedure prescribed by O. XXXVII of the Code of Civil Procedure is inappropriate for the matters governed by the Rent Act. To that argument, the answer is very simple—if it is unreasonable to apply summary procedure, it is incorrect to conclude that the summary procedure is a procedure consistent with the scheme and object of the Rent Act merely on the expectation that unconditional leave to defend the suit shall be granted in such cases. Such a question was mooted for consideration before the High Court of Bombay in a suit governed by provisions of Bombay Money-lenders Act reported in *Damji Deraaj v. Megraj B & Co.*³ Under s. 21 of the Bombay Money-lenders Act of 1946, the Court is enjoined with a duty to decide the issue in a suit to which the said Act applies as to whether the money-lender has complied with the provisions of keeping accounts etc. under ss. 18 and 19 of the Act before deciding the claim on merits. The question before the Court was as to whether the summary procedure in terms of O. XXXVII of the Code of Civil Procedure was appropriate to a suit to which the said Act applied, particularly in view of the mandatory duty of the Court to decide the issue regarding compliance with ss. 18 and 19 of the said Act in light of the argument that the said issues should be decided in presence of the defendant and the said presence would not be available if the defendant was refused leave to defend the suit. The learned Chief Justice Shri M. C. Chagla observed that the effect of refusal of leave to defend the suit or non-compliance with the conditions subject to which the leave was granted was that the mouth of the defendant was shut and the plaintiff was entitled to proceed as if the averments in the plaint were proved or admitted and to get a decree as prayed for in the plaint. In this context it must be kept in mind that there is a substantial distinction between the proof based on evidence and proof on basis of presumption arising from legal fiction. It was also observed by the learned Chief Justice that s. 29 of the Bombay Money-lenders Act could not possibly contemplate the compulsory absence of the defendant which O. XXXVII brings about on the failure of the defendant to get leave from the Court or to comply with the conditions on which leave was granted. It was also observed by the learned Judge as under (p. 1368) :

"... Therefore, it is clear to my mind that in a suit to which the Money-lenders Act applies it is difficult, if not impossible, to apply the procedure of O. XXXVII. It is possible to take

the view that in every suit to which the Money-lenders Act applied and which is filed under O.XXXVII, unconditional leave should be granted. If that were done, undoubtedly the provisions of the Money-lenders Act may be given effect to. *The other view is that the procedure under O.XXXVII does not and cannot apply to a suit to which the Bombay Money-lenders Act applies.*"

Similarly, the provisions of the Bombay Rent Act does not contemplate the compulsory absence of the defendant which might be occasioned by reason of the procedure followed under O. XXXVII of the Code of Civil procedure. If one of the possible views is that in any event the determination of these issues requires granting of unconditional leave to defend the suit, the better view is that the suit should not be allowed to be filed as a summary suit at all and that the summary procedure is in conflict with the provisions of substantive law enjoining determination of issues like that of comparative hardships in a suit for eviction on ground of reasonable and bona fide personal requirement of the premises by the landlord. It is submitted that there is no question of such issues being decided on basis of constructive admission of averments in the plaint.

The Supreme Court in *Ramkarandas v. Bhagwandas* decided that the appellant was not entitled to raise the contention about the inappropriateness of summary procedure or invalidity of r. 8 in the said appeal inasmuch as the appellant himself had made application to the Court of Small Causes at Bombay for setting aside the decree under O. XXXVII, r. 4, of the Code of Civil Procedure and the appeal before the Supreme Court arose from the order on the said application. On merits of the contention, the Supreme Court observed that while passing a decree, the Court could exercise a discretion on the facts deemed to be admitted and exercise of discretion does not mean that in every case the defendant should have a right to place his side of the case for assisting the Court in exercise of that discretion.

A Court shall not be able to exercise its discretion in questions relating to hardship on the ground of personal requirement in absence of the defendant on the footing that the allegations in the plaint are deemed to be admitted. In such a situation, the obligation imposed upon the Court under s. 13 (2) of weighing the hardship of the landlord and the tenant can never be properly discharged in absence of the defendant. If such absence is voluntary, the defendant has to thank himself. There is no justification to regulate the right of appearance of the defendant and to prevent him from appearing before the Court to point out the hardship to be caused by passing the eviction order in terms of s. 13 (2) of the Rent Act merely by enacting a rule of procedure.

In the same connection, it is pertinent to point out the observations of his Lordship Mr. Justice Bose of the Supreme Court in *Santosh Kumar v. Mool Singh*⁴ quoting from *Sangram Singh v. Election Tribunal, Kotah, Bhurey Lal Baya*⁵ to the following effect (p. 323) :

"[Rules relating to procedure are] designed to facilitate justice and further its ends; ... our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them."

It is, therefore, suggested that in the interest of justice the said rule be suitably amended by deleting the applicability of procedure prescribed by O. XXXVII of the Code of Civil Procedure to the matters covered by the provisions of the Bombay Rent Act.

4 [1958] A.I.R. S.C. 321.

5 [1955] 2 S.C.R. 1, at pp. 8, 9.

GLEANINGS.

OCCUPIER'S LIABILITY TOWARDS TRESPASSERS

THE decision of the Privy Council in *Commissioner for Railways (New South Wales) v. Quinlan* ([1964] 1 All E.R. 897) gives guidance on the duty, such as it is, of the occupier of land towards a trespasser. The basic rule, as everyone knows, is that the trespasser must take the state of the premises, and the activities being pursued thereon, as he finds them; and is without any remedy for any injury sustained on the premises, whether due to the state of the premises or activities going on at the time of the trespass. The trespasser has committed a wrongful act in disturbing the possession by unlawfully entering upon the land against the occupier's will. That is the general rule; but the occupier could in certain circumstances be held liable to a trespasser.

Actually in *Quinlan's* case the occupier was held not to be liable. It arose out of a collision between a train and a lorry on a level-crossing, and the facts must be stated at length. The Commissioner for Railways owned a stretch of railway-line over which a crossing gave access from the highway to a farm on the other side of the line. The line was fenced on both sides and the crossing had two gates, one giving access to the highway, the other to the farm. At the crossing the line ran north and south; fifty yards above the crossing there was a marked bend and a train coming round it would be obscured by a belt of trees from the sight of anyone on the crossing; *vice versa*, the engine driver could not see anyone on the crossing. Until 1955 the crossing was used only by the occupier of the farm and those having business with him. But in November 1955 the land on the farm side became the subject of housing development; building operations were put in hand, and a number of loads of materials were driven over the crossing. Witnesses for the Commissioner denied having seen any person or vehicle going over the crossing, or the gates open. A building contractor, by letter dated December 1, 1955, asked permission to use the crossing but was refused. On the same date the secretary of the Housing Commission also wrote asking for a like permission, but received no reply. The accident took place early in the morning of January 5, 1956, when both the gates of the crossing were open. The respondent Quinlan was driving a lorry over it, but before he got clear he was run into by a train and injured. The line before the crossing was on a down gradient and the train, with steam cut off, approached the crossing quickly and silently. Owing to the trees neither the engine driver nor his fireman could see Quinlan's truck before the train was coming round the bend when there was insufficient time to pull up before the crossing.

Quinlan had succeeded before the New South Wales trial Judge and a jury—probably, the Privy Council thought, because the jury misunderstood the relevant law. It seems to have decided on the basis that there was a likelihood of people coming to the crossing, that the appellant was aware of such likelihood, and therefore owed a duty to Quinlan as a member of the public to take reasonable precautions for his safety, notwithstanding that he was a trespasser. The full Court of the Supreme Court of New South Wales ordered a re-trial on the ground that the case might show that Quinlan could claim from the railway a breach of the general duty of care laid down in *Donoghue v. Stevenson* ([1932] All E.R. Rep. 1). The Privy Council was emphatic that *Donoghue v. Stevenson* cast no light on the rights and duties arising where a person injured on a railway crossing was a trespasser. Having pointed out that there was no general principle to be deduced from that decision as regards the legal rights and duties of a trespasser on a railway line, Viscount Radcliffe continued (at p. 902): "...it is not correct on principle to suppose that the mere fact that there was a likelihood, apparent to the occupier, of a trespasser being present on the crossing at some time or another is sufficient to impose on the occupier any general duty of care towards such a trespasser. The consequences of such a supposition would be far reaching indeed..."

The statement of the law applicable, which the Privy Council approved, was that of Hamilton, L.J., in *Latham v. Richard Johnson and Nephew, Ltd.* ([1911-13] All E.R. Rep., at pp. 124, 125): "The owner of the property is under a duty not to injure the trespasser wilfully; not to do a wilful act in reckless disregard of ordinary humanity towards him; but otherwise a man trespasses at his own risk".

This duty was further explained in 1935 by Lord Atkin who sometime before had delivered what is generally recognised as the speech in *Donoghue v. Stevenson* containing the kernel of the decision. In *Hillen and Pettigrew v. I.C.I. (Alkali), Ltd.* ([1935] All E.R. Rep., at p. 558), Lord Atkin said: "I know of no duty to a trespasser owed by the occupier of land other than when the trespasser is known to be present, abstaining from doing an act which, if done carelessly, must reasonably be contemplated as likely to injure him and, of course, abstaining from doing acts which are intended to injure him".

It is the occupier's knowledge of the presence of the trespasser that matters. The trespasser known to be present must not be injured intentionally or recklessly. Thus, the occupier was held liable in *Excelsior Wire Rope Co., Ltd. v. Callan* ([1930] All E.R. Rep. 1). Again, in *Addie v. Dumbreck* ([1929] 4 All E.R. Rep. 1) there was an endless wire cable in a field belonging to a colliery. Colliery officials knew children used the field as a playground but never consented to this use and sometimes warned children off. A boy of four was killed by being drawn into the machinery when set in motion by colliery employees who could not see the boy. Held, the colliery was not liable; in cases of trespass there can be no difference between the case of a child and that of an adult. By contrast, in *Haughton v. North British Ry. Co.* (1892) 20 R. (Ct. of Sess.) 113 the railway was held liable to a child known to be in the path of a truck moving during a shunting operation.

Wanton or reckless conduct is, therefore, actionable. That does not mean that a duty of reasonable care and foresight is owed to a trespasser; he has not been promoted to the rank of "neighbour" in the *Donoghue v. Stevenson* sense. So the Commissioner for Railways would not be liable to the lorry driver trespassing on the level crossing unless his engine driver deliberately drove his engine at the lorry when he saw it. Even if the Commissioner was aware that the presence of a trespasser on the line at a given time was likely or possible, he still owed no duty to foresee the trespasser's presence and take care accordingly. In short, the occupier is not liable for his actions, even if dangerous, unless he knows of the trespasser's presence or it is extremely likely or very probable that the trespasser will be present. That certainly was not so in *Quinlan's case*.—S. J.

EMPLOYER'S DUTY TO DISCIPLINE

THE case of *Veness v. Dyson, Bell & Co.*, which came before Widgery, J., for determination of a preliminary point of law, presented two novel problems in the law of employment. Does an employer owe a duty to prevent fellow employees, from hampering, annoying and upsetting an employee, without actually inflicting personal injury on him or her? Does an employer owe a duty not to treat an employee with discourtesy, subjecting him or her to irritation, insult and humiliation, and making him or her overwork? The plaintiff, who complained of a campaign of abuse, insult and obstruction, based her action upon the well-known principle that an employer is under a duty, both contractual and tortious, to take reasonable care for the safety of his employees, so far as reasonably foreseeable injury is concerned. There is no doubt that if, in such circumstances, physical injury is inflicted on an employee by the misconduct of fellow employees, the employer will be liable to the employee who is injured (*Hudson v. Ridge Manufacturing Co., Ltd.* [1957] 2 All E.R. 229). Can this apply where the employee complains of what might be termed "mental injury" by analogy with the "mental cruelty" that is often the basis of a divorce petition? From what was said by Widgery, J., it would seem that, pro-

vided such injury is reasonably foreseeable by the employer, on the basis of his knowledge, through complaints or otherwise, of what is going on in his place of employment, a breach of the employer's duty of care can occur in this, as well as in the more usual way. It would seem to be a matter of degree, dependent upon whether the employer acted reasonably or not in continuing to expose his employee to the rudeness or discourtesy of fellow-employees with knowledge of the likely result of such exposure upon the health of the employee complaining of injury. The fact that the employee concerned was sensitive to the conduct of the other employees will not of itself involve the employer in liability. The complaining employee can always choose between leaving the employment and, by remaining, continuing to accept the risks involved. There is a distinction between conduct by fellow employees that is physically dangerous and conduct that is emotionally upsetting. To be rude or discourteous, as Widgery, J., said, is not an actionable wrong, and in ordinary life the victim must either put up with it or take himself elsewhere. In some situations, however, it would seem that an employer would be obliged, contractually or otherwise, to put a stop to the kind of persecution and bullying of which the plaintiff in this action complained.

On the second point, relating to the alleged discourtesy of the employer, Widgery, J., took the view that, unless by such conduct severe emotional distress is deliberately or recklessly caused, as occurred in *Wilkinson v. Downton* [1895-9] All E.R. Rep. 267, no liability could ensue. *Wilkinson v. Downton* (*supra*) was the famous nervous shock case in which the defendant told the plaintiff an untrue story about her husband. A servant who is dissatisfied with her employer's personal attitude towards her or her hours of work or remuneration must put up with it or leave. Excessive hours or inadequate pay are not breaches of contract, nor torts for which there is liability. An employee can refuse to work long hours, or can leave the employment if the wages or salary are not deemed sufficient. But no complaint of personal injury can be based upon discourtesy on the part of an employer. This type of misbehaviour, if such it may be termed, cannot be brought under the rubric of the employer's duty to take reasonable care to prevent an employee from being exposed to unnecessary risks of injury. In other words, an employee may be said to have no legal right to courtesy. As regards these allegations, therefore, the learned Judge struck out the relevant paragraphs in the pleadings, permitting the action to go forward only on the ground that has been discussed above. It will be instructive to see whether, if the case comes to trial, there will be a finding in the plaintiff's favour. Though this would seem now, as a result of the judgment of Widgery, J., to be largely a question of fact, there is certainly an interesting element of law involved.—*L.J.*

NEGLIGENCE AND FORESEEABILITY

In *Doughty v. Turner Manufacturing Company Limited*, 235 L.T. 39, the plaintiff workman was injured at the factory where he worked when another workman inadvertently knocked a loose asbestos cement cover and caused it to fall four to six inches into a cauldron of extremely hot molten liquid. The extreme heat caused the asbestos cement to undergo a chemical change creating or releasing water, which turned to steam which one or two minutes later caused an eruption of the molten liquid from the cauldron. The plaintiff was injured by some of this erupted liquid. Until the accident had been investigated no one knew or suspected that heat would cause this chemical change in asbestos cement, but (as the trial judge found) the plaintiff's employers should have realised that dropping the cover into the liquid might cause a dangerous splash: the plaintiff, however, was not injured by any splash, and at the time when he was injured any danger from splashing had ceased. In an action by the plaintiff against his employers in negligence:

Held, the employers were not liable because the eruption which injured the plaintiff was unforeseeable by a reasonable man at the time when the accident happened, and because, although risk by splashing was foreseeable, this was

an accident of an entirely different kind, its cause being the intrusion of a new and unexpected factor, viz. the chemical change of the compound asbestos cement at high temperatures. *Overseas Tankship (U.K.) Limited v. Morts Dock and Engineering Company Limited* ((1961) 1 All E.R. 404) applied. *Hughes v. Lord Advocate* ((1963) 1 All E.R. 705) distinguished.—*L.T.*

BEQUEST FOR FINDING THE BACON-SHAKESPEARE MANUSCRIPTS.

By her will the testatrix bequeathed one-third of her residuary estate to the Francis Bacon Society "towards finding the Bacon-Shakespeare manuscripts and, in the event of the same being discovered by the date of my death, then for the general purposes of work and propaganda of the society." The testatrix died on 7th April, 1961, and the sum in question was £6,500. The society was formed in 1903 and the testatrix had been a member of it for many years. Its main objects as at the date of the will and the date of the testatrix's death were "to encourage the study of the works of Francis Bacon, also his character, genius, and life; his influence on his own and succeeding times and the tendencies and results of his writings; and to encourage the general study of the evidence in favour of Francis Bacon's authorship of the plays commonly ascribed to Shakespeare, and to investigate his connection with other works of the Elizabethan period." The society was registered as a charity under the Charities Act, 1960. Doubts having arisen as to the validity of the gift, since it was not a gift to the society absolutely but upon a stated trust, the trustees took out a summons to determine whether the gift was a valid charitable trust. Wilberforce, J., said that the search for the Bacon-Shakespeare manuscripts was not so manifestly futile that the court should not allow the bequest to be spent upon it as upon an object devoid of the possibility of any result. A bequest for the purpose of search or research for the original manuscripts of England's greatest dramatist, whoever he was, would be well within the law's conception of charitable purposes because it was for improvement of our literary heritage. He would declare that the gift was a valid charitable trust. (In re *Hopkins's Will Trusts*).—(A.R.) *S.J.*

REVIEWS.

Principles and Precedents of Pleadings. By V. M. SHUKLA, LL.M., Advocate. LUCKNOW: Eastern Book Company, 34, Lalbagh. 1965. Roy. 8vo. Pages 1022. Price Rs. 27.50.

THIS is a welcome addition to the literature on a subject which is of paramount importance to every practising lawyer. The book opens with a section which deals with general rules of pleading and deals with such topics as alternative pleas, cause of action, jurisdiction, interrogatories and affidavits. The next section contains precedents and forms of pleadings relating to suits, particulars to be given in actions on contract and tort and defences to such actions. The last section gives precedents and forms of pleadings relating to petitions under the Civil Procedure Code and various other enactments like the Hindu Marriage Act, 1955, the Arbitration Act, 1940, the Companies Act, 1956 and the Indian Succession Act, 1925. This exhaustive compendium of forms and precedents considered against the background of their underlying principles will be of much use not only to the busy practitioner but also to the neophyte in the profession.

Commentaries on the U. P. Industrial Disputes Act, 1947. By KIRPA DAYAL SHRIVASTAVA. Second Edition, 1965. LUCKNOW: Eastern Book Company, 34 Lalbagh. Roy. 8vo. Pages 545. Price Rs. 25.

THIS Act which was passed to meet the special circumstances of industrial peace in Uttar Pradesh was brought into force on February 1, 1948, and since then has

been amended a number of times till its amendment in 1957 has made the Act very comprehensive. Since the publication of the first edition of this book some far-reaching changes have been effected in the Central Industrial Disputes Act of 1947. All this has necessitated revision which has been carried out now and the case law bearing on the subject has been brought up to date. The various provisions of the Act are lucidly explained and are examined in the broader context of an industrial legislation which is aimed at maintaining industrial peace and the voluntary settlement of industrial disputes. The appendices contain useful material including the various Rules and Orders made under the Act. In a work of this nature a table of cases could well have been included. The book should prove useful to all those who have to deal with this piece of labour legislation.

Hindu Law. By PREM NATH CHADHA, B.A., LL.B., Advocate, Supreme Court of India. LUCKNOW: Eastern Book Company, Lalbagh Road. Demi 8vo. Pages 486. Price Rs. 12.

THIS brief survey of Hindu Law which first appeared some seven years ago, in its present third edition has been revised and enlarged, in the light of recent decisions of the various High Courts and the Supreme Court, reference to which has been brought down to the end of January 1965. The appendices contain the full texts of the four Acts relating to Hindu succession, marriage, adoption and maintenance and guardianship. These also give Rules framed by the different High Courts under the Hindu Marriage Act, 1955. This being pre-eminently a student's book the author has surveyed the entire law on the subject with commendable brevity and lucidity. The old Hindu law as well as what Dr. Derrett rightly calls the anglo-Hindu law as affected by legislative enactments are clearly explained. The ease law is judiciously chosen and the principles deduced therefrom are succinctly set forth. An excellent vade-mecum for students on this branch of law.

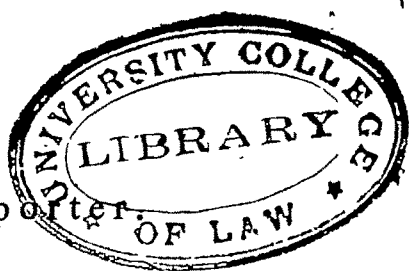
Principles of Equity. By G. P. SINGH, B.SC., LL.M. Advocate. LUCKNOW: Eastern Book Company, Lalbagh. Demi 8vo. Pages 438. Price Rs. 10.

THIS book which is prepared as a text-book for law students explains the principles of English equity and its bearings on the Indian legal system as envisaged in the Specific Relief Act and the Indian Trusts Act. The re-enactment of the law of specific relief in 1963 necessitated major changes in this third edition of the book which also incorporates recent statute and case law on the subject. The topics dealt with are the nature and scope of equity, the maxims of equity, equitable rights, trusts and equitable remedies or specific reliefs, the latter two considered at great length as being branches of equitable jurisdiction common to both English and Indian law. The author has clearly explained the principles underlying the equity jurisdiction not only with the help of select English and Indian decisions but has liberally drawn upon English authorities. This is an eminently suitable book for students going up for their law examinations.

Domestic Tribunals and Administrative Jurisdictions. By SURANJAN CHAKRAVERTI, M.A., B.L. LUCKNOW: Eastern Book Company, Lalbagh Road. Demi 8vo. Pages 100. Price Rs. 5.

DOMESTIC Tribunals are defined by the author as non-judicial bodies when they act judicially and in this brochure he examines the law applicable to these bodies and the constitution and powers of some of the more important ones. In this exposition of the rules of natural justice the author has extensively referred to judicial pronouncements. The book is addressed to persons who are called upon to preside over such tribunals and they will find here much to interest and instruct them.

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December 15, 1965.

HON'BLE MR. H. K. CHAINANI.

TO the many tributes which were paid to the memory of the Hon'ble Mr. Chainani, who died on November 28, 1965, we may add our humble tribute and our sense of personal loss. Notwithstanding his heavy judicial and administrative duties, he could always spare some time for our Journal and he made it a point to meticulously go through the reports of the judgments submitted for approval and to make corrections in his neat and clear handwriting. Persons who knew him and came in daily touch with him, either in Court or outside it, are better qualified to appreciate the qualities of a man who was a great gentleman and an urbane Judge. We were more concerned with the finished product of his mind, namely, the judgments which he delivered during his tenure on the Bench.

One outstanding merit of his judgments was the clarity of expression reflecting the working of a clear and incisive mind which through a tangled mass of facts and law arrived at the heart of the problem involved. His approach was logical, which started with a consideration of the relevant provisions of the statute, followed by a discussion of the case law cited in Court, and ended with a lucid interpretation of the law, stated with conciseness and precision. To some his approach may have seemed impersonal and jejune, but

For complete life-sketch see 60 Bombay Law Reporter Journal p. 177.

his aim was not to excel in the niceties of style or elaboration of legal subtleties but, in the words of an eminent jurist, to do justice between citizens on concrete issues. He administered law as he found it without losing sight of the broader concepts of justice and humanity. Some of the memorable judgments he delivered during his Chief Justiceship may be recalled here: *Bombay Municipal Corp. v. Ramchandra* (61 Bom. L.R. 1129) where whether a resolution passed by the Corporation to express regret at the execution of a former Prime Minister of Hungary was *ultra vires* the Corporation was considered; *The State of Bombay v. K. M. Nanavati* (62 Bom. L.R. 383) where the constitutional question involving the powers of the Governor of a State *vis-a-vis* art. 161 of the Constitution was discussed; *Manohar v. Konkan Co.-op. Housing Socy.* (63 Bom. L.R. 1001) and *I. R. Hingorani v. Pravinchandra* (67 Bom. L.R. 306) which dealt with the law relating to co-operative societies and *State v. Bennett Coleman Co. Ltd.* (66 Bom. L.R. 147) where the applicability of the Prize Competitions Act, 1955, to competitions was considered. Besides these he had delivered many far-reaching judgments dealing with Tenancy and Industrial laws which will be found enshrined in the law reports.

His activities were however not merely confined to his judicial duties but he took a keen interest in education to which he devoted his spare time. Our association with him after nearly two decades, during which he rendered all possible help to us, has now ended with his tragic passing away and the least that we can do is to offer our heartfelt condolences to Mrs. Chainani and the members of his family for the irreparable loss they have suffered.

Requiescat in pace.

On November 30, 1965, all the Judges of the High Court, members of the Bar, Attorneys and the staff of the High Court gathered in the Central Court Room at 10.30 A.M. when the Hon'ble Mr. Y. S. Tambe, Acting Chief Justice, made a reference to the late Hon'ble Mr. Chainani.

The Hon'ble Mr. Y. S. Tambe, Acting Chief Justice, said.—

Mr. Advocate General, Mr. Government Pleader, Mr. President of the Western India Advocates' Association, Mr. President of the Incorporated Law Society, Members of the Bar, and friends:

We assemble here to mourn the premature and tragic death of Mr. Hashmathrai Khubchand Chainani, our highly esteemed Chief Justice.

Chief was born on February 29, 1904. He had his early education in Hyderabad (Sind), and had passed the Matriculation examination at the age of 16. After prosecuting further studies in D. J. Sind College at Karachi, he proceeded to England and joined the Magdalene College at Cambridge. In 1925 he took the degree of Bachelor of Arts. In the next year, he competed for the Indian Civil Service and stood first. In the year 1927, he joined duties in India. For the first 5 or 6 years, he served on the Executive side, but in 1933 he came to the Judiciary, and in 1933 he acted as the Assistant Judge at Poona. Soon thereafter he was appointed as a District Judge at Sholapur. In 1935 he was appointed the Secretary of the Legislative Council and Assistant Legal Remembrancer, and the Legislative Council later became the Legislative Assembly of the State, of which also he acted as the Secretary. In his Secretaryship of the Legislative Assembly, he was associated with and was responsible for drafting many legislative measures including the Bombay Industrial Relations Act, a fore-runner of industrial legislation in India. Again, in the year 1944, he acted as the Joint Secretary of the Government of Bombay, Home Department. Subsequently, he was transferred as the Deputy Secretary to the Government of India in the Home Department. Later, he was posted at Surat as the District and Sessions Judge, and thereafter he was transferred to Ahmedabad as District and Sessions Judge. In the years 1947-48, he held the post of Commissioner, Central Division, and on August 28, 1948, he was appointed a Puisne Judge of this High Court.

It would be seen that he came to the Bench equipped with a very wide and varied experience in administrative, legislative and judicial spheres. In September 1958, he was appointed to perform the duties of the Chief Justice of this High Court, during the absence of the then Chief Justice M. C. Chagla. Three months later, he was made permanent in this post. He was the first Indian Civil Servant to occupy the post of the Chief Justice of this Court.

During his term as Chief Justice, he was twice appointed to act as Governor of Maharashtra—in October 1962, on the sudden death of the then Governor Dr. Subbarayan, and in September 1963 when the then Governor Mrs. Vijayalaxmi Pandit led the Indian Delegation to the United Nations.

On 14th of this month, at about 8.30 p.m., he was hit by a motor car, received severe injuries including concussion of brain, and in an unconscious condition was removed to the hospital. After a grim fight for 14 days, and in spite of the best efforts on the part of the doctors, his near relations and friends, he breathed his last, last Sunday at about 8.30 p.m. plunging all of us in grief. His accidental death has rudely shocked not only his colleagues, members of the bar and the staff of the High Court, but also the citizens of Bombay; and the manner in which he met his death is a matter of concern to all of us.

All the 38 years of his service are characterised by three principles: He thought, acted and behaved as an Indian and not as a person belonging to any caste, creed or community, province or State. Secondly, he was civil to every one with whom he came in contact; and lastly, he tried his utmost to be of service to others. In its true sense, he thought and behaved as an Indian Civil Servant.

Friends, we all know that he held this high office of tradition for the last seven years with distinction and credit. He possessed qualities necessary for an ideal Judge. He heard patiently, he interfered very little with the arguments of counsel, and decided cases without fear or favour. He possessed a keen legal acumen which was accompanied by profound study of law. His mind was never closed to arguments, and he was always open to persuasion. As an administrator, he was very thorough, and had passion for details. There is no file which he has not studied carefully and wholly. He tried to secure speedy disposal of cases. In his behaviour both towards his colleagues, staff and members of the Bar, he was very polite. I have not heard during the last eight years I am associated with him a single harsh word uttered by the Chief Justice to any one. Truly, the Governor has described him as a "urbane gentleman". Work in Court was not the be all and end all of his activities. He had kept himself busy with social work also, and his principal passion was the field of education. Yesterday, at the Crematorium, a considerable number of students had assembled to pay their homage to the departed soul. Some of them asked me to whom they should express the grief and offer condolences.

Friends, the Judiciary has lost a distinguished Judge, the State has also lost an able Administrator, the City of Bombay has lost a silent but very devoted social worker, and we have lost an esteemed friend and our leader. The loss would not be easily repaired.

On behalf of Brother Judges and on behalf of myself, we place on record our deep sense of sorrow and grief at the tragic death of our Chief, and convey to Mrs. Chainani, his son, his daughter and his relations, our profound sense of sorrow and convey to them our deepest condolences and sympathies. We share their grief and are with them in their bereavement.

May his soul rest in peace.

I request you all to observe two minutes' silence as a mark of respect to the departed soul, after the reference is over.

Mr. H. M. Seervai, Advocate General, said.—

My Lords, yesterday, with every mark of public esteem and private sorrow we laid to rest our late Chief Justice. Tributes have been paid to him from the highest in the land—the President of India, the Governor of Maharashtra—to the humblest citizen who filed past his bier yesterday. But he belonged to this Court in a manner in which he belonged to no one else. The best years of his life were spent here and we members of the Bar join Your Lordships in mourning what is a common sorrow. The question keeps recurring to us: "Surely this was unnecessary". But the ways of Providence are inscrutable and we have to bow to the inevitable.

This is not the time to assess the work which he did as a Judge. That will be done by the historian of the future. But we would like to recall some of the things which endeared him to us, things which the historian would like to know as coming from men who practised in his Court. He came to us in 1948 with the wide and varied experience to which my Lord the Acting Chief Justice has referred. As a civil servant familiar with the districts, as a Secretary of the Legislature familiar with the working of the constitutional machinery, as a Remembrancer of Legal Affairs familiar with the legal affairs of the State and as a Secretary in the Home Department familiar with the problems of law and order, he brought to his work an experience which is not to be gathered from books and which was reflected in his judgments, particularly in matters of constitutional law.

I would like today for a while to dwell on some of the things which linger in my memory. He came to us in 1948 and I remember he was a vacation Judge. My learned friend Mr. Vachha and I had a complicated interim matter before him. We were resigned to an hour and a half of argument. We wondered how the Judge would deal with a commercial matter. We went

to his Chamber. He said to me: "Isn't this order enough to protect you?" I said "Yes". He passed the order and said "I do not want to hear the case hereafter because the father of the plaintiff was a very great friend of mine." We came out delighted with the speed, thoroughness and impartiality with which the Judge had decided the matter.

Another case lingers in my memory. It was a party in person arguing before a Division Bench consisting of Mr. Justice Rajadhyaksha and Mr. Justice Chainani. The conduct of the petitioner to his father was so disgraceful that Mr. Justice Rajadhyaksha got angry and excited and would have dismissed the petition on a ground which would have been wholly untenable. Quietly, firmly but persuasively he dislodged his brother Judge from that position and the petition was dismissed on a ground which was unassailable.

These were the judicial qualities which were brought to his work and I would like for a while to dwell on the qualities which we at the Bar noticed in him. He was a Puisne Judge for ten years and we noticed that he was careful and meticulous and paid attention to details and facts. He disliked, or it would be more accurate to say, he distrusted rhetoric, although he was not insensitive to its charms, and although, as his speech on the death of Pandit Jawaharlal Nehru, shows he was capable of emotional oratory if he chose to adopt it. But he looked upon a purple passage in a judgment as a poor substitute for clear thinking, and he resisted the fatal temptation to dictate a judgment on the spot in important matters, with the result that his judgments on important questions are well arranged, well argued, business like and workmanlike performances. He may be right or he may be wrong, but in clear lucid language he left you in no doubt about what he wanted to decide and what he had decided.

As to his courtesy to the Bar, that was proverbial and he had engaging and winning ways and a smile for all. When he assumed the high office of the Chief Justice on December 8, 1958, my learned friend, the then Government Pleader, now a member of your Lordship's Bench, voiced his fear by expressing the hope that the immense administrative duties of the Chief Justice would not deprive him of that smile which was always his. He expressed that fear because when the great cricketer Don Bradman became the skipper of the Australian team he lost his smile and it may be that in skippering the High Court Bench the same thing might happen to the Chief Justice. The learned Chief Justice in his modest manner assured the Government Pleader that he would be what he had always been, and no promise was more accurately fulfilled. The smile that was his never left him. His courtesy was uniform, though no doubt apart from purely judicial work heavy demands were made on his time by his administrative duties. My Lords, in matters of administration and policy differences are bound to arise, but he never allowed them to cloud personal friendship or courtesy and never allowed them to deflect him from the course of judicial conduct.

We mourn today a distinguished Judge and a public servant who has served his day and his generation to the best of his capacity. It is true that he drove others hard, but he drove himself much harder.

On this sad occasion our thoughts go out to the members of his family, particularly to his wife who has borne during these fourteen days the pain and suffering from which he was mercifully spared. I would, My Lords, on behalf of the Bar request your Lordships to convey not only your deepest sympathy and sorrow but ours to his wife and all the members of his family in their grave and irreparable loss.

Mr. R. B. Kotwal, Government Pleader, said.—

My Lords, I associate myself with all that has been said by my Lord the Chief Justice and by the learned Advocate General. We are meeting this morning under circumstances which are tragic in the extreme. The Chief

Justice of Maharashtra has died as a result of a motor accident. It is indeed an irony of fate that a Judge who always took a compassionate view of the guilt of the accused in motor accident cases should himself have fallen a prey to a motor accident.

Chief Justice Chainani was born in 1904. He was educated at Karachi and Cambridge and he joined the Indian Civil Service in 1927. He was first appointed in the Revenue Department as Assistant Collector. But the judicial bent of his mind soon induced him to opt for the judicial line. He served first as Assistant Judge and then as District Judge in various districts. He was Revenue Commissioner in 1948 when he was elevated to the Bench and in 1958 he became Chief Justice of this Court.

Chief Justice Chainani had a passion for justice and the justice he meted out was always tempered with mercy. Even though he never hesitated to be stern when justice demanded it, his decisions had always a soft inner lining of kind-heartedness. Towards Government his attitude was equally balanced. He never allowed the State to commit an aggression on the rights of the citizens, but at the same time he fully appreciated the difficulties of those who had to run the Government, and never hastily criticized the Government. Chief Justice Chainani presided over the Bench of seven Judges specially constituted to examine the legality of the Governor's order passed in the famous Nanavaty Case. He had the privilege of being the Chief Justice of this Court when it completed a hundred years of its useful existence and celebrated the centenary in 1962. He was twice appointed Governor of this State for short periods and during one of these periods he presided over the centenary celebrations of the Western India Advocates' Association. The speech which he then made and the manner in which he took part freely in all the functions during those celebrations show how great was his love and respect for the Bar. No wonder the Bar reciprocated with an equal amount of love and respect for their Chief Justice.

Chief Justice Chainani after a life dedicated to hard and sincere work was about to retire from service very soon and to start enjoying the well earned rest of his life. But the rest which he was destined to enjoy was not the earthly rest in life but the divine rest in death.

My Lords, my heart aches within me when I think of the terrible disaster that has fallen on Mrs. Chainani and the whole family. God and time alone can heal their broken hearts. All that we humans at the present moment can do is to send out our heart-felt sympathies to this unfortunate family. May the departed soul rest in peace.

Mr. K. B. Sukthankar, President, Western India Advocates' Association, said.—

On behalf of the Advocates' Association of Western India I associate myself in paying homage to the memory of the late Chief Justice and with all that has been said by your Lordship, the Advocate General and the Government Pleader. But for the poignant tragedy that overtook Chief Justice Chainani a fortnight ago, we would have met here exactly three months hence to give an affectionate farewell to the Chief Justice. Chief Justice Chainani had made great efforts to minimise the proverbial law's delays. He used to say that those persons who felt irritated at being hustled subsequently came to thank him for taking away the burden of arrears in Courts of law. Chief Justice Chainani had a penchant for bringing about amicable settlement between litigants and there are innumerable agriculturists both landlords and tenants in the districts of Maharashtra who bless him for bringing about an end to the bitter feelings between landlord and tenant throughout Maharashtra. Bernard Shaw has given the definition of a gentleman. He says that a gentleman is a person who gives back to society a little more than what he has received from it. Chief Justice Chainani has given to society much more

than what he has received from it. He was connected with at least three educational institutions and took active interest in the affairs of the societies with which he was connected. There have been great Judges, there have been good Judges. Chief Justice Chainani was a great Judge and a good Judge, but above all he was a humane Judge. May his soul rest in peace.

Mr. R. A. Gagrath, President, Incorporated Law Society, said.—

My Lords, on behalf of the Bombay Incorporated Law Society and myself I join my Lord the Acting Chief Justice and my learned friends who have addressed before me, in the sentiments of sorrow that they have expressed on the sad and untimely death of our late Chief Justice. Death takes the toll of anyone of us at any time, but we deeply regret the manner in which and the circumstances under which his Lordship met his untimely death. Throughout the period when I had the privilege to meet his Lordship in connection with the affairs of our Society we always found him courteous and considerate and he dealt with us with the utmost understanding and consideration. Although his Lordship occupied the high office of the Chief Justice, he never made a show of himself and his simple style and graces were carried by him throughout the end of his life. I have no further words to add than what has been already spoken by the previous speakers and I convey to your Lordships on behalf of the Society and myself our sincere condolence on the death of a valued colleague and to Mrs. Chainani and the members of his family our sincere sympathy on the sad loss they have suffered as a result of the death of a beloved head of their family. May his soul rest in eternal peace.

After the reference was over, two-minutes' silence was observed.

RENUNCIATION : AN ESSAY IN ANGLO-HINDU LAW.*

In a review of a European author's book on Hindu law an Indian law teacher asked, "What is Anglo-Hindu law?" This paper will throw light on that question. The expression "Hindu law" is merely the label by which the personal law is identified. The various sources, or components of it, have to be detailed separately. If the problem arises in India in the law of nullity of marriage or succession to the property of a Hindu dying after the commencement of the Hindu Succession Act, the source is naturally the relevant part of the Hindu Code. We are then in the realm of Modern Hindu Law. But if the problem arises in the field of the joint Hindu family the source is not the Code but that strange amalgam of ancient commentatorial opinion and judicial construction and adaptation which is called "Anglo-Hindu law" to distinguish it from the true Hindu law, the *sastric* law which continued its own existence outside the Courts and irrespective of governmental agencies. The India of the British period had its Anglo-Indian aspects: it was neither truly Indian nor truly British. The law of British India was Anglo-Indian, neither truly English nor truly Indian. It became however, *sub modo*, part of modern India's heritage, and the surviving portions of Anglo-Hindu law, like Anglo-Muhammadan law, are features of the current (but hardly "modern") Indian scene. Anglo-Hindu law is not Modern Hindu law, though for the time being it is still part of the current Hindu law for India, as it is for a number of other jurisdictions as well.

This paper will study a very curious case which entirely exemplifies the condition and nature of Anglo-Hindu law, and especially its uneasy relationship to *sastric* law. The case of *Anjaneyulu v Ramayya*¹ was decided by a full bench of five judges in the Andhra Pradesh High Court, P. Chandra Reddy, C. J., Manohar Pershad, Chandrasekhara Sastry, Narasimham, and Gopal Rao Ekbote, JJ. Such a large bench was needed because the question at issue involved considering the correctness of a Madras full bench answer, namely that in *Ramayya v. Venkataraju*²,

*By Prof. J. Duncan M. Derrett, University of London.

¹ [1966] A.I.R. An. P. 177, F.B.

² [1954] A.I.R. Mad. 864, s.c. [1954] 2 M.L.J. 176, F.B.

which was not only in the same field but actually with reference to the same family and the identical set of facts, though the parties and ultimate issues differed. It is a quite extraordinary thing for one full bench to hold that another full bench was wrong on facts and possibly in law in dealing with problems of one and the same family. It adds piquancy to the situation that the Andhra Pradesh High Court was sitting in judgment, virtually, on the learning and ability of the Madras High Court, which remains in every sense its elder brother. For students of Hindu law the result should be welcome, since every full bench answer is to be treated seriously, and to have one on top of another should give us well considered and matured learning. Readers in Maharashtra cannot afford to smile indulgently at the errors now purported to have been discovered in a Madras judgment: if the Andhra Pradesh decision is correct law for Andhra Pradesh it is bound to be considered in Madras itself, and will be a strong candidate to be followed in Maharashtra. The present writer believes that *Anjaneyulu*, for all its five Judges, was wrong, because it does not represent what the Anglo-Hindu law truly is on this admittedly difficult subject. This does not mean that Madras was literally right either. As we wend our way through the intricate maze of this legal conundrum, we shall inevitably reach the conclusion that the subject in issue, namely renunciation, is as yet imperfectly understood. It would always be better to start with the sastric law on the subject: yet this is something which advocates seem hardly ever to do, and naturally most Judges follow their customary technique, and approach the sastra through the eyes of early English Judges, which cannot help, sometimes, being a distorted point of view.

Let us first review the facts. The law is apt to confuse if one approaches it from the back end, as it were, and even if we shall, on the contrary, start from the beginning: but the facts of the case in themselves are, fortunately, very simple. A family consisted of *F*, the father (called Ramaiah), his son, *S* (called Nageswara), and *S*'s son *SSI* (called Pedda Anjaneyulu). They were an undivided Mitakshara family. *S* was improvident and incurred debts indiscriminately, and was pressed by creditors. He was induced to execute a document the operative portion of which reads as follows:

"I have for the benefit of you the members of our joint family and the male issue that may be born to me hereafter, relinquished the entire right, title and interest possessed by me in the moveable and immoveable properties as well as assets and liabilities of our joint family, and executed and delivered this release deed in your favour creating in your favour all absolute right, title, possession and interest. I have hereby relinquished the right, title and interest possessed by me in the entire moveable and immoveable properties as well as the assets and liabilities of our family. The male issue that may be born to us hereafter shall, according to Hindu law, enjoy the same with all absolute rights of gift, transfer, exchange and sale, bearing all the liabilities in respect thereof."

In a suit brought later by a creditor of *S* against all three persons a personal decree was passed against *S*. In execution the decree-holder proceeded against the family properties (naturally on the footing that the judgment-debtor was joint at the time of the decree). *F* and *SSI* protested. The execution Court sustained attachment against the shares of *SSI* on the footing that the debts were pre-partition debts binding on *SSI* under the pious obligation, and assuming the renunciation to have left *SSI* with one half of the joint estate, that half was liable for his father's debts. The full bench of the Madras High Court, before whom the problem at length came, held that the decree against the father alone could not be executed without more ado against properties allotted to the son. The basis of this decision in point of fact was that *S*, by executing that document, severed himself from the family, taking no share, whereupon *SSI* became separated from his father, so that a separate suit must be filed (in the traditional Madras view) against *SSI* before his liability under the pious obligation could be established.

SSI later died, leaving *F* the sole surviving coparcener. A few years later a creditor of the family obtained decrees against *F*. Certain properties were attached. *SS2*, a son born to *S* after *S* executed that release deed, petitioned for the release

of the attachment *quoad* his half share in the family properties, on the footing that by birth and irrespective of his father's renunciation he had acquired title to the estate. This was a failure. Family property passed into the hands of third parties. In order to recover part of this property *SS2*, evidently with the connivance of *F*, instituted a suit for partition against *F* and the alienees, alleging a former partition between *F* and *SS2*, and claiming a half share on the footing that *S* released his interest in favour of *S*'s sons to be born in the future also. Quite how one can release in favour of persons not in existence was naturally a point left in the air, but the fundamental *Mitakshara* law must have served, somehow, as basis for his contention.

S executed the release deed in 1946. *SS2* was born in 1950. The alienees claimed that *SS2* acquired by birth no interest in the properties which had vested solely in *F* after *SS1* had died in 1949. The issue was contested whether the lives of *SS1* and *SS2* overlapped. But since *SS1* died on October 12, 1949 and *SS2* was born on July 29, 1950, it would be difficult to prove that the lives overlapped. Yet another son was born to *S*, and *SS3* was thus added as co-plaintiff in this partition action. The trial Court held that there had not been a partition between *F* and *SS1*, that the two lives had not overlapped, and that *SS2* acquired an interest in the properties of *F*. It was against this decision that the appeal eventually came to the Andhra High Court. The position adopted was that *S* had separated from his father and son in 1946 (the view, as we have seen, taken by the Madras High Court), but that he had separated without taking any share for himself. His afterborn sons could therefore reopen that partition. Alternatively if it was a relinquishment in favour of children to be born subsequently they could succeed on that footing. Since the deed had already been construed by a full bench, the question, if the first and second pleas were both to be considered had to be referred to a fuller bench.

The Andhra Pradesh full bench were pressed hard to treat the Madras construction as *res judicata*, whereupon reliance could be placed on the case of *Athilinga* (to which we return). But it was discovered, as his Lordship, Chandra Reddy C.J., points out at p. 181, that the Madras Courts had assumed, without proving, that the release deed operated as a partition, and that property had somehow been allotted to *SS1*. Since the construction was not so much a matter of judgment as of assumption, the Andhra Court had no difficulty in proceeding to construe the document for itself.

The result is shortly stated (p. 181) :

"...We feel that the relinquishment of a share by one of the co-parceners in favour of the other members does not alter the status of the joint family. The releasor alone separates himself from the family...."

For the general proposition there was indeed abundant authority. *Venkatapathi v. Venkatanarasimha*³ illustrated the rule that the relinquishment of one member had no effect on the status of the others. The Privy Council said (p. 267) :

"...The only effect of renunciation is to reduce the number of the persons to whom shares would be allotted, if, and when, a division of the estate takes place."

The same point is made by the Supreme Court in *Rukhmabai v. Laxminarayan*.⁴ One could go further and refine the statement : in fact a renunciation of his share at a particular partition does not automatically or necessarily preclude the renouncing member's remaining joint, so that he can participate later (see *Krishnan v. C. Kesavan*⁵); but such considerations did not arise in this case. As a result it was concluded that *S* separated himself from his family, leaving *F* and *SS1* as coparceners, so that when *SS1* died (*SS2* not yet being in the womb), *F* became sole coparcener.

The question now remained, whether *SS2* and *SS3* obtained any interest in *F*'s property by birth. Let us first look into the sastric position. Their Lordships did so after the usual fashion, i.e. after first consulting Anglo-Hindu cases, in-

³ [1936] A.I.R. P.C. 264, s.c. [1937] Mad. S.C.R. 253.

¹, p.c.

⁴ [1960] A.I.R. S.C. 335, s.c. [1960] 2 S.C.R. 523.

⁵ [1959] A.I.R. Ker. 336. Derrett, *Introduction to Modern Hindu Law*, §537.

cluding *obiter dicta* in cases not closely resembling this one, and then turned to sastric texts on partition selected from a point of view already established by the trend of the (inconclusive) case-law. They also paid attention to the point of view of the editor of Mayne's eleventh edition, p. 522, a point of view not based on an unprejudiced re-examination of the sastric material, as we shall see.

The fundamental question is not so much what S did, as what SS2 and SS3 gained by their birth. The Mitakshara doctrine, as everyone knows, is that by birth alone a grandson acquires proprietary right of an "unobstructed" character in his grandfather's property, whether the grandfather be alive or dead⁶. They obtain their rights *through* their fathers, but "through" means only for purposes of calculation, and not on condition that their fathers should be alive at the date of their birth, provided, that is to say, (i) their fathers did not separate taking a share or renouncing their share, and (ii) if such a separation did not take place the father was not disqualified by a disqualification such as automatically disqualified his immediate issue.⁷ At pure sastric law a father can separate taking his son with him, and this writer suspects (though he is not certain) that this power extended to the major son as well as the minor son (the latter only can be separated at Anglo-Hindu law). At pure sastric law, again, a father could renounce his share, taking a trifle for evidential purposes, and thereby terminate all his sons' interests in the ancestral property, subject to a definite condition, namely, that the father anticipates no need, on the part of his branch, of his branch's share of the ancestral assets.

Yajnavalkya II. 116 (Colebrooke numbered it 117) :

"The separation of one, who is able to support himself and is not desirous of participation, may be completed by giving him some trifle."

Mitakshara on this⁸ :

"To one who is himself able to earn wealth, and who is not desirous of sharing his father's goods, any thing whatsoever, though not valuable, may be given, and the separation or division may be thus completed by the father; so that the children, or other heirs, of that son, may have no future claim of inheritance."

To confirm that this does indeed represent the sastric law we need do nothing more elaborate than look up Yajn. II. 116 in the *Dharma-kosha* of L.S. Joshi published at Wai, to which this writer has already referred often in the pages of this journal. There at *Vyavahara-kanda*, vol. 1, pt. 2, p. 1169, we have besides the commentary of Vijnanesvara those of Visvarupa and Apararka. The first says that the renouncer must be able to support his family and attend to all religious duties without the aid of the father's assets. The basis of the rule is the fundamental power of the father to make (at that time) unequal distribution (as Yajn. II. 116 goes on to say in fact), so that if the renouncer accepts knowingly and subject to the conditions stated a share very much less than he was entitled to, he cannot subsequently come back and demand a full share, or demand enough to make up the trifle he has taken into a full share. The comment of Apararka is extraordinarily interesting for our purposes, as it incidentally applies to exactly such cases as our present case and that in *Abhiram Sabal v. Shyamsundar*⁹. Apararka says that these gifts of trifles for the purpose of separating sons may be made by their fathers either when the sons do not want to participate because they are able to acquire wealth for themselves, or when "though able to earn wealth they make no effort tending towards acquisition and preservation of assets by reason of natural depravity." Thus the father has power to force on his son a separation in the nature of what we should call renunciation, giving him a token, as a punishment for his non-cooperative outlook and a neutralisation of the latter so far as the family's interests are concerned. Apararka confines this discretion on the part of the father to joint acquisitions by father and sons : in ancestral property however the erring son is entitled to his full share, should he insist upon it.

The result is that at pure sastric law grandsons could be excluded from their interests in ancestral and joint-family property if their fathers had renounced by

⁶ Vijnanesvara, *Mitakshara*, Colebrooke's trans., I, i., 3; v. 2.

⁷ The son of the *putra* : *ibid.*, II, x, 1.2.10.

⁸ *ibid.*, I, ii, 12.

⁹ [1964] A.I.R. Or. 59.

separating themselves and taking, for evidential purposes, a token share, a 'trifle'. Let us suppose, in the pre-British period, a father consisting of *F*, his son *S*, and *S*'s son, *SSI*. *S* is a wastrel and is induced to leave the family, leaving *SSI* behind. *S* would normally be given one half of the property; but in the circumstances he takes a minute fraction, a trifle. What effect did this have on *SSI*? If *S* was capable of maintaining himself and his family naturally *SSI* would be excluded. It would be up to *F* to make gifts of affection to him as and when appropriate. But if the renunciation were the result of *S*'s misconduct, and a kind of punishment (as in our case), the debarring of his issue could not take place merely by *S*'s 'renunciation'. In other words, *SSI*'s one-quarter (one-half of the normal one-half), belonging to him by virtue of his birthright, would remain unaffected by the transaction with *S*. *S* would have the right to take it away with him, and he might waste it, if *SSI* could not prevent it or *F* did not take steps to keep *SSI*'s share with him. If *SSI* were a major he could insist upon a partition at the same time as his father's renunciation, and thus secure his share.

What if *SS2* were conceived to *S* and born after the renunciation? His birthright would not extend to any part of *F*'s property, because he would be conceived and born to one separated. His situation would be quite different from that of his brother *SSI*, who was born before separation and whose rights would in one way or another be protected.

Has the Anglo-Hindu law departed from this, and if so with what effects? Firstly, the Anglo-Hindu case-law did not admit that a father could renounce any interest except his own.¹⁰ The importance of this departure is fundamental. The renunciation can never be in favour of anyone individually and must operate, if at all, for the benefit of the entire coparcenary body. The 'trifle' is no longer necessary, because renunciation can be evidenced otherwise and perhaps more effectively. A member who renounces will not cut off the birthright of any of his sons. But it may be objected that sons conceived and born subsequently to his renunciation must be effected by the separation which that renunciation effects so far as he himself is concerned. They are born to a separated father, and must suffer the consequences, taking him and his property as they find it. This would seem to agree with the *sastric* position. Yet there is something unsatisfactory about such a situation. Let us compare it with the position of sons conceived and born after a partition in the ordinary way. *F* has two sons, *S1* and *S2*, and separates from them, giving each a one-third share. Afterwards another son *S3* is conceived. *S3* must rest content with *F*'s share and at partition would take one-sixth. This is clear on the texts and the law does not deviate from it.¹¹ The clue is simple. The father's rights were satisfied at the partition, and the subsequently conceived son cannot complain. The position is quite different if the father's rights were *not* satisfied, as if he were unjustly deprived of a share, or, as in the renunciation cases, the condition had *not* been observed, namely that he had sufficient assets for the maintenance of himself and his family. What *S* did in our instant case was to reserve for himself a right of maintenance. He did not take any share, and he did nothing to provide for his future issue. The statement that he renounced in favour of all members including those to be born subsequently was of no value, as the decision of the Andhra High Court shows. Only the law could protect *SS2* and *SS3*, and in this case it failed to do so.

We must now examine the valuable case of *Athilinga v. Ramaswami*¹² which jurists have sought to limit in its application with a curious and quite unwarranted unanimity. The case is an instance (contrary to what their Lordships of the Andhra High Court suggest) of judicial legislation, by drawing out of the former incompleted law what in essence it potentially contained for the solution of a new problem. It is evidence that during the British period the Hindu law was not stagnant, as is so often said; and it should therefore be cherished. The facts were these, that a Hindu had two wives, and one son by one of them and two by the other, all being at the relevant time minors. He partitioned the family property

¹⁰ *Anandrao v. Vasantao*, (1907) 9 Bom. L.R. 595, p.c. ceptionable.

¹² [1945] A.I.R. Mad. 28, s.c. [1945] Mad.

¹¹ Mayne, para. 419, seems unex- 297.

alloting one share to the senior wife and her son and two shares to the junior wife and her sons. He retained property for his own maintenance without power of alienation, and retained no share for himself otherwise. He provided that sons to be born subsequently should share in the shares already allotted, according to mothers. A son born to the senior wife one year afterwards claimed to reopen the partition, on the footing that the father had reserved no share for himself at the partition. It was held that the provision in the deed did not take away the right of the after-born son to share as if the partition had not taken place.

The reasoning by which the learned judges, Mockett and Krishnaawami Ayyangar, JJ., arrived at this decision was as follows: Mulla's *Hindu Law* (p. 381 of the relevant edition) had the following statement¹³:

"Where the father has not reserved a share for himself at a partition with his sons, a son who is born as well as begotten after the partition is entitled to have the partition reopened and to have a share allotted to him not only in the property as it stood at the time of the original partition, but in the accumulations made with the help of that property."

This was based on *Chengama Nayudu v. Munisami Nayudu*.¹⁴ The correctness of that case was not challenged, and the case of *Ganpat v. Gopalarao*¹⁵ was distinguishable on the point that the father there had actually retained a share, upon which the after-born son could rely. When we turn to *Chengama's* case, an old case with a very short judgment, we find an extraordinary discrepancy. From the judgment of the Subordinate Judge we find that the plaintiff was a son born, but not also conceived, after the partition. The attention of all the Courts was directed to the question whether, *assuming* he was entitled to a share, he was entitled to share in acquisitions made out of the shares of his brothers, and it was held that he was. But that decision could not have been arrived at unless it had been clear that the plaintiff was entitled to reopen the partition in the first place. This was impossible unless he was conceived before the partition and born afterwards, and there is nothing in the evidence reported in the report of the case to show that he was conceived after the partition. All we are told is that the property was partitioned before he was born. The reliance of the Sub-Judge on Yajnavalkya's text relative to the rights of a posthumous son shows that this son's rights arose out of his having been in existence (unknown) in the womb at the time of the partition. The High Court's references to sastra likewise apply only to such cases. The head-note, however, speaks of the father not having reserved a share for himself, and Mulla (for reason to be guessed later) was deceived into thinking that this was the principle in issue. Mulla's text therefore was not entirely supported by the case which he cited. Therefore when, in *Chengama's* case, their Lordships decided that the after-born son could reopen the partition, though he was conceived as well as born after the arrangement made by his father, they were deciding something new. If they had not been so doing the suspicion with which the case was subsequently treated would be difficult to explain.

Yet *Athilinga's* case¹⁶ makes perfect sense, as we have seen. The decision gave the after-born son one-fourth, whereas had the father's provision been given effect to he would have been entitled only to one-sixth. The learned Judges supposed they were doing nothing new and were merely following *Chengama* as relied upon by Mulla (*ubi cit.*) and Mayne (11th edn., p. 521, para 420). Both Mulla and Mayne incautiously followed the head-note in *Chengama* without realising that the case did not concern itself with the rights of one conceived as well as born after partition, and oblivious of the fact that the case was really concerned with the rights of a son born after partition (but conceived prior to it) to participate in acquisitions made by the separated co-parceners out of the corpus of their respective shares. In reality *Athilinga's* case is good law, for this reason: the father not having taken a share for himself, the partition he made between his sons did not satisfy his own rights in the family property. A son subsequently conceived and born to him would therefore have a birthright in ancestral property in respect of which his

¹³ This is para. 310 (2), p. 482 of the 12th edition (1960).

¹⁴ (1899) 20 Mad. 75.

¹⁵ (1899) 23 Bom. 636.

¹⁶ [1945] A.I.R. Mad. 28, s.c. [1945] Mad. 297.

father's rights had not been satisfied. This is the justification for the rule, and it can be applied in many other cases than those where the partition is between father and son. Since the texts and the previous case-law do not in so many words provide anything of the kind this was judicial legislation, but of a most agreeable and satisfactory kind. The Madras Judges thought they were doing nothing new, and indeed accused (p. 304) the Sub-Judge of innovation, but in fact what they decided was a great step forward. That it was consistent with modern ideas is proved by the misconceived notions about *Chengama's* case entertained in happy ignorance by both Mulla and Mayne. And I hope I have shown that it was not inconsistent with sastric notions. Where the renunciation is made in circumstances where the family cannot be maintained by the renouncer (i.e. where subsequently born issue cannot be as well off with *his* property as they would be had he remained joint), the renunciation cannot foreclose their birthright.

Now we may proceed to see how the matter was tackled in the Andhra Pradesh High Court. So far we have seen that they understood that the renunciation made by *S* did not have the effect (as Madras had supposed) of separating *SS1* from *F*, so that all the property went eventually to *F* by survivorship. Then they proceeded to say that *SS2* and *SS3* might well be coparceners with their father, but could not be coparceners with *F*. The nexus, namely the status of the father, was missing. Their Lordships failed to notice that at sastric law this would be true only if *S* had property sufficient for all his duties. In fact he had nothing but a bare and personal right of maintenance. Their Lordships distinguish the privileged position of the posthumous son from that of an after-begotten son, rightly. They then turn to *Shivajirao v. Vasantrao*.¹⁷ There a son relinquished his rights in favour of his father, having a son of his own living at the time. The facts were not altogether dissimilar from those in our own case. That son, the grandson, sued for partition and obtained a one-half share. Another son was born to the renouncer, who sued for participation in his brother's one-half. Knight, J., held he was not entitled, since his father had separated himself by his renunciation, so that an after-born son could not claim a birth-right in the ancestral property. It is important to notice that the father had loaded the family with debt, and his renunciation was purchased with sums intended to release him from debt and other considerations. His issue would thus have virtually no property unless they could prove a birthright in the property of their grandfather. The learned Judge in fact correctly points to the principle in *Chengama's* case¹⁸ as belonging to the field of rights of sons *en ventre sa mere* at the date of the respective partitions. He refuses to extend the principle to partitions other than between sons and father: his reason is based upon the supposition that *Chengama* put into effect the text of Vishnu quoted in 2 Colebrooke's Digest, 268.¹⁹ That text refers, as do all such texts, to the rights of sons conceived before partition but born after it. The textbook-writers take up Knight, J., here, and use the dictum as a restriction on *Athilinga* itself. This is evident from Mayne (*ubi cit.*).

We reach the position, then, where, without realising that they had done so the Madras High Court in *Athilinga* put the spirit of the sastric law into effect, while in *Shivajirao v. Vasantrao* the Bombay High Court had refused to allow a son, born in similar circumstances to *SS2* and *SS3* in our Andhra case, to participate in his brother's share. In our Andhra case *SS2* and *SS3* seek to participate in their grandfather's property, but the principle is the same. In agreeing

¹⁷ (1908) 33 Bom. 267, s.c. 10 Bom. L.R. 778.

¹⁸ (1896) 20 Mad. 75.

¹⁹ Cited from the edition of 1865. In the original edition, this was vol. 3, p. 51. The text of Vishnu runs, "Sons, with whom the father has made a partition, shall give a share to another son who is born after it." Jagannatha's commentary is most interesting. It concludes that where a son is born after a partition of such a kind that it ought not to be made while the mother is capable of having children (i.e. the father renounces his pro-

perty—as in our *wastrel* cases—while his wife is still of child-bearing age), the son born after that renunciation is certainly entitled to reopen the partition which had taken place between his elder brothers, on the footing that separation of property during the mother's capacity to bear more sons, the father retaining no share for himself, was unlawful and not binding on subsequently-born issue. Such an important opinion on the part of a leading Hindu jurist can hardly be overlooked with satisfaction on the part of modern exponent of "Hindu" law.

with *Shivaji's* case the Andhra Pradesh High Court hold that once the renouncing member is separate, even if he takes no share of the ancestral property he debars his issue from participation unless they were alive in fact or in law at the time of the renunciation.

Their Lordships pass on, in the peculiar way so common in India, to discuss what would be the position if the renunciation by *S* had effected a severance between *F* and *SS1*. Since they had decided in the clearest terms that it had no such effect the part of the judgment proceeding on the assumption that it *did* is otiose and not a little confusing to the reader. This is a very usual proceeding in India, and one searches in vain for an explanation. Perhaps Judges do not want to be unfair to advocates who have spent time and trouble on alternative arguments, or perhaps they have an eye to what the Supreme Court may do. However, we shall follow their Lordships in their apparently academic discussion of what the law would have been if the facts had not been what they had just decided they were. They discuss the case of *Krishna v. Sami*,²⁰ which was not a case of renunciation at all, but was concerned with the rights of the sons of a deaf and dumb coparcener, who was at that period disqualified from taking a share. The decision was that their birthright was unaffected by their father's disqualification. The reason for the citation of the case is an incautious, and speculative dictum by Turner, C. J., at p. 77. After detailing the various contexts in which the term "son born after partition" is used, the Chief Justice says of one begotten and born after partition... "he takes the shares (*sic*) of his parents and acquisitions made after partition, or, if his father has reserved no share, he may call upon his brothers to make up a share to him." This was incautious, as well as *obiter*, because the learned Chief Justice had already expressed (at p. 72 foot) doubts as to the extent to which in practice it would be wise to apply the authority (the isolated authority) which he had found to such an effect. It was speculative in that the sole authority had never been tested in experience, and no case had adopted this rule until then. There was no knowing in 1884/5 what might flow from such a proposition, and the general notion which his Lordship expressed at p. 70 ("The case in which a son born after partition would receive nothing is not contemplated by any of the authors of the texts and commentaries to which we have had access except Varadaraja in the *Vyavahara Nirnaya* in a passage to which reference will presently be made") was what, after all, guided the full bench in its decision in favour of the sons of the disqualified man. This case no doubt predisposed the author of the headnote in *Chengama Nayudu v. Munisami Nayudu*²¹ (which we saw was unjustified by anything in the report) to draft it in the way he did.

The Andhra High Court surveyed *Krishna v. Sami* and the other Madras cases with the object of showing that although when a partition *had* taken place the after-born son could, if his father had taken nothing for himself, reopen the partition, even when he was conceived as well as born after partition (which the sastric texts had not in so many words contemplated), nevertheless that right was not a feature of the law of the joint Hindu family generally, but derived from the sastric limitation on the powers of a father to partition the property "so long as the mother has not passed the stage of childbearing" (p. 183, col. 2). This notion is no doubt sound in itself. But merely because in *Shivajirao v. Vasantirao*²² and subsequently in a Bengal case²³ the Madras cases had not been followed, on the alleged ground that they were all of partitions between father and his sons, it does not follow that the Madras rules have no application to other cases. At Anglo-Hindu law there might be room for such an argument: *Athilinga*, even in view of *Chengama*, and of a dictum in *Krishna* precariously based on Varadaraja (see below), was an innovation, though the Judges did not realise it; therefore it must be restricted to its own facts. But in reality the case of *Athilinga* did express a genuine sastric principle, as we have seen. Thus it is submitted that the Andhra Pradesh High Court were wrong in refusing to recognise in *SS2* and *SS3* any rights in *F's* property, and to allow them to partition it and so divest the alienees of the rele-

20 (1884-5) 9 Mad. 64, F.B.

21 (1896) 20 Mad. 75.

22 (1908) 33 Bom. 267, s.c. 10 Bom. L.R.

778.

23 *Kusum Kumari v. Dasarathi*, [1931] A.I.R. Cal. 487, s.c. 34 Cal. L.J. 323.

vant fractions. The Andhra Pradesh High Court of course knew that the whole affair was a device to defeat creditors : but that had not in the past stood in the way of the development of the Hindu law.

Their Lordships considered the sastric texts relating to the rights of sons born after partition, but from the angle of the Judges in *Krishna v. Sami*. They believed that a text such as Vishnu's, "Sons with whom the father had made a partition should give a share to the son born after partition", applied to sons conceived as well as born after partition : but there is not the slightest reason for supposing this. The sastra did not contemplate shares for sons conceived after partition, who must rely exclusively on their father's share^{23a}. To this it might be replied, "What happens when the father takes no share, as in *Athilinga*?" The texts are quiet on the subject, but we have seen that in principle when the father takes nothing and is not able to maintain his family as well as he could had he remained joint the renunciation does *not* have the effect of foreclosing the birthright which would otherwise operate in respect of the ancestral property. And for this reason the rule in *Athilinga*, though from an Anglo-Hindu point of view technically novel, was in touch with the sastra, and should be applied in all other cases, including ours, where the father did not have his rights satisfied at the renunciation, and where the branch which he represents is virtually reduced to poverty relative to the parent family.

It might be argued, as it was in *Krishna v. Sami*,²⁴ that Varadaraja says something to confirm the right of the son conceived as well as born after partition when the father took no share. Turner, C. J., gives his text as follows :—"Yajnavalkya says that for one born after partition a provision is to be made from the divided brothers' own shares if there be no property of the father." This seems a fair translation of the text which will now be found at p. 423 of K. V. Rangaswami Aiyangar's edition (Adyar, 1942) and probably agrees with Burnell's version of 1872. But though this interpretation of Yajnavalkya and Vishnu, whom Varadaraja cites, is a possible one it conflicts with the Mitakshara interpretation and is based upon the view that where the father's property is lost or wasted and so the son is left destitute he ought to be entitled to divest his divided brothers of a proportion to save himself from destitution. This goes far beyond what we have been contending, and is not supported by the sastric principle we have recovered from a general consideration of the accepted authorities. Varadaraja seems to stand alone in this humanitarian, but apparently eccentric view. The fact that it is not repeated in his successors, the *Sarasvati-vilasa* or the *Smriti-chandrika*, tells heavily against its authenticity, certainly for later times.

CONCLUSION

The full bench answer in *Anjaneyulu v. Ramayya*²⁵ differs from the full bench answer in *Ramayya v. Venkanraju*²⁶ in taking a deed of renunciation of all right, title and interest in joint family property to be, not evidence of severance from the family such as would sever a son from his renouncing father, but evidence merely that the father severed himself from the family, leaving the son joint with the grandfather. The result was that, although the son's liability under the pious obligation was unaffected by the change in construction of the deed, the death of that son would leave the grandfather by survivorship full owner of the family property. The Andhra full bench has now decided that sons of the renouncing father conceived as well as born posterior to the renunciation are disentitled to claim a birthright in the grandfather's property. They refused to apply the principle enshrined in *Athilinga v. Ramaswami*²⁷ not because it was bad law, but because, under *obiter dicta* in *Shivajirao v. Vasantrao*²⁸ and *Kusum Kumari v. Dasarathi*²⁹, that principle applied only when a father had separated sons from himself

23a The leading text is not that of Vishnu which is ambiguous, but that of Brihaspati cited and relied upon by the Mitakshara at I, vi, 4-5.

24 (1884-5) 9 Mad. 64, F.B.

25 [1965] A.I.R. An. P. 177, F.B.

26 [1954] A.I.R. Mad. 864, s.c. [1954] 2

M.L.J. 176, F.B.

27 [1945] A.I.R. Mad. 28, s.c. [1945] Mad. 297.

28 (1908) 33 Bom. 267, s.c. 10, Bom. L.R. 778.

29 [1921] A.I.R. Cal. 487, s.c. 34 Cal. L.J. 323.

retaining no share for himself, a position quite plainly not arising in the case before them. The distinction, it is submitted, is thin and misconceived. In reality wherever a father renounces and sons are subsequently born to him the latter should be able to obtain the portion of the joint family property to which their birthright entitles them, notwithstanding their father's separation by virtue of his renunciation, provided that he renounced in circumstances which do not secure their welfare. The cases under consideration are cases of wastrel or insolvent fathers who are neutralised in their own and the family interest, partly or mainly to frustrate claims by existing or future creditors. In such cases the interests of the sons should not be denied by pointing mechanically to the partition in which their father took nothing. Nor should they be denied because the family assets are in the hands of an ascendant or a single collateral or his heir. The principle which lies in reality behind *Athilinga* is, or should be, available in all parallel cases. It is true that once the sons are allowed their birth right, irrespective of the renunciation by their father, creditors may obtain access to their shares under the pious obligation; whereas if the property had remained with the ascendant, it would have come to them unimpaired, one hopes, by inheritance. But this is not an adequate reason for denying an Anglo-Hindu legal right which emerged, no doubt indirectly, from a misunderstanding of the authorities. The whole position requires reconsideration, and that upon the footing that the sastric texts and their true meaning ought to be available in straightening the tortuous and difficult Anglo-Hindu law.³⁰

GLEANINGS.

OFFERS TO RENEW COHABITATION

AN offer or request by a wife to her husband, or *vice versa*, to resume cohabitation may be made after separation by consent or by a spouse who is in desertion. In either case it is of no effect unless genuine, but if it is genuine and there is no sufficient cause for the recipient spouse to remain separated, then failure to comply with it can have the result of bringing a state of desertion to an end or of putting the recipient of the offer in a state of desertion. The genuineness of the offer is thus all important. How is it to be tested? The best test, the courts have said, is by accepting it. Indeed, if the offeree does not test the offer by accepting it, that is itself some evidence that he thinks it genuine. So, if the recipient spouse is to be advised that the offer can be rejected, there should be independent evidence showing that it was not genuine—a mere assertion that the offer is not genuine will not be enough. Such evidence is likely to rest on the offeror's behaviour. A wife may, for example, be claiming maintenance based on an allegation of persistent cruelty; such a ground of claim is not easily reconciled with a genuine offer on her part to resume cohabitation permanently. Then the offer may be by letter—it may be a solicitor's letter, it may be a careful registered letter in her own handwriting of which she keeps a copy, or it may be a spontaneous, natural letter. The fact that the letter is written by a solicitor does not prevent its being accepted as conveying a genuine request to resume cohabitation. The fact that the spouse writes a careful letter and keeps a copy may tend to cast the shadow of doubt on the real genuineness of the offer. There are, of course, many facets to this sort of problem. On most of them guidance will now be found in the report of *Dunn v. Dunn* ([1965] 1 All E.R. 1043) and the decisions noted there at pp. 1050 *et seq.*—*L.J.*

³⁰ The present writer suggests that to study Jagannatha, and the other commentaries on the Yajñavalkya-smṛiti besides the *Mitākshara* cannot exceed the scope of present-day Courts when determining the meaning and effect of old Anglo-Hindu case-law. The Supreme Court's boldness in using the *Mada-*

naratnapradīpa (an untranslated text) via the *Vyavahara-mayukha* in *Guramma Channasappa v. Mallappa*, (1963) 86 Bom. L.R. 284, S.C., s.c. [1964] A.I.R. S.C. 510 is an example to everybody (see the matter noted at (1964) 66 Bom. L. R., Journ., p. 129).

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REPORTS.

APPELLATE CIVIL

Before Mr. Justice Tambe and Mr. Justice Naik.

B. K. JOBANPUTRA v. B. S. KALELKAR.*

Payment of Wages Act (IV of 1936), Sec. 2(vi)—Industrial Disputes Act (XIV of 1947), Secs. 2(p), 12, 18—Indian Contract Act (IX of 1872), Sec. 10—Gratuity payable under settlement arrived at in course of conciliation proceedings—Whether such gratuity “wages” within s. 2(vi) of Payment of Wages Act.

Gratuity payable under a settlement arrived at during the course of conciliation proceedings is not “wages” within the meaning of that word in s. 2(vi) of the Payment of Wages Act, 1936.

Per Naik J. Section 12(4) of the Industrial Disputes Act, 1947, covers a situation where no settlement has been reached as also a situation where a settlement has been reached between the parties, but that settlement is not regarded by the conciliation officer as a fair or just or reasonable settlement.

Bombay Chronicle v. V. B. Potdar¹ and Bata Shoe Co. (P) Ltd. v. Ganguly, referred to.

THE facts appear in the judgment.

D. S. Parikh, for the petitioners.

N. V. Phadke, with *D. O. Sanghavi,* for opponents Nos. 2 and 3.

TAMBE J. This is an application under art. 227 of the Constitution of India, by 29 workmen who were in the employment of respondent No. 3, the New Asiatic Company Limited. They seek to get quashed the order of the Second Additional Authority under the Payment of Wages Act, 1936, Bombay, of April 27, 1962.

The question that arises is whether the gratuity payable under the settlement arrived at during the course of the conciliation proceedings is “wages” within the meaning of that word in the Payment of Wages Act, 1936. These 29 workmen have been retrenched from service by respondent No. 3, the first 27 on July 1, 1960, and Nos. 28 and 29 on November 1, 1960. These 29 workmen, after they had been retrenched, filed applications under the Payment of Wages Act, for recovery of certain sums falling under three categories—wages for over-time work and for leave period, bonus and the amounts of gratuity claimed by them under the settlement reached during the course of conciliation proceedings. Now, the petitioners who had claimed payment of gratuity are only petitioners Nos. 2 to 8, 10, 16, 18, 28 and 29. The respondent company raised various objections, *inter alia*, contending that the gratuity was not ‘wages’ within the meaning of that word in the Payment of Wages Act. The issue arising out of this contention was considered as a preliminary issue by the Authority appointed under the Payment of Wages Act, and has been decided against the workmen; hence this application.

In order to appreciate the rival contentions raised by counsel for parties, it would be convenient to reproduce the material part of the definition of

*Decided, August 28, 1964. Special Civil
Application No. 1283 of 1962.

1 (1961) 63 Bom. L.R. 812.

2 [1961] 3 S.C.R. 308.

“wages”. The definition is contained in cl. (vi) of s. 2 of the Payment of Wages Act, and the material part reads:

“(vi) ‘wages’ means all remuneration (whether by way of salary, allowances or otherwise) expressed in terms of money or capable of being so expressed which would if the terms of employment, express or implied, were fulfilled, be payable to a person employed in respect of his employment or of work done in such employment, and includes—

(a) ...

(b) ...

(c) ...

(d) any sum which by reason of the termination of employment of the person employed is payable under any law, contract or instrument which provides for the payment of such sum, whether with or without deductions, but does not provide for the time within which the payment is to be made”.

Therefore, for a sum to be “wages” under cl. (d), the conditions that are required to be fulfilled are: (1) it must be a sum payable by way of termination of employment; and (2) it must be a sum payable under any law, contract or instrument which provides for the payment of such sum, but does not provide for the time within which the payment is to be made. Both these conditions must be cumulatively satisfied. It is not in dispute that the amount of gratuity claimed by the petitioners is payable to them by reason of the termination of their employment. Clause of Demand No. 8 of the Settlement of date June 16, 1951, makes the position clear. The question next to be considered is whether it is a sum payable under any law, contract or instrument. It is clear that the claim being that it is payable under the settlement, it cannot be said to be a sum payable in law. The only question that has to be considered is whether it is a sum payable under a contract or instrument. In other words, the question that arises for consideration is whether the settlement arrived at in the course of the conciliation proceedings is a contract or instrument. It is the contention of Mr. Parikh, appearing for the petitioners, that having regard to the provisions of the Industrial Disputes Act (XIV of 1947), the settlement is a contract between the employer on the one hand and all the workmen on the other, irrespective of the fact whether they were in service on the date of settlement or not. In the alternative, it is his contention that, at any rate, the settlement is a contract between the employer on the one hand and the workmen who actually were parties to the industrial dispute in relation to which the settlement was reached before the Conciliation Officer. Mr. Phadke, appearing for respondents Nos. 2 and 3, the employer company and its manager of the Western Division, contends that the settlement arrived at in the course of the conciliation proceedings is not a contract either between the employer on the one hand and all the employees on the other, or the employer on one hand and the employees who were parties to the industrial dispute on the other.

To appreciate the arguments advanced by counsel for the parties, it would be necessary to refer to the relevant provisions in the Industrial Disputes Act (hereinafter called the Act). A ‘settlement’ is defined in cl. (p) of s. 2 of the Act. It provides:

“‘Settlement’ means a settlement arrived at in the course of conciliation proceedings and includes a written agreement between the employer and workman arrived at otherwise than in the course of conciliation proceeding where such agreement has been signed by the parties thereto in such manner as may be prescribed and a copy thereof has been sent to the appropriate Government and the conciliation officer.”

Section 4 empowers the appropriate Government to appoint by notification such number of persons, as it thinks fit, to be conciliation officers. These conciliation officers are, under sub-s. (1) of s. 4, “charged with the duty of mediating in and promoting the settlement of industrial disputes.” Chapter IV of the Act relates to the procedure, powers and duties of authorities

appointed under the Act, and it consists of ss. 11 to 21. Sub-section (2) of s. 11 empowers a conciliation officer to enter the premises occupied by any establishment to which the dispute relates for the purpose of an inquiry into any existing or apprehended industrial dispute, of course after giving a reasonable notice to the party concerned. Sub-section (4) of s. 11 empowers a conciliation officer to call for and inspect any document which he has ground for considering to be relevant to the industrial dispute or to be necessary for the purpose of verifying the implementation of any award or carrying out any other duty imposed on him under the Act, and for the aforesaid purposes the conciliation officer has the same powers as are vested in a civil Court under the Code of Civil Procedure. Section 12 enumerates the duties of the conciliation officer, and it is *inter alia*, in the following terms:

"12. (1) Where any industrial dispute exists or is apprehended, the conciliation officer may, or where the dispute relates to a public utility service, and a notice under section 22 has been given, shall, hold conciliation proceedings in the prescribed manner.

(2) The conciliation officer shall, for the purpose of bringing about a settlement of the dispute without delay, investigate the dispute and all matters affecting the merits and the right settlement thereof and may do all such things as he thinks fit for the purpose of inducing the parties to come to a fair and amicable settlement of the dispute.

(3) If a settlement of the dispute or of any of the matters in dispute is arrived at in the course of the conciliation proceedings the conciliation officer shall send a report thereof to the appropriate Government together with a memorandum of the settlement signed by the parties to the dispute.

(4) If no such settlement is arrived at, the conciliation officer shall, as soon as practicable after the close of the investigation, send to the appropriate Government a full report setting forth the steps taken by him for ascertaining the facts and circumstances relating to the dispute and for bringing about a settlement thereof, together with a full statement of such facts and circumstances, and the reasons on account of which, in his opinion, a settlement could not be arrived at".

Sub-section (5) provides that after the consideration of the report under sub-s. (4), the appropriate Government may make a reference to the Industrial Tribunal, if it considers necessary. Sub-section (6) provides the time limit within which the report is to be made by the conciliation officer after the commencement of the conciliation proceedings. The prescribed rule shows that the procedure which is to be followed by the conciliation officer when he apprehends an industrial dispute is, first to issue notices both to the employer and the representative of the workmen. The representative of the workmen is expected to file the statement of demands of the workmen which gave rise to the dispute, and the employer is expected to file the say of the industry. Thereafter, the conciliation officer holds sittings either calling the employer and the employees together, or sees them separately, and endeavours his best to see if a reasonable and amicable settlement is possible. If he finds that a settlement, which he considers to be the right settlement, is arrived at, then he makes a report accordingly. This is the procedure in short. Considering these sections together, it is clear that the settlement is of two kinds: (1) settlement which is arrived at in the course of the conciliation proceedings, and (2) an agreement between the employer and the workmen relating to the dispute between them otherwise than in the course of the conciliation proceedings. For the latter to become a settlement, however, the copies of the agreement signed by the parties have to be in the prescribed manner sent to the appropriate Government and the conciliation officer. It would be seen that the settlements which are arrived at in the course of conciliation proceedings are those which are arrived at with the mediation of the conciliation officer and which are in the opinion of the conciliator the right settlement. The statute casts a duty on the conciliation officer to take steps immediately he apprehends an industrial dispute. It requires the conciliation officer to move of his own accord to get the employer and the representatives of the workmen together.

In this, he has to act without delay. He is expected to investigate into the dispute. For this purpose, he is empowered to inspect any document which he deems it necessary to inspect. It is his duty to see that the settlement, which in his opinion is the right settlement, is amicably arrived at between the parties. After such a settlement, which meets his approval, is arrived at, he makes a report to the Government accordingly and also forwards a memorandum duly signed by the parties, i.e., the representative of the workmen and the representative of the employer, along with the report. It may be stated that the prescribed Form 'H' shows that the conciliation officer also has to sign evidencing that the settlement has been reached in the course of the conciliation proceedings. Section 18 relates to persons on whom the settlements and awards are binding. It is in the following terms:

"18. (1) A settlement arrived at by agreement between the employer and workman otherwise than in the course of conciliation proceeding shall be binding on the parties to the agreement.

(2) An arbitration award which has become enforceable shall be binding on the parties to the agreement who referred the dispute to arbitration.

(3) A settlement arrived at in the course of conciliation proceedings under this Act or an award of a Labour Court, Tribunal or National Tribunal which has become enforceable shall be binding on—

(a) all parties to the industrial dispute;

(b) all other parties summoned to appear in the proceedings as parties to the dispute, unless the Board, Labour Court, Tribunal or National Tribunal, as the case may be, records the opinion that they were so summoned without proper cause;

(c) where a party referred to in clause (a) or clause (b) is an employer, his heirs, successors or assigns in respect of the establishment to which the dispute relates;

(d) where a party referred to in clause (a) or clause (b) is composed of workmen, all persons who were employed in the establishment or part of the establishment, as the case may be, to which the dispute relates on the date of the dispute and all persons who subsequently become employed in that establishment or part".

It would be noticed that the section divides the settlements and awards into two categories. The first category consists of settlements and awards which are arrived at otherwise than in the course of any proceedings before an authority appointed under the Act. They are contained in cls. (1) and (2). The other category consists of settlements and awards which are arrived at in proceedings before the authorities appointed under the Act, namely, the conciliation officer in the case of settlements, and the Labour Court, Tribunal or National Tribunal in the case of awards. The binding nature of settlements and awards falling under the two categories is also different. A settlement under the first category is binding only on persons who are parties to the agreement. The employer, of course, is a common party in both types of settlements and awards; but the workmen who get bound by settlements and awards falling under the first category are only those workmen who were parties to the agreement in the case of a settlement, or who were parties to the reference made to a private arbitrator. The case, however, is different in respect of settlements and awards falling under the second category. The combined effect of cls. (a) to (d) of sub-s. (3) of s. 18 would be that settlements and awards, which are arrived at during the course of proceedings before the authorities appointed under the Act, are binding not only on the workmen who were parties to the industrial dispute, i.e., who had appeared before the conciliation officer or before the Industrial Tribunals or Courts, but also all persons who were workmen in the establishment or part of the establishment to which the dispute relates, and all the workmen who were in the establishment on the date of the dispute as well as all the workmen who are subsequently employed in the establishment or part of the establishment to which the dispute relates. Similarly, a settlement or award binds not only the employer who was actually a party to the industrial dispute, but also his heirs,

successors or assigns in respect of that particular establishment. It would thus be seen that the binding nature of a settlement or an award arrived at before an authority appointed under the Act is much wider than the settlement otherwise arrived at or the award otherwise made. These are all the relevant provisions which it is necessary for us to consider.

Now, Mr. Parikh, in the first instance, argues that reading sub-s. (3) of s. 18, as a whole, the position in law that emerges is that workmen, who were in employment, but who were not parties to the industrial dispute as well as workmen who are subsequently employed in the establishment, become parties to the settlement itself. Those of the workmen on whom a settlement arrived at in the course of the conciliation proceedings is made binding are, by fiction of law, made parties to the settlement. A settlement arrived at in the course of conciliation proceedings thus is a contract between the employer on the one hand and all the workmen on whom the settlement is binding. It is not possible for me to accept this contention of Mr. Parikh on the language of sub-s. (3) inclusive of its clauses, of s. 18. Sub-section (3) of s. 18 provides the extent of the binding nature of a settlement arrived at in conciliation proceedings and an award made by the authorities under the Act, and cls. (a) to (d) of sub-s. (3) enumerate the persons on whom such a settlement or award is binding. The sub-section itself distinguishes between persons who were parties to the dispute on whom the agreement is binding, and the persons, though not parties to the dispute, who are bound by the settlement or award. It is thus clear that cl. (d) does not enact a fiction relating to the parties to the dispute, but it enacts the categories of persons on whom a settlement or award would act. The first contention of Mr. Parikh, therefore, should fail.

It is next argued by Mr. Parikh that it may be that the settlement arrived at during the conciliation proceedings binds not only parties to the dispute but persons who were not parties to the dispute and enumerated in cl. (d), but nonetheless a settlement is an agreement. It is an agreement freely reached between the employer on the one hand and the representatives of the workmen who were parties to the dispute. The conciliation officer acts only in an advisory capacity. His role is that of ironing out the differences between the employer and the workmen and to endeavour that they amicably arrive at a right agreement, which in his opinion, is a fair and reasonable agreement. The settlement thus arrived at is, therefore, nothing but a contract between the employer on the one hand and the workmen who are parties to the dispute on the other. At any rate, therefore, the settlement is a contract between the workmen who were actually parties to the dispute and the employer, and it has been pointed out by Mr. Parikh that the petitioners before us, who claim gratuity, were the members of the Union that had agreed to the settlement on the date the dispute arose. It is true that a mere fact that the settlement is reached with the mediation of the conciliation officer by itself may not have the effect of altering the character of the settlement if it was, in fact, a contract. It is also true that a settlement is reached as a result of the mediation and at the persuasion of the conciliation officer. Nonetheless, the agreement reached is reached by the parties to the dispute with a free consent. The conciliation officer has no power to effect a settlement if the parties do not agree, and, therefore, mediation or intervention of the conciliation officer by itself may not have the effect of altering the original character of the settlement. Still the question remains whether, having regard to all the provisions of the Act, a settlement reached during the course of the conciliation proceedings, is a contract. Section 10 of the Indian Contract Act defines a "contract", and it reads:

"All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object and are not hereby expressly declared to be void".

It would thus be seen that all agreements are not contracts. Only the agreements described in s. 10 of the Contract Act are contracts; and the essential feature of a contract is that it is an agreement between the parties. In other words, it is binding on persons who have arrived at or entered into the agreement. This is one of the essential features of a contract, apart from the other essential features, namely, that the parties must be competent to contract, their consent to the agreement must be of free will, consideration for the agreement must be lawful and the agreement itself must be for a lawful object. We have already shown that by reason of the provisions of sub-s. (3) of s. 18, the binding nature of the settlement is of much wider character. The settlement does not bind only the parties to the dispute which the conciliation officer has settled, but binds all the workmen in the establishment, present or future. Thus, though it is possible to say that the agreement initially arrived at between the parties to the dispute is a contract between those parties, it is difficult to say that the ultimate product, namely, the settlement in a conciliation proceeding is a contract between the parties to the dispute. On receiving the assent of the conciliator in token of which he signs the agreement, it ceases to be an agreement between the parties and becomes a settlement having a binding effect not only on the parties to the dispute but also other employees, namely, the employees who were at the date of the dispute in the service of the relevant establishment and also those who joined the establishment subsequently. Thus, the settlement in a conciliation proceeding ceases to be a contract between the parties to the dispute or parties to the initial agreement, and becomes a creature of the statute having a binding effect on all the aforesaid three categories of workmen. In this view of the matter, the authority under the Payment of Wages Act, in my opinion, was not in error in holding that the petitioners, who were claiming gratuity under the Payment of Wages Act, were not entitled to claim it. I find it difficult to accept the argument that a settlement in a conciliation proceeding after it has received the assent of the conciliator still retains the character of a contract as between the original parties to the dispute, though such may not be the case so far as the other persons, who are bound by the settlement, are concerned.

It is next to be considered whether a settlement is an instrument within the meaning of the definition of "wages". The expression "instrument" was considered by this Court in *Bombay Chronicle v. V. B. Potdar*.¹ The question that was considered by a Division Bench of this Court in that case was whether gratuity payable under the award is not 'wages' within the meaning of this term given in s. 2(vi) of the Payment of Wages Act. It was held that gratuity payable under the award is not 'wages'. The learned Chief Justice, who delivered the judgment of the Court, considered the true meaning of the expression "instrument" at page 814 of the report, observed:

"The next question to be considered is whether an award can be said to be an instrument. The word 'instrument' in its ordinary meaning means a document of a formal legal kind, which creates some right or liability. It is usually used in the sense of a document executed by or between the parties. An order of a Court cannot be said to be an instrument... An award is an adjudication by an Industrial Tribunal. In our opinion, therefore, it cannot be said to be an instrument. It may also be noted that the word 'instrument' follows the word 'contract', which means an agreement between the parties. It seems to us that the word 'instrument' is used in the same sense in sub-cl. (d), that is a document executed by the employer or between him and his employees". There is no good reason shown to take a different view. I have already shown that the settlement arrived at in the course of conciliation proceedings is not an agreement as between the parties on whom it is binding. In my opinion, therefore, a settlement is not an "instrument" within the meaning of the definition of "wages".

Another decision which was cited before us by Mr. Phadke is a decision of

their Lordships of the Supreme Court in *Bata Shoe Co. (P) Ltd. v. Ganguly*.² The decision has no direct bearing on the question which we have to consider here. There, the question that arose was whether a settlement arrived at between the employer and some workmen otherwise than in the course of conciliation proceedings is a settlement, debarring the State Government from making a reference to the Industrial Court; and their Lordships held that a settlement arrived at in the course of the conciliation proceedings would alone have the effect of putting an end to the industrial dispute, and not a settlement arrived at between a section of workmen in the employment of the employer, though the settlement was reached during the pendency of the conciliation proceedings. The difference between the two has been pointed out by their Lordships in this decision.

For the reasons stated above, in my opinion, the petition fails. I would, therefore, discharge the rule. The opponents have not pressed for costs, and therefore, I would make no order as to costs.

NAIK J. I am in agreement with the conclusion reached by my learned brother. I would, however, like to make a few observations on the question as to whether a gratuity that becomes payable under a settlement arrived at in the course of conciliation proceedings can be treated either as a contract or an instrument within the meaning of these words in cl. (d) of sub-s. (vi) of s. 2 of the Payment of Wages Act. Before proceeding to analyse the relevant provisions of the Industrial Disputes Act, it would not be out of place to consider the scheme of the definition of "wages" contained in sub-s. (vi) of s. 2 of the Payment of Wages Act. This definition was substituted for the old definition by the Payment of Wages (Amendment) Act, 1957. In the first part, wages are defined to mean all remuneration expressed in terms of money... if the terms of employment, express or implied, were fulfilled, be payable to a person employed in respect of his employment or of work done in such employment. This is the primary definition of the term "wages". Clauses (a) to (c) then describe the inclusive part of the definition of the term wages. Clause (a) says that "wages" includes any remuneration payable under any award or settlement, between parties or order of a Court. I need not refer to cls. (b) and (c) and (e). Clause (d) is the relevant clause, and the argument of Mr. Parikh was that a claim for gratuity under the settlement effected in the present case falls within the purview of the words "contract or instrument" used in this clause. Clause (d) runs thus:

"(d) any sum which by reason of the termination of employment of the person employed is payable under any law, contract or instrument which provides for the payment of such sum, whether with or without deductions, but does not provide for the time within which the payment is to be made."

The third part of the definition can be characterised as exclusive part of the definition. The categories enumerated as falling in this exclusive part are six in number. The first clause speaks of a bonus payable under an award or settlement. Clauses (2) to (5) are not relevant for the present discussion. Clause (6) is again important, and it provides "any gratuity payable on the termination of employment in cases other than those specified in sub-clause (d)". It will at once be noticed that the object of the Legislature in providing an elaborate definition comprising three parts, namely the meaning part, the inclusive part and the exclusive part, is to make the definition exhaustive. Reading cl. (6) of the exclusive part and cl. (d) of the inclusive part together, I arrive at the result that a claim for gratuity can only be enforced under the Payment of Wages Act as "wages", if it falls within the purview of cl. (d) but not otherwise. Mr. Parikh readily conceded that the claim for gratuity arising out of the settlement arrived at in the course of conciliation proceedings in the present case does not fall within the purview of the word

"law". He, therefore, restricted his argument to the submission that this claim would either fall under the word "contract" or "instrument".

For a proper consideration of the question as to whether the settlement arrived at in the course of the conciliation proceedings can be treated as a contract within the meaning of that word in s. 2(vi)(d) of the Payment of Wages Act, it is necessary to refer to the manner in which conciliation proceedings are conducted, and the role played by the conciliation officer in the course of the conciliation proceedings, culminating in a settlement. The word "settlement" has been defined in s. 2(p) of the Industrial Disputes Act in two parts—(1) settlement means a settlement arrived at in the course of conciliation proceedings, and (2) it includes a written agreement between the employer and workmen arrived at otherwise than in the course of conciliation proceeding where such agreement has been signed by parties thereto in such manner as may be prescribed and a copy thereof has been sent to the appropriate Government and the conciliation officer. It is common ground that in the present case, the settlement is a settlement which is arrived at in the course of the conciliation proceedings, and therefore, falls within the first part of the definition. Section 4 which relates to the appointment of a conciliation officer, lays down that the conciliation officer is "charged with the duty of mediating in and promoting the settlement of industrial dispute". The word "promoting" indicates that the conciliation officer is expected to play an active role in bringing about a settlement. Section 11(2) relates to the powers of the conciliation officer, and provides that it would be open to the conciliation officer to enter the premises occupied by any establishment to which the dispute relates for the purpose of inquiring into an existing dispute. Sub-section (4) of the same section empowers a conciliation officer to call for and inspect any document which he has ground for considering to be relevant to the industrial dispute. Section 12 lays down the duties of the conciliation officer. Sub-section (1) relates to the duties of the conciliation officer where the dispute relates to the public utility services. This sub-section, therefore, is not relevant for the present discussion. Sub-section (2) provides that the conciliation officer shall, for the purpose of bringing about a settlement of the dispute, without delay investigate the dispute and all matters affecting the merits and the right settlement thereof and may do all such things as he thinks fit for the purpose of inducing the parties to come to a fair and amicable settlement of the dispute. It would thus appear that sub-s. (2) requires the conciliation officer to investigate all matters which affect the merits and the right settlement of the dispute. The expression "merits and the right settlement thereof" suggests that it is for the conciliation officer to examine the merits and try to arrive at a settlement which he considers to be the right settlement. Again the words "for the purpose of inducing the parties to come to a fair and amicable settlement of the dispute" show that the conciliation officer has to assist the parties in forging a settlement which, according to him, is a fair settlement. Sub-section (3) of s. 12 lays down that the conciliation officer shall send a report of the settlement arrived at in the course of the conciliation proceedings to the appropriate Government together with the memorandum of the settlement signed by the parties to the dispute. Pausing here for a moment, it is true that the section nowhere lays down that a settlement reached between the parties requires the sanction or the approval of the conciliation officer. Formal sanction of the conciliation officer is not a condition *sine qua non* for the validity of a settlement reached between the parties. At the same time, it is implicit in the words used in sub-ss. (2) and (3) emphasised above that the concurrence of the conciliation officer is necessary, and without his concurrence the settlement reached is not a settlement in the proper sense of the term. The concurrence of the conciliation officer must be satisfied in regard to the fairness, justness and the reasonableness of the settlement reached. The conclusion suggested above is strengthened if reference is made to the provisions of sub-s. (4) of s. 12. Sub-section (4) provides for the contingency of a settlement not hav-

ing been reached in the course of the conciliation proceedings. It runs thus:

"(4) If no such settlement is arrived at, the conciliation officer shall... send to the appropriate Government a full report setting forth the steps taken by him for ascertaining the facts and circumstances relating to the dispute and for bringing about a settlement thereof, together with a full statement of such facts and circumstances, and the reasons on account of which, in his opinion, a settlement could not be arrived at."

The report, which the conciliation officer is expected to submit, must contain a statement (1) regarding the steps taken by him for ascertaining the facts and circumstances relating to the dispute and for bringing about a settlement, (2) a full statement of such facts and circumstances, and (3) the reasons on account of which, in his opinion, a settlement could not be arrived at. Sub-section (4) covers a situation where no settlement has been reached as also a situation where a settlement has been reached between the parties, but that settlement is not regarded by the conciliation officer as a fair or just or reasonable settlement. This view finds support from the observations at page 315 of the report in *Bata Shoe Co. (P) Ltd. v. Ganguly*.¹ In that case, a settlement was reached between the parties during the pendency of the conciliation proceedings, but that settlement was not approved of by the conciliation officer. The question was whether the settlement would be a bar to a reference of the dispute by the Government under s. 12(5). Their Lordships held that such a reference would not be barred. The relevant observations are to be found at page 315. While discussing the meaning of the expression "in the course of the conciliation proceedings", their Lordships stated (p. 315):

"...But do these words mean that any agreement arrived at between the parties during this period would be binding under s. 18 of the Act? Or do they mean that a settlement arrived at in the course of conciliation proceedings postulates that that settlement should have been arrived at between the parties with the concurrence of the conciliation officer? As we read this provision we feel that the legislature when it made a settlement reached during the course of conciliation proceedings binding not only on the parties thereto but also on all present and future workmen intended that such settlement was arrived at with the assistance of the conciliation officer and was considered by him to be reasonable and therefore had his concurrence."

Although, therefore, it is true that the settlement is based on the consent of the parties, still, since it requires the concurrence of the conciliation officer for acquiring the status of a settlement, the same cannot be treated as a creature of the agreement between the parties. Under s. 10 of the Indian Contract Act, all agreements are contracts if they are made by the free consent of the parties competent to contract. It is true that the consent of the parties does not cease to be free merely because the conciliation officer brings his influence to bear upon the discussions and negotiations that are proceeding around the table. His influence can hardly be regarded as anything like undue influence. The consent of the parties is essentially a free consent, and in that sense, the agreement reached can be considered as a contract in the sense in which that word is used in the Indian Contract Act. At the same time if we concentrate our attention upon the peculiar role played by the conciliation officer, it would be difficult to say that the final product that emerges is nothing more than an agreement between the parties. The conciliation officer has, in the course of discussion, brought to bear his influence and has tried to mould the agreement so that it should conform to a standard which he has set before his mind's eye. The conciliator cannot be treated as just a middle-man or an honest broker. He plays a dynamic part, and in view of the part played by him, it would be impossible to sever the final product that emerges, from the process of the formation or the forging out of the settlement. In my view, the two are so indissolubly connected that it would not be proper to treat the product apart from the process. In the course of negotiations, inevitably a process of bargaining goes on. The dispute may centre round several demands put forward by the Union on

behalf of the workmen. Some of these demands may be given up in favour of securing a concession in respect of others. In the entire process, what emerges cannot be treated as just a proposal and acceptance, which are the essence of an agreement between the parties. I have already pointed out that the conscience of the conciliation officer must be satisfied about the reasonable character of the settlement. It is then only that the conciliation officer treats the agreement as a settlement. In the process, therefore, what was essentially an agreement becomes transformed into something more than an agreement and, therefore, loses its original character as an agreement.

The view set out above would be strengthened on a close analysis of the provisions of s. 18. Sub-section (1) of s. 18 relates to the binding effect of a settlement which is arrived at by agreement between the employer and workmen otherwise than in the course of conciliation proceedings, and provides that such a settlement will be binding on the parties to the agreement. The expression "parties to the agreement" is significant. It is also necessary to note that sub-s. (1) does not contemplate an agreement between the Union on one side and the workmen on the other. It refers in terms to an agreement between the employer and the workmen. That shows that the agreement is binding only upon the individual workmen who are parties to the agreement. Sub-section (2) has no bearing upon the question under discussion. Sub-section (3) relates to the effect of a settlement arrived at in the course of the conciliation proceedings, and provides that such a settlement would be binding on (a) all parties to the industrial dispute; (b) all other parties summoned to appear in the proceedings... (c) where a party referred to in cl. (a) or cl. (b) is an employer, his heirs, successors or assigns, (d) where a party referred to in cl. (a) or cl. (b) is composed of workmen, all persons who were employed in the establishment or part of the establishment, as the case may be, to which the dispute relates on the date of the dispute and all persons who subsequently become employed in that establishment or part. It is significant to note that whereas sub-s. (1) speaks of parties to the agreement, sub-s. (3) speaks of parties to the industrial dispute. The distinction between the two phrases, viz., "parties to the agreement" and "parties to the industrial dispute" is clear and requires no elaboration. Had the Legislature intended to convey the idea that the settlement arrived at in the course of the conciliation proceedings stands on the same footing as an agreement, they would have used the same or similar language as used in sub-s. (1). Instead of using the words "parties to the industrial dispute" they would have more appropriately used the words "parties to the agreement". This shows that the settlement arrived at is not a mere agreement. After all, the agreement which forms the basis of the settlement is arrived at between the parties to the dispute. Yet, the Legislature have preferred the expression "parties to the dispute". That shows that the Legislature wanted to put settlement on a different footing than agreement. My learned brother has already elaborated upon the significance of cl. (d) which makes a settlement binding not only on all the workmen employed in the establishment at the time of the settlement, but also workmen who would be employed in future in such establishment. A contract ordinarily binds parties to the contract. When the Legislature have expressly provided that the settlement would not only bind parties to the dispute but also workmen, who would get themselves employed in future in the same establishment, they are contemplating a case of something which is more sacrosanct and has greater force than agreement reached between the parties. We cannot also forget that the Legislature have put the 'settlement' on the same pedestal as an 'award'. The binding effect of a settlement in sub-s. (3) of s. 18 is the same as the binding effect of an award. On the other hand, the Legislature have taken care to distinguish a settlement and an award on one side and an agreement between the parties on the other.

Finally, I may point out that the Legislature have used the words 'award' and 'settlement' in cl. (a) as also in cl. (1) of sub-s. (vi) of s. 2 of the Payment of Wages Act. There should have been no difficulty for them to use the

word "settlement" in cl. (d) so as to put the matter beyond any pale of controversy. This was necessary particularly because by cl. (6), the Legislature provided that no other gratuity except the one provided in cl. (d) would fall within the purview of 'wages'. Considering the question from any point of view, I am inclined to the view that a gratuity which has a settlement as its basis cannot be enforced as "wages" under the Payment of Wages Act.

So far as the argument advanced by Mr. Parikh, namely, that the settlement can be treated as an instrument, is concerned, I adopt the reasons given by my learned brother, which in turn are based upon the decision of this Court in *Bombay Chronicle v. V. B. Potdar*.² I would, therefore, agree with the order suggested by my learned brother.

Petition dismissed.

Before Mr. Justice Tambe and Mr. Justice Naik.

DR. A. N. TENDULKAR v. C. F. MATHIAS.*

Bombay District Municipal Act (Bom. III of 1901), Secs. 23(7), 24(1)(a)—Constitution of India, Part III—Order made by State Government under s. 23(7) whether a quasi-judicial order—President of municipality presiding at meeting passing resolution disallowing some members to sit in house—Order passed by State Government under s. 23(7) removing President from office—Validity of such order—Right of councillor to attend meeting of municipality whether a fundamental right.

An order made by the State Government under s. 23(7) of the Bombay District Municipal Act, 1901, removing the President of a municipality, governed by the Act, from the office of President, is a quasi-judicial order.

Board of High School v. Ghanshyam,¹ applied.

The President of the Bhor Municipality, governed by the Bombay District Municipal Act, 1901, presided at a meeting of the municipality which passed a resolution disallowing two of its members to sit in the house. The State Government made an order under s. 23(7) of the Act removing the President from the office of President for neglect and of incapacity to perform his duty as President on account of his failure or omission to disallow the said resolution:—

Held, that as under the Act or the Rules framed thereunder by the municipality there was no duty cast on the President to *suo motu* disallow moving of a resolution, the failure on the part of the President to *suo motu* object to the moving of the resolution did not amount to negligence on his part to perform his duty or to his incapacity to perform his duty and, therefore, the order passed by the State Government was liable to be quashed.

A right of a member or councillor to attend the meeting of a municipality is not a fundamental right as enshrined in the Constitution of India.

THE facts appear in the judgment

Y. S. Chitale, for the petitioner.

M. S. Sanghavi, instructed by *Little & Co.*, for the opponents.

TAMBE J. By this petition under arts. 226 and 227 of the Constitution, the petitioner, who was the President of the Bhor Municipality, seeks to get quashed the order dated July 16, 1964, made by the State Government, in exercise of its powers under s. 23(7) of the Bombay District Municipal Act, 1901, (hereinafter referred to as the Act), removing the petitioner from the office of President.

The facts giving rise to this petition in brief are: As already stated, the petitioner was an elected President of the Bhor Municipality. In his capacity as the President, he presided over the meetings of the Municipality on January

² (1961) 69 Bom. L.R. 812.

Civil Application No. 1056 of 1964.

*Decided, August 26/27, 1964. Special . 1 [1962] A.I.R. S.C. 1110.

30, 1963. In that meeting, the Municipality passed a resolution to the effect that Sarvashri B.S. Bapat and R.D. Patil of the Bhore Municipality should not be allowed to sit in the house till they apologised for having published mischievous news in the two newspapers i.e. 'Tarun Bharat' and 'Sakal' against the President. The effect of passing that resolution was that the aforesaid two councillors were prevented from participating in the deliberations of the meeting. On these facts being brought to the notice of Government, it appears that the State Government took the view that the failure or omission on the part of the petitioner to disallow the said resolution amounted to neglect to and showed incapacity to perform his duty properly. Further it appears that Government took the view that the President had taken the law in his own hands and had prevented the councillors from attending the said meeting. It appears that the view taken by Government is that the right of a municipal councillor to attend the meeting of the municipality is a councillor's "fundamental right", and preventing a municipal councillor from attending the meeting amounted to misconduct. A show cause notice was, therefore, issued to the petitioner, and the order of July 16, 1964, indicates that Government found that the explanation of the petitioner was not satisfactory. The State Government came to the conclusion that the action of the petitioner amounted to negligence in the performance of his duty and showed his incapacity to perform his duty as President properly. On these findings, the State Government made the following operative order:

"In exercise of the powers conferred by section 23(7) of the Bombay District Municipal Act, 1901, Government hereby removes Dr. A. N. Tendulkar, President, Bhore Municipality, from the Office of President, Bhore Municipality for neglect and of incapacity to perform his duty as President."

It is this order that the petitioner seeks to get quashed by this petition. We were, at the commencement of the hearing, at a loss to know as to what was meant by the clause "Further, he (petitioner) took the law in his own hand and prevented the Councillors from attending the said meeting". It was not clear whether the petitioner (President) had by any physical act prevented the councillors from attending the meeting, or what was the manner or mode in which the petitioner had taken the law in his own hands in preventing the councillors from attending the said meeting. Mr. Sanghavi, learned counsel for the respondents, told us that the only act of the petitioner of which complaint is made is omission or failure on the part of the petitioner to disallow the aforesaid resolution at the meeting of the Bhore Municipality on January 30, 1963. It is thus clear that what prevented or what came in the way of the two councillors from further participating in the meeting was the passing of the resolution by the Municipality—the only fact on which the finding of neglect and incapacity to perform his duty is founded. There was an ambiguity in the order made by Government. In the preamble, it appears that the view taken by Government was that on the aforesaid facts the petitioner was guilty of misconduct. However, the operative part of the order did not indicate that the petitioner had been removed for misconduct on his part. We, therefore, again asked Mr. Sanghavi to make the position clear, and the learned counsel has stated at the Bar that the petitioner has not been removed for any misconduct, but the ground on which the petitioner has been removed is neglect of and incapacity to perform his duty as President properly.

Before we proceed to consider the contentions raised by counsel for the parties, on merits, it would be convenient to consider an objection raised by Mr. Sanghavi, which could be said to be in its nature a preliminary objection. It is the contention of Mr. Sanghavi that the order of Government removing the petitioner is not a quasi-judicial order, but it is an administrative act. It is, therefore, not competent to this Court to quash this order in exercise of its power under arts. 226 or 227 of the Constitution of India.

The first question, therefore, that arises is whether the order which the peti-

tioner is seeking to get quashed is a quasi-judicial order; in other words, whether there was any duty imposed by the Act on the State Government to act in a quasi-judicial manner in the matter of removing the President. It is indeed true that in making the order, the State Government was not deciding a dispute between two private parties, but the parties to the dispute were the State Government on the one hand and the petitioner on the other. A similar question arose before their Lordships of the Supreme Court in *Board of High School v. Ghanshyam*.¹ The facts in that case were that the Examination Committee under the U.P. Intermediate Education Act, which was a statutory educational authority, had taken action against an examinee on the ground that he had used unfair means. The question that arose was whether the statutory educational authority was under a duty to act in a quasi-judicial manner in taking action against the examinee, and their Lordships held that there was such a duty cast on it though there were no express provisions to that effect in the Act. The principle laid down by their Lordships has been thus summarised in the placitum:

"The statute is not likely to provide in so many words that the authority passing the order is required to act judicially; that can only be inferred from the express provisions of the statute in the first instance in each case and no one circumstance alone will be determinative of the question whether the authority set up by the statute has the duty to act judicially or not. The inference whether the authority acting under a statute where it is silent has the duty to act judicially will depend on the express provisions of the statute read along with the nature of the rights affected, the manner of the disposal provided, the objective criterion if any to be adopted, the effect of the decision on the person affected and other indicia afforded by the statute."

Dealing with the provisions of the statute, their Lordships further observed:

"...Though there is nothing express one way or the other in the Act or the Regulations casting a duty on the Committee to act judicially, the manner of the disposal based as it must be on materials placed before it, and the serious effects of the decision of the Committee on the examinee concerned, must lead to the conclusion that a duty is cast on the Committee to act judicially in that matter, particularly as it has to decide objectively certain facts which may seriously affect the rights and careers of examinees, before it can take any action in the exercise of its power under R. 1(1)."

Applying these principles to the facts of the present case, the power conferred on the statutory authority, viz., the State Government, is a power to remove a President or a vice-President of a municipality. The exercise of the power depends on the existence of either negligence in performance of duty by the President or vice-President, or incapacity of the President or vice-President to perform his duty, or a misconduct on the part of the President or vice-President. It is clear that before an action could be taken by the statutory authority, it has to inquire objectively whether any of these three aforesaid facts exists in the case. Needless to say, the action when taken under s. 23(7) of the Act prejudicially affects a subject having serious consequences. It is not merely that a President or vice-President is removed from the office, but the sub-section further provides that he is debarred from standing for a re-election during the remainder of the term of the office of the municipality. There can hardly be any doubt that the principles laid down by their Lordships are attracted to the facts of the present case. In our opinion, therefore, having regard to the provisions of the Act, the order made by the State Government, removing the petitioner from the office of President, is a quasi-judicial order. The preliminary objection raised on behalf of the respondent, therefore, should fail.

The question that next arises is whether there was any duty on the part of the President (petitioner) to disallow the resolution that has been moved at the meeting. It is only if there would be any duty cast on the petitioner to *suo motu* disallow the resolution then alone, if at all, it could be so said that his failure to disallow the resolution would amount to negligence or incapacity

on his part to perform his duty. The argument of Mr. Chitale, learned counsel for the petitioner, is that there is no such duty cast on the petitioner under the provisions of the Act. On the other hand, it is the argument of Mr. Sanghavi, that having regard to the provisions of s. 24(I)(a) read together with r. 12 framed by the Bhor Municipality, the only possible inference that could be drawn is that there was such duty imposed on the petitioner. Section 24 deals with the functions of a President, and cl. (a) of sub-s. (I) thereof is in following terms:

"24. (1) It shall be the duty of the president of a Municipality to—

(a) preside, unless prevented by reasonable cause, at all meetings of the Municipality, and subject to the provisions of the rules for the time being in force under clause (a) of section 46 to regulate the conduct of business at such meetings;"

It would be seen that the duty imposed by this clause on the President is two-fold—(1) he has to preside, unless prevented by reasonable cause, at all meetings of the municipality, and (2) subject to the provisions of the Rules for the time being in force under cl. (a) of s. 46 to regulate the conduct of business at such meetings. There is no provision in the statute further elucidating the meaning of the clause "*to regulate the conduct of business at such meeting.*" And this brings us to the Rules. Relevant rules are framed by the Municipality under s. 46 of the Act. Relevant portion of s. 46 reads:

"Every Municipality shall, as soon as conveniently may be, after the constitution thereof, and subject to the provisions of Chapter XIII A, make and may from time to time alter or rescind rules, but not so as to render them inconsistent with this Act,

(a) regulating the conduct of their business and the delegation of any of their powers or duties and, subject to the provisions of sections 27 and 27A, the appointment and constitution of committees;"

The rules framed by the Municipality in exercise of the powers under this clause are contained in Chapter II of the Rules. They are rr. 3 to 36.

Rule 3 deals with the time of commencement of the meetings. Rule 4 relates to confirmation of the minutes of the last meetings. Rule 5 provides the manner in which the amendment to the minutes of the last meeting are proposed. Rule 6 relates to the language to be used at the meeting, r. 7 provides the manner in which a member will speak at the meeting. Rule 8 provides that the presiding authority shall preserve order and all points of order shall be summarily decided by him, no discussion thereon being allowed, unless he shall think fit to take the opinion of the members of the meeting thereon. Rule 9 provides that any member of a meeting may at any time submit a point of order to the decision of the presiding authority. Rule 10 provides that a councillor called to order by the presiding authority shall seat till the decision of the point of order raised. Rule 11 empowers the President to adjourn any meeting that has refused to obey his ruling on the point of order. Rule 12 provides that when the Councillor disregards the presiding authority or is guilty of obstructive or offensive conduct at any meeting, the presiding officer shall forthwith put the question (no amendment, adjournment or debate being allowed) that such councillor be suspended from the service of the council for the remainder of his seating, and if a majority of the councillors present are in favour thereof the councillor named shall withdraw, failing which the presiding authority may call such aid as he deems expedient to secure such withdrawal and suspension. Rule 13 enables a councillor to leave the meeting before it is closed after intimating his intention to do so to the presiding authority. Rules 14 to 17 relate to the procedure to be followed by the members in putting questions. Rule 18 relates to the provisions relating to the seconding of motion or amendment. Rule 19 relates to the manner in which the discussion of a motion or amendment is to be conducted. Rule 20 relates to the manner in which the amendment could be moved. Rule 21 relates to the right of a mover to speak, and also give a reply. Rule 22 relates to adjourning or postponing the consideration of any question. Rule 23 relates to opening adjourned debate. Rule 24 relates to closure of discussion.

Rule 25 relates to voting on original motion and amendments. Rules 26 and 27 relate to manner in which votes are taken. Rule 28 relates to the procedure to be followed when the votes are equal. Rule 29 relates to declaration of the result of voting. Rule 30 enables a poll to be demanded. Rule 31 relates to the taking of votes for appointment of committees. Rules 32 and 33 relate to the voting on budget. Rule 34 relates to the form of minutes. Rule 35 relates to the manner in which notice of business is given to the members. Rule 36 relates to the order in which the business is to be taken up by the chairman of the meeting. Rule 37 provides the extent to which the procedure at the general meeting is to be followed in committee meetings.

These are all the rules which have been framed under cl. (a) of s. 46(1) of the Act, which are relevant for the purposes of this case. It is nowhere expressly stated that one of the duties of the President is to *suo motu* disallow a resolution which the members or a councillor propose to move at the meeting. On the other hand, the scheme appears to be that it is the member or the councillor who has to raise a point of order, and it is only when a point of order is raised by a member, it is the duty of the President to decide normally summarily without allowing any debate or discussion on the point of order. It is only in a special case when the President thinks it advisable to take the opinion of the members on the point of order, that he may allow a debate thereon. The only case in which the President is empowered to *suo motu* move a motion is provided in r. 12, and that is only when a councillor disregards the presidential authority or is guilty of obstructive or offensive conduct at any meeting. But, it would be seen that under r. 12, the President is not empowered to ask a member to withdraw or suspend him from the meeting. The only proposal which the President can make under r. 12 is in the form of putting a question whether the member who has disregarded the presidential authority is guilty of obstructive or offensive conduct at the meeting should be suspended from the service of the council for the remainder of his seating. It is only when the House or the councillors present are in favour of such an action, the President may call such a councillor to withdraw from the meeting. It would be noticed that the scheme of the rules is that a point of order is to be raised by a councillor, but decided by the President; motion under r. 12 alone could be made by the President *suo motu*, but the decision thereon is left to the House. It is thus clear that the member or the President who proposes a motion or an action has not been made or has not been empowered to judge the merits of the motion or the action, or is not empowered to take a decision thereon himself. It would, therefore, be difficult to hold that the President is empowered under the provisions of the Act or the rules framed thereunder to *suo motu* disallow a resolution which a councillor intends to move in absence of any point of order raised by the member. It is pertinent to note that at the meeting no councillor or member including the two members Messrs. Bapat and Patil had raised any point of order regarding the competence of the municipality to consider the resolution No. 59 moved at the meeting on January 30, 1963. It is, therefore, difficult to hold that there was any failure on the part of the petitioner to perform his duty imposed on him by the Act or the rules framed thereunder. It is, however, the argument of Mr. Sanghavi that the petitioner ought to have known that the only contingency provided in the rules under which a member could be suspended is one provided in r. 12, and on no other ground a member could be suspended from the House. The argument of Mr. Sanghavi virtually amounts to reading something more than what r. 12 contains. It is nowhere stated in r. 12 that a member could be suspended only when the conditions mentioned in that rule are fulfilled. However, it is not necessary for us to pursue the matter further, because we are not here concerned with the validity or otherwise of the Resolution No. 59 passed by the municipality. Mr. Chitale has frankly conceded that we should proceed to consider this case on an assumption that the municipality was not competent to pass such a resolution. What we have to decide is whether there was a duty cast on the petitioner to *suo motu* disallow moving

of the resolution. We have already discussed that not only there is no express provision to that effect in the Act, but the inference that follows from the rules framed thereunder, is that there was no such duty cast on the President.

The question next to be considered is whether such a duty could be read in the expression: "to regulate the conduct of business at such meeting" occurring in cl. (a) of sub-s. (1) of s. 24. We have already stated that the expression has not any further been elucidated in the Act, nor are there any provisions which impose any duty on the President in respect of regulating the conduct of business of a meeting of the municipality. On the other hand, as it appears, it is left to each of the municipality to frame rules regulating the conduct of business of its meetings. Further, we have not been shown that there is any rule in any municipality or Corporation or a book on the subject, imposing a duty on its President to *suo motu* disallow moving of a resolution on the ground of incompetence of the municipality to consider the resolution.

In view of the aforesaid conclusion, it can hardly be said that the failure on the part of the petitioner to *suo motu* object to the moving of this resolution amounted to negligence on his part to perform his duty or to his incapacity to perform his duty. The error in the order which assumes that there was such a duty cast on the petitioner is apparent on the face of the record. There is also another error which is apparent on the face of the record. It appears that the view taken by the respondent is that the said failure on the part of the petitioner has prejudicially affected the two councillors' "fundamental right" of attending the meeting. Now, the fundamental rights of a citizen are enshrined in Part III of the Constitution of India. It is not necessary to elaborate, but suffice it to say that having regard to the articles contained in Part III of the Constitution, it can hardly be said that a right of a member or a councillor to attend the meeting of a municipality is a fundamental right. The error being apparent on the face of the record, the petitioner is entitled to get the order quashed.

In the result, application is allowed. The order of date July 16, 1964, made by the respondent is hereby quashed. Rule is made absolute with costs.

Rule made absolute.

CRIMINAL APPELLATE.

Before Mr. Justice Patel and Mr. Justice Bal.

THE STATE OF MAHARASHTRA *v.* HIRAMAN PUNJA VIDHATE.*

Indian Evidence Act (I of 1872), Sec. 8, Explanation 1—Statement explaining conduct, admissibility of.

The accused was charged for an offence under s. 376 of the Indian Penal Code for rape on a young girl of four years of age. There was no direct evidence in regard to the offence but the following statement was made by the mother of the girl in her evidence: "I saw her answering call of nature outside in the open and on seeing me she began crying and on questioning she told me that accused had placed her on his lap and blood came out". It was held that the latter part the statement which was by way of explanation of her crying was admissible under Explanation 1 to s. 8 of the Indian Evidence Act, 1872.

William Evans Wallwork,¹ referred to.

V. T. Gambhirwala, Assistant Government Pleader, for the State.
G. N. Vaidya, for the accused.

*Decided, August 24, 1964. Criminal Appeal No. 1204 of 1963, against the order of acquittal passed by S. G. Mandlik, Additional Sessions Judge, Nasik, in Criminal Appeal No. 152 of 1963.
1 (1958) 42 Cr. App. R. 153.

PATEL J. The accused in this case is a young man. He was convicted by the learned Assistant Sessions Judge at Nasik for an offence under s. 376 of the Indian Penal Code for rape on a young girl of four years of age but was acquitted by the learned Additional Sessions Judge at Nasik in appeal.

The facts as they emerge from the evidence of Indubai (P.W. No. 1), the mother of the girl, are few and are as follows: Her husband, Sukhdeo (P.W. No. 7), is a motor driver in the State Transport Corporation and at the relevant time in January 1963 he was posted at Nasik, while she and her child lived at Pimpalgaon. Her husband used to come to the village every week. The accused lived with his brothers Vithoba and Balkrishna one house away from her house. Vithoba had two young daughters and therefore whenever Indubai had to go for any work, she used to leave her daughter Suman at the house of Vithoba.

The incident occurred next day after the Sankrant. Her husband left on that day for Nasik at about 8 o'clock in the morning. She then went to the river for washing clothes keeping Suman in the house of Vithoba. She returned within a short time and after putting the clothes to dry she came out and saw her child answering call of nature and as soon as she saw her, Suman started weeping. She found her private parts injured and bleeding. She asked her what had happened and she learnt from her that the accused had caused the injury to her. She then contacted Vithoba who pleaded that she should forgive what had happened. She then went to her neighbour Shantabai (P.W. No. 6) who advised her to contact her husband. She accordingly went to Nasik and contacted Sukhdeo (P.W. No. 7) her husband. When she informed him about the incident he decided to lodge a complaint with the police. They, therefore, came to Pimpalgaon and lodged the present complaint on which immediate investigation was commenced.

After the complaint was lodged, the girl's clothes were attached and she was also sent after a *panchnama* of her injuries having been made, to the Medical Officer. He is Dr. Jotikumar (P.W. No. 4). He found six injuries on her. They are as follows: (1) Separation of thighs was painful. (2) Labia Majora and minora were swollen. (3) Vaginal canal was red and tender to touch. (4) Hymen ruptured and bleeding and tender on touching. (5) A tear of $1/4'' \times 1/8'' \times 1/8''$ on the right lateral wall of the vagina. (6) A tear of $1/6'' \times 1/6'' \times 1/8''$ on the anterior fornix of the vagina. The accused after his arrest was also forwarded to this doctor and he reported that there were no injuries detected on any part of the body of the accused.

Now, the evidence of the *panch* Madhukar Gujar (P.W. No. 4) in connection with the examination of the accused and the seizure of his clothes is important. It was found that the pyjama which the accused was wearing had stains of blood and semen. The witness has further stated that the *panchnama* correctly recorded what was seen by the *panchas*. Now, the *panchnama* is at exh. 8. It states that there were two stains of blood on the right sleeve of the pant just below the thigh and similarly at three places there were stains on the left sleeve below the thigh and near about there were stains of semen. It also states that the private parts of the accused appeared to be flushed and swollen, though it is no doubt true that the Medical Officer when he examined the accused at 9.20 p.m. did not find this to be so. It also appears from another *panchanama* at exh. 6 that the front room in the house of the accused was examined and there appeared to be some spots of blood. The report of the Chemical Analyser and the Serologist showed that the girl's clothes had blood, that the pyjama of the accused had blood and also semen.

The difficulty arose in the case because the child was too young to give evidence and when she came in the box she was found not able to understand the value of oath nor could she give any rational answers. In fact, in such cases the advisability of calling child witnesses has been questioned by L.C.J.

Goddard in the case of *William Evans Wallwork*¹. In this case there was no evidence of the victim...

Though evidence of statements made to Indubai by Suman cannot be given, in our view, evidence of her and Indubai's conduct is relevant under the second part of s. 8 of the Evidence Act. Explanation 1 to the section further shows that even a statement very closely connected to the conduct, in that it explains the conduct, would be admissible. That this is intended by the section is demonstrated by illustration J. to it. In the case above referred to we have the following observations (p. 162):

"...There would have been no objection to the grandmother saying: 'The little girl made a complaint to me' and she could have been asked: 'In consequence of that complaint what did you do?'—and the answer would have been 'I took her to the doctor and later to the police.' One realises that, although the terms of the child's statement must not be given, any jury could see at once that as a consequence of the complaint the grandmother took the child to the doctor and the police and that the terms of the complaint would mention her father."

Indubai says

"I saw her answering call of nature outside in the open and on seeing me she began crying and on questioning she told me that accused had placed her on his lap and blood came out."

The latter part is by way of explanation of her crying and clearly is admissible. The first circumstance, therefore, against the accused is that the child made the complaint naming the accused....

Order of acquittal set aside.

APPELLATE CIVIL.

Before Mr. Justice Naik.

M. W. PRADHAN v. M/s. PANCHAL ENGINEERING WORKS.*

Indian Limitation Act (IX of 1908), Art. 85—Indian Partnership Act (IX of 1932), Secs. 46, 47—Mutual, open and current account between plaintiff and defendant firms—Suit for dissolution of plaintiff firm and appointment of Court Receiver—Suit by Receiver against defendant firm for balance due to plaintiff at foot of account—Applicability of art. 85.

There was a mutual, open and current account between the plaintiff firm and the defendant firms. One of the partners of the plaintiff firm filed a suit for dissolution of the firm on July 24, 1950. The Court Receiver was appointed to manage the property of the firm and to realise the assets. On November 3, 1953, the Receiver filed a suit against the defendant for recovery of the balance due to the plaintiff at the foot of the accounts. In the plaintiff's account relating to its transactions with the defendant the last debit entry was made on June 17, 1950, and as the accounting year ran from Divali to Divali, during the relevant year 1949-1950, November 9, 1950 was the closing date of the accounting year. On the question whether the suit filed by the Receiver was barred by limitation, the Receiver contended that the account continued to be mutual, open and current till the date of the suit and, therefore, art. 85 of the Indian Limitation Act, 1908, applied and the suit was within time. The defendant contended that the account had ceased to be so on the dissolution of the plaintiff firm on July 24, 1950, and that the suit was barred by limitation:—

Held, that as the plaintiff firm was dissolved on July 24, 1950, and it became incapable of continuing the dealings between the parties, the account had ceased to be mutual, open and current at the date of the suit, and

1 (1958) 42 Cr. App. R. 153.

*Decided, August 5, 1964. First Appeal No. 178 of 1958, against the decision of B. J.

Divan, Judge, City Civil Court, Bombay, in Suit No. 2315 of 1953.

that, therefore, art. 85 of the Indian Limitation Act, 1908, was not applicable and the suit was barred by limitation.

Karsondas v. Surajbhan,¹ *Gonesh Lal v. Sheo Golam Singh*² and *Kalpada v. Sree Bank Ltd.*,³ referred to.

THE facts appear in the judgment.

D. H. Buch, instructed by *Bhaishankar Kanga & Girdharlal*, for the appellant.

R. L. Dalal, instructed by *Mulla & Mulla & Cragie Blunt and Caroe*, for the respondent.

NAIK J. This appeal arises out of a suit filed by the Court Receiver of a firm called Prabhat Trading Company against the defendant for the recovery of a sum of Rs. 7,000 and odd due at the foot of the accounts. The Prabhat Trading Company (hereinafter referred to as the plaintiff-firm) was a firm carrying on business at Bombay in the sale and purchase of paper and engineering goods. The defendant was a firm carrying on business as iron and brass founders at Ahmedabad. Among other things they were manufacturing lathe machines. The defendant-firm was placing orders with the plaintiff-firm for the supply of engineering goods. In the same way, the plaintiff-firm was also placing orders with the defendant-firm for the supply of the products of their factory. There was an account opened in the name of the defendant-firm in the plaintiff-firm, and entries were made in this account as transactions took place. The last entry made in the account with the plaintiff-firm was on June 17, 1950. It is common ground that the accounting year ran from Divali to Divali and during the relevant year viz., 1949-50, November 9, 1950, would be the closing date of the accounting year. Disputes started between the partners of the plaintiff-firm and on July 24, 1950, one of the partners filed a suit for dissolution of the firm on the Original Side of this Court (No. 1001 of 1950). On August 18, 1950, the Court Receiver had been appointed as receiver to manage the property of the firm and to realise the assets. On April 20, 1951, the Court Receiver wrote a letter (exh. B collectively) to the defendant-firm stating that a suit for dissolution of the partnership was pending in the High Court of Bombay and that he was appointed as receiver for collecting the assets and that it was noticed that a sum of Rs. 18,000 and odd was due at the foot of accounts from the defendant-firm. He called upon the defendant-firm to make that payment good and threatened action in case of its failure to pay the amount. The defendant-firm gave a reply on April 27, 1951, stating that the balance shown by the plaintiff-firm against the defendant-firm was not true and contending *inter alia* that a big sum was due from the plaintiff to the defendant on account of delivery of nineteen lathe machines not being taken in pursuance of a contract between the parties. The defendant, therefore, called upon the plaintiff to settle the account and accept delivery of the remaining nineteen lathe machines. The Receiver, therefore, filed a suit for the recovery of the balance due to the plaintiff-firm at the foot of accounts. The plaintiff-firm alleged that there were mutual dealings between the parties since May 1945 in respect of the goods supplied from time to time by the plaintiff to the defendant, and the goods supplied by the defendant to the plaintiff from time to time. The plaintiff averred that the account continued to be mutual, open and current till the date of the suit. At para. (7), the plaintiff referred to the correspondence that ensued between the Receiver and the defendant. It is not necessary to set out the details of that correspondence at this stage of the discussion.

The defendant-firm put in its written statement and resisted the plaintiff's claim on several grounds. It denied that the account between the parties was mutual, open and current. Alternatively, it contended that assuming that

1 (1933) 35 Bom. L.R. 929.

2 (1879) 5 C.L.R. 211.

3 [1960] A.I.R. Cal. 285.

the account was mutual, open and current, the same ceased to continue as such on the dissolution of the plaintiff's partnership. At para. (12) of the written statement, the defendant gave details of the set-off, which it claimed from the plaintiff. At para. (16), it referred to the internal disputes between the members of the plaintiff-firm and stated:—

"...The disputes and difference which had arisen between the partners of the plaintiffs' firm ultimately led to the dissolution of the plaintiffs' firm as appears from the said High Court suit for dissolution of the plaintiffs' firm."

It is not necessary to set out the other defences, since the suit has been decided on the preliminary point viz., that it is barred by limitation.

Appropriate issues were framed, but the trial Court chose to treat issues Nos. 1 to 3 as preliminary issues. These issues ran as follows:—

"(1) Whether there was a mutual, open and current account between the parties before the suit was filed?

(2) Whether the suit is barred by the law of limitation?

(3) Whether the partnership firm of Messrs. Prabhat Trading Co. was dissolved on 20th June 1950 or on 24th July 1950?"

It was conceded on behalf of the plaintiff that the plaintiff-firm was dissolved with effect from July 24, 1950. The learned trial Judge, therefore, recorded a finding to that effect on issue No. 3. With regard to issue No. 1, the trial Judge proceeded on the footing that initially the account was mutual, open and current for the purpose of deciding the issue of limitation. Eventually, the trial Judge came to the conclusion that the suit was not governed by art. 85 of the Limitation Act inasmuch as the account ceased to be mutual, open and current at the date of the suit. Once it is held that art. 85 of the Limitation Act is not attracted to the facts of this case, it is clear that the suit is barred by limitation, since the date of the last debit entry was June 17, 1950 and that of the last credit entry was made on May 30, 1950, whereas the suit was instituted on November 3, 1953. Consequently, the trial Court dismissed the plaintiff's suit. It is against that judgment that the plaintiff has come up in appeal.

It is clear that the suit would be in time, in case it is held that art. 85 of the Limitation Act applies to the facts of this case. Article 85 of the Act runs thus:

1st Col. "Description of suit: For the balance due on a mutual, open and current account, where there have been reciprocal demands between the parties".

2nd Col. "Period of limitation: Three years".

3rd Col. "Time from which period begins to run: The close of the year in which the last item admitted or proved is entered in the account; such year to be computed as in the account".

It is conceded that the accounting year in this case begins from Divali to Divali, and since the last entry was dated June 17, 1950, and since Divali of that year fell on November 9, 1950, the cause of action for filing the suit under art. 85 would commence from November 9, 1950.

The crucial question, however, for consideration is whether art. 85 of the Limitation Act applies to the facts of the present case. It has been held by this Court in *Karsondas v. Surajbhan*¹ that the account must continue to be mutual, open and current till the date of the suit in order that art. 85 is attracted. The only point that was raised in the written statement was that the account had ceased to be mutual, open and current, because the plaintiff-firm had come to be dissolved. The trial Court held that the fact that the plaintiff-firm has come to be dissolved with effect from July 24, 1950, must bring the account to an end. The trial Court also proceeded to consider the effect of the demand put forward by the Receiver by the registered notice dated April 20, 1951, and the reply given by the defendant to the said notice on April 27, 1951, and came to the conclusion that the legal effect of this correspondence is that the account

was closed between the parties. Mr. Buch, for the appellant, contended that the trial Court was wrong in holding that the effect of the correspondence referred to above is to close the mutual dealings between the parties. He also contended that the dissolution of the partnership would not put an end to the dealings between the parties. These two points are connected with one another and, therefore, they can be conveniently discussed together.

In order to appreciate the rival contentions raised on behalf of the parties before me, it is necessary to set out a few more facts. Suit No. 1001 of 1950 was filed by one of the partners against the other for dissolution of the plaintiff-firm. The partnership was a partnership at will. The plaintiff averred at para. (2) of the plaint in that suit that there was an express agreement to the effect that in the event of the dissolution of the firm neither of the partners shall be entitled to trade under the firm name, i.e. the Prabhat Trading Company, and that it would cease to exist. Again, at para. (6) of the said plaint, the plaintiff averred that on June 20, 1950, the defendant gave a notice alleging mismanagement of the affairs of the firm by the plaintiff and that, therefore, he was dissolving the said partnership. At para. (9) of the plaint, the plaintiff stated that he was willing to treat and was thereby treating the said firm as dissolved from the date of the filing of that suit. Alternatively, he submitted that the firm be dissolved by the Court from the date of the filing of that suit. He also requested that accounts of the said firm be taken and its affairs be wound up by or under the supervision of the High Court. The other partner in his written statement accepted the position taken by the plaintiff in the plaint. At para. (9) he reiterated that he was compelled to dissolve the said partnership by his letter dated June 20, 1950. He also submitted that the said partnership may be treated as dissolved as from the date of the filing of the suit. It will, therefore, be seen that it was common ground between the partners of the plaintiff-firm that the firm was dissolved either from June 20, 1950, or in any case from the date of the institution of the suit i.e., July 24, 1950. It is an admitted fact that the High Court has passed a decree fixing the date of the dissolution of the plaintiff-firm as July 24, 1950, and the Commissioner has been asked to take accounts of the firm. I have already pointed out that the High Court appointed a Receiver by an order dated August 18, 1950. The Receiver was called upon to take into possession the furniture and stock-in-trade of the firm. He was invested with all the powers under O. XL, r. 1, Civil Procedure Code, including the power of management of the property of the firm. It is significant to note that this order did not confer any power upon the Receiver to carry on the business of the firm. In his registered letter dated April 20, 1951, the Receiver referred in the opening paragraph to his appointment by an order of the High Court with powers to recover the outstandings due to the plaintiff-firm. It will thus be clear that the Receiver was writing the letter dated April 20, 1951, with the object of realising the outstandings belonging to the plaintiff-firm.

It is in this background that we have to consider the two points viz., (1) what is the effect in law of the dissolution of the firm upon the transactions between the parties? and (2) what is the effect of the correspondence that ensued between the Receiver on one side and the defendant on the other so far as the mutuality and openness of the account between the parties was concerned? As pointed out above, it has been held in *Karsondas's* case that the account must continue to remain mutual, open and current till the date of the institution of the suit. The Calcutta High Court in *Gonesh Lal v. Sheo Golam Singh*² had taken the view that it was not necessary that the account should continue to remain mutual, open and current till the date of the institution of the suit and it was enough for the application of art. 85 of the Limitation Act that the account was open, mutual and current till the end of the year when the last transaction or the last entry took place. Under art.

85 of the Limitation Act the cause of action accrues at the end of the accounting year and the Calcutta High Court proceeded on the footing that once the cause of action had accrued and once the Court came to the conclusion that till the accrual of the cause of action the account was mutual, open and current, the happening of the subsequent events, that is to say, subsequent to the accrual of the cause of action, would not affect the nature and character of the account. This view was disapproved by this Court and it categorically held that the account must continue to be open, mutual and current till the date of the institution of the suit. The learned Judges have also considered the question as to under what circumstances, the account would be deemed to have been closed between the parties. The facts of the case under the learned Judges' consideration were as follows: On July 10, 1922, the defendants wrote to the plaintiffs a letter sending them an account showing the amount due from the defendants to the plaintiffs as Rs. 2,123 odd, and they stated that they had settled that amount by a *hawala* entry in favour of another shop, in which they alleged the plaintiffs were partners. To that letter the plaintiffs replied on July 16, saying that they did not admit the accuracy of the account and they also challenged the right of the defendants to settle the account by means of the *hawala* entry, and they stated that the money due must be paid to themselves. After some further correspondence, on July 28, the defendants wrote saying that they would send the moneys due viz., Rs. 2,123 odd to the plaintiffs, and they further contended in the correspondence that the accounts were correct. On July 25, 1928, the present suit was filed. Beaumont C.J. emphasized two facts viz., that there were no dealings between the parties after April 1922 and that in July the defendants sent in an account showing the amount due and made an unconditional offer to pay that amount. From these two circumstances the learned Chief Justice drew the inference that it was the intention of the defendants to close the account. Rangnekar J., who gave a concurring judgment, observed as follows (p. 937):

"...An account current means a running account, that is an account which is continued and not stopped or closed. If the account is running, that is to say, if it is unclosed, then it is open and current. It is open either because the balance remains to be drawn or struck, or because it is to be carried forward because of some contemplated future dealings between the parties. If the account is not closed by settlement or otherwise, it is open. Of course mere cessation of the dealings between the parties does not mean that the account is closed. The real question in each case would be what is the intention of the parties, and that must be inferred from the surrounding circumstances. Suppose there is a mutual, open and current account between the parties and the dealings close in July and the plaintiffs draw a balance against the defendants and then demand the sum from them intimating that no further dealings will take place between them, I am unable to see how it can be said that after July the account still remained a mutual, open and current account and continued to bear that character right up to the end of the year. There is nothing in law which prevents a party from saying to the other 'I am closing your account today. This is what is due to you. I shall have nothing to do with you in future'."

Thereafter, the learned Judge referred to a passage from Wood, 4th edn., p. 1427, which is as follows:

"The theory upon which the doctrine as to mutual accounts rests is that there is a mutual understanding between the parties, either express or implied, that they will continue to credit each other until one signifies a contrary intention, when the balance being ascertained, becomes due and payable."

The learned Judge then referred to the facts of the case and remarked that the only conclusion possible on the facts was that the account between the parties was closed.

The principles deducible from the above decision are the following:

- (1) The account between the parties may be settled by mutual consent and

finally put an end to. This is the clearest case of the closure of the account between the parties.

(2) The account may be settled by one of the parties and a demand made accompanied by an intimation that he was closing the account. This also is a clear case for raising the inference that the account has ceased to be mutual, open and current.

(3) Between the two extreme positions illustrated by cases (1) and (2) above, there may be circumstances from which it will be permissible to draw the inference that the intention of the parties or either of them was to close the account.

Side by side with the positions described at Nos. 1 and 2 above, which arise out of the act of the parties, there may be cases where certain situations arise by the operation of law which would make it impossible for the parties or either of them to carry on the dealings between them. The mutuality, openness and currency of the account presupposes the continuance of the mutual dealings between the parties. If an event has taken place which will make it impossible for the parties or either of them to continue the dealings, then certainly it would be difficult to say that the account continued to be open or mutual. It is true that mere stoppage or cessation of dealings by itself is no ground for holding that the account has come to a close. But, side by side with the cessation of the dealings, if we find a situation which makes it impossible for either of the parties to continue the transactions, then it would be reasonable to draw an inference that the mutuality or openness of the account has come to an end. Such a situation would arise where one of the parties is dead or where, if it is a firm, it has been dissolved and if it is a limited company, it has gone into liquidation. As pointed out above, it was one of the terms of the agreement of partnership that after the dissolution of the partnership, the firm ceased to exist and the name of the firm could not be utilised by either of the parties and no transactions could be carried on in that name. In the present case, the firm has been dissolved with effect from July 24, 1950. The defendant is aware that the firm has been dissolved. It is significant to note that the firm has been dissolved before the date of the closing of the accounting year in which the last transaction took place viz., November 9, 1950, the date of the last transaction being June 17, 1950. If the firm is dissolved, it became incapable of continuing the dealings between the parties. That, in my view, should be sufficient to close the dealings between the parties and the logical corollary of the closure of the dealings would be the closure of the account between the parties. In this connection, reference may be made to ss. 46 and 47 of the Indian Partnership Act. Section 46 of the said Act in effect provides that

"On the dissolution of a firm every partner or his representative is entitled, as against all the other partners or their representatives, to have the property of the firm applied in payment of the debts and liabilities of the firm and to have the surplus distributed among the partners or their representatives according to their rights".

That means that once the firm is dissolved, not only the firm becomes incapable of carrying on the business of the old firm but that the assets of the firm become liable to be distributed between the partners. Section 47 of the Act provides that after the dissolution of the firm the authority of each partner to bind the firm, and the other mutual rights and obligations of the partners, continue notwithstanding the dissolution, so far as may be necessary to wind up the affairs of the firm and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise. In *Kalipada v. Sree Bank Ltd.*³ (which is relied upon by Mr. Buch, for the appellant), the Bank was ordered to be wound up or liquidated and it was held that the legal effect of liquidation must mean that openness, mutuality and currency of the account are all disrupted. Of course, the Calcutta High Court took the view that although as a result of liquidation the openness, mutuality and currency of the account have come to

an end, still the cause of action which was vested in the Bank when the account was mutual, open and current, would pass on to the liquidator and the liquidator could file a suit within three years from the date of the closure of the accounting year. In taking this view, the Calcutta High Court reaffirmed the view taken in *Ganeshlal's* case which was not accepted by this Court in *Karsondas's* case. I am, therefore, inclined to the view that the fact that the firm came to be dissolved even before the accrual of the cause of action must result in the disruption of the mutuality, openness and currency of the account between the parties.

Turning to the other point, it is necessary to note that the receiver in his letter (exh. B) dated April 20, 1951, after pointing out that he had been appointed a receiver with power to recover the outstandings, called upon the defendant to pay the amount due to the plaintiff with interest at nine per cent. within four days from the receipt thereof. He has also stated that in case the defendant failed to pay the said amount, further steps would be taken for the recovery of the amount. It is true that the mere circumstance that a balance has been struck at the end of the year and the further circumstance that a demand for the balance has been made by the creditor by themselves do not amount to the closing of the account. At the same time, we have to take into account the surrounding circumstances viz., the fact that demand was being made by the receiver, who was appointed by the Court in the suit for dissolution of the partnership; that the receiver was making a reference to the powers vested in him by the Court to recover the outstandings; that demand was being made by a registered notice; that the receiver was calling upon the defendant to pay interest at nine per cent., when no interest was charged in the earlier account and that finally, he made a peremptory demand for payment within a short period of four days and threatened to take legal steps for the recovery in case of default, would indicate that the notice was inspired with the intention to close the business and the account between the parties. In *Firm Kamta Prasad v. Gulzari Lal*,⁴ the Full Bench of the Allahabad High Court was dealing with the following facts: (1) After the end of the year the plaintiff struck a balance in his books on November 3, 1937, and (2) thereafter he started making demand for payment and on April 18, 1938, he served defendant No. 1 with a registered notice of demand threatening defendant No. 1 with institution of a suit for recovery in case he failed to pay within a week. The learned Judges held that the mutuality, openness and currency of the account must be deemed to have been closed with effect from November 3, 1937. The facts of the present case are, in my view, stronger than those with which the learned Judges of the Allahabad High Court were dealing. But the matter does not rest there. Assuming that the letter dated April 20, 1951, written by the receiver did not by itself amount to the closure of the account, we have on record the reply of the defendant which leaves no manner of doubt about the defendant's intention. In this letter, the defendant made a counter claim on the allegation that there was a breach of contract committed by the plaintiff in regard to the supply of twenty lathe machines. On its part, the defendant too called upon the plaintiff-firm to take delivery of the remaining lathe machines within eight days from the receipt of the letter and settle the account with the said firm. The two letters read together, therefore, lead to the conclusion that neither of the parties was intending to continue the business and that they were keen on putting an end to the transactions between themselves and thus close the account.

The result is that the appeal fails and is, therefore, dismissed with costs.

Appeal dismissed.

CRIMINAL APPELLATE.

[NAGPUR BENCH]

Before Mr. Justice Paranjpe.

ATMARAM LAXMAN v. THE STATE OF MALLARASHTRA.*

Bombay Police Act (Bom. XXII of 1951), Sec. 161—Criminal Procedure Code (Act V of 1898), Sec. 197—Indian Penal Code (XLV of 1860), Sec. 99—Bombay District Police Act (Bom. VII of 1867), Sec. 80—Police officials when investigating murder case wrongfully detaining and assaulting suspects—Whether such wrongful acts done under colour of duty and in excess of duty—Applicability of s. 161 of Bom. Act XXII of 1951—Distinction between s. 161, Bombay Police Act and s. 197 of Criminal Procedure Code.

The accused who were police officials were charged with the duty of proceeding with the investigation in connection with a suspected murder case and they questioned the suspects for that purpose. In order to enable them to carry out this duty, they wrongfully detained these persons and assaulted them for the purpose of extorting statements or confessions in course of that investigation. On the question whether the acts of the accused came within the ambit of s. 161(1) of the Bombay Police Act, 1951:—

Held, that the wrongful acts of detention and assault were committed by the accused in the course of their official duty of investigation and though their impugned acts were not by virtue of their duty and though they were in dereliction of their duty, they were clearly under the cloak of duty within the meaning of s. 161 of the Bombay Police Act, 1951.

Held further, that the impugned acts were in excess of the accused's duty or authority of questioning the witnesses for the purpose of investigation and consequently their acts would also be covered by the clause "in excess of duty imposed or authority conferred on them," and therefore the acts would come within the ambit of s. 161 of the Act.

Virupaxappa v. State of Mysore,¹ followed.

State of Andhra Pradesh v. Venugopal,² distinguished.

Satwant Singh v. State of Punjab,³ explained.

Hori Ram Singh v. Emperor,⁴ *Gill v. King*,⁵ *Albert West Meads v. The King*,⁶ *Ronald v. State of West Bengal*,⁷ *Ramayya v. State of Bombay*,⁸ *Amrik Singh v. State of Pepsu*,⁹ *Narayan Hari v. Yeshwant Raoji*,¹⁰ *State v. Atmaram Mahadeo*¹¹ and *Narhari v. State*,¹² referred to.

THE facts are stated in the judgment.

M. N. Phadke, *M. W. Puranik* and *B. V. Kulkarni*, for the appellant-accused.

G. R. Mudholkar, Additional Government Pleader, and *P. G. Palsikar*, Honorary Assistant Government Pleader, for the State.

PARANJPE J. Three police officials, now under suspension, are challenging their convictions and sentences under ss. 330, 342, 343 and 348 of the Indian Penal Code.

The appellants Atmaram and Uttam are Head Constables and the appellant Bhikaji is a police constable. All three of them were attached to the Jalgaon

*Decided, July 23/24, 1964. Criminal Appeal No. 193 of 1963, against the order of conviction and sentence passed by S. L. Bapat, Additional Sessions Judge, Khamgaon, in Sessions Trial No. 24 of 1963.

1 [1963] A.I.R. S.C. 849.

2 [1964] A.I.R. S.C. 33.

3 [1960] A.I.R. S.C. 266.

4 [1939] A.I.R. F.C. 43.

5 (1948) 50 Bom. L.R. 487, s.c. [1948] A.I.R. P.C. 128.

6 [1948] A.I.R. P.C. 156.

7 [1954] A.I.R. S.C. 455.

8 [1955] A.I.R. S.C. 287, s.c. 57 Bom. L.R. 632.

9 [1955] A.I.R. S.C. 309.

10 [1928] A.I.R. Bom. 352, s.c. 30 Bom. L.R. 1018, F.B.

11 (1964) 66 Bom. L.R. 356.

12 (1964) Criminal Application No. 6 of 1963, decided by Wagle and Paranjpe JJ., on March 31, 1964 (Unrep.).

Police Station in Buldana district in September 1962. On September 1, 1962, one Akaram went to that police station to report that his brother Lahanu had disappeared. He expressed a suspicion that Lahanu might have been murdered. The Sub-Inspector in charge of the police station recorded that information and ordered the appellant Atmaram to enquire into that report of Akaram.

The case for the prosecution was as follows: From the report of Akaram, the appellant Atmaram suspected that Lahanu was murdered, and Shewanti w/o Sonaji, Dwarki w/o Lahanu, Sheikh Jumma, Sakharam son of Kisan and Sakharam son of Sonaji were involved in that murder. In order to obtain information from these persons with respect to the murder of Lahanu and for knowing where the corpse was, Atmaram kept these five persons in unauthorised custody from September 3, 1962, till September 7, 1962, and also assaulted them. While she was in his custody, Atmaram also committed rape of Dwarki wife of Lahanu. The co-accused Uttam and Bhikaji also helped him in these illegal acts. Hence the prosecution under ss. 330, 342, 343, 348 read with s. 34 of the Indian Penal Code.

All the three appellants abjured the guilt. According to them, false charges were levelled against them due to enmity.

The Additional Sessions Judge, Khamgaon, found on facts that Atmaram had wrongfully confined Sheikh Jumma and had caused hurt to Sakharam son of Kisan, Sakharam son of Sonaji, Sheikh Jumma, Shewanti wife of Sonaji and Dwarki wife of Lahanu between September 3, 1962, to September 7, 1962. He also found that Atmaram had confined the other four persons from September 3 to 7, 1962. According to him, appellant No. 2 Uttam was guilty of causing hurt to Shewanti wife of Sonaji and Sheikh Jumma, and appellant No. 3 Bhikaji was guilty of causing hurt to Sakharam son of Kisan on September 7, 1962. He convicted appellant No. 1 Atmaram under ss. 330, 342, 343 and 348 of the Indian Penal Code and sentenced him to rigorous imprisonment for one year on each count, the sentences being concurrent. He convicted appellant No. 2 Uttam and appellant No. 3 Bhikaji under s. 330 of the Indian Penal Code only and sentenced each of them to rigorous imprisonment for six months. Those convictions and sentences are being challenged now.

Mr. M. N. Phadke, learned advocate for the three appellants pointed out that though the offences were committed between September 3 and 7, 1962, the charge sheet was not put up in the Court till March 15, 1963, i.e. for more than six months after the commission of the offences. According to him, s. 161 of the Bombay Police Act precluded the Court from entertaining such a complaint or police report after the expiry of six months from the date of the offence and consequently the convictions and the sentences were bad in law. He also urged that the learned Additional Sessions Judge was in error in relying on the oral evidence which was interested and uncorroborated. I think it desirable to first consider the question of jurisdiction of the trial Court and then to proceed to discuss the evidence on merits if it were to be found that the trial was not vitiated by virtue of s. 161 of the Bombay Police Act.

In support of his main contention, Mr. Phadke submitted that the three appellants were charged with the duty of investigating the offences of the alleged murder of Lahanu and they were performing that official duty of investigation and of questioning the suspects. According to him, the alleged wrongful detention and assault were made "under colour" or "in excess of" the duty or authority of investigation and, therefore, they were all protected by s. 161(1) of the Bombay Police Act. He was relying on the decision of the Supreme Court in *Virupaxappa v. State of Mysore*,¹ and also on *Shriram v. State*² and *Narhari v. State*³ which I had decided on the authority of the aforesaid Su-

¹ [1963] A.I.R. S.C. 840.

² (1963) Criminal Appeal No. 35 of 1963, decided by Paranjpe J., on October 15, 1963 (Unrep.).

³ (1963) Criminal Appeal No. 153 of 1963, decided by Paranjpe J., on November 11, 1963 (Unrep.).

preme Court decision. Mr. Phadke also placed reliance on the order of the Division Bench in *State v. Narhari*⁴ by which leave to appeal to the Supreme Court against the decision in *Narhari v. State* was refused.

Mr. Palsikar, Honorary Assistant Government Pleader, contended that the impugned acts had no connection or nexus with the official duty which was assigned to the three accused and, therefore, their act of wrongfully confining and assaulting the five persons cannot come within the ambit of s. 161 of the Bombay Police Act. He was relying on the opinion of the Full Bench in *Narayan v. Yeshwant; Dattatraya v. Annappa*⁵ in answer to the questions referred in First Appeal No. 346 of 1924 by Marten C.J. and Crump J. According to him, *Virupaxappa's* case was not applicable to the facts of the present case and the principles laid down in *State of Andhra Pradesh v. Venugopal*⁶ would more appropriately apply to the facts of this case and would show that the impugned acts not being protected by any provision of law or authority would not give the protection of s. 161 of the Bombay Police Act to the accused.

Section 161(1) of the Bombay Police Act on which both parties are relying is in the following words:

"161. (1) In any case of alleged offence by the Revenue Commissioner, the Commissioner, a Magistrate, Police officer or other person, or of a wrong alleged to have been done by such Revenue Commissioner, Commissioner, Magistrate, Police officer or other person, *by any act done under colour or in excess of any such duty or authority as aforesaid, or wherein, it shall appear to the Court that the offence or wrong if committed or done was of the character aforesaid*, the prosecution or suit shall not be entertained, or shall be dismissed, if instituted, more than six months after the date of the act complained of." (Italics are mine).

The relevant question to be decided would, therefore, be whether the offence does or does not arise out of an act done under colour of office or in excess of duty or authority or whether it does or does not appear to the Court that the act was of the character aforesaid.

Analogous provisions with respect to acts done in the discharge of official duties have also been made in s. 99 of the Indian Penal Code and in s. 197 of the Code of Criminal Procedure. Section 99, Indian Penal Code, protects

"acts of a public servant acting in good faith under colour of his office, though that act may not be strictly justifiable by law."

It would, therefore, be clear that s. 99, Penal Code, would countenance an act of an official if done in good faith even if it is not strictly justifiable by law by which he is governed.

The relevant provisions of s. 197 of the Code of Criminal Procedure are in the following words:

"197. (1) When... a Judge... or any Magistrate, or public servant... is accused of any offence alleged to have been committed by him *while acting or purporting to act in the discharge of his official duty*, no Court shall take cognizance of such offence except with the previous sanction (of the prescribed authority)."

A comparison of s. 197 of the Code of Criminal Procedure with s. 161 of the Bombay Police Act would show that there is a considerable difference between them. Section 197(1) of the Code of Criminal Procedure is limited to offences committed while acting or purporting to act in the discharge of the official duty. It does not cover acts committed under colour of or in excess of the authority. Section 161(1) of the Bombay Police Act, however, covers cases of acts done under colour of office and/or in excess of any such duty or authority. It further covers offences in which it appears to the Court that the wrong done was of the aforesaid character, viz., under colour of office or in excess of the duty. In view of this difference in the language of the two sections, there can be no doubt that the provisions of s. 161 of the Bombay Police

4 (1964) Criminal Application No. 6 of 1963, decided by Wagle and Paranjpe JJ., on March 31, 1964 (Unrep.).

5 (1928) 30 Bom. L.R. 1018, F.B.
6 [1964] A.I.R. S.C. 33.

Act are much wider than those of s. 197 of the Code of Criminal Procedure. There is another important distinction also. Under s. 197 of the Code of Criminal Procedure, the Government acts in an executive capacity and it is in the discretion of the Government whether to grant or withhold sanction under s. 197 and the orders of the Government, either refusing or granting sanction under s. 197, need not be based on legal evidence; vide, *In the matter of Kalagava Bapiiah*.⁷ Unlike these provisions of s. 197 of the Criminal Procedure Code which the Government can use in an executive manner, the provisions of s. 161 (1) of the Bombay Police Act have to be interpreted by the Courts judicially on the basis of the evidence and materials on record. That would be another important distinction between these two provisions.

Before proceeding to consider how s. 161 of the Bombay Police Act should be interpreted, I should think it necessary to review how the law regarding sanction under s. 197, Criminal Procedure Code, had been applied. In the case of *Hori Ram Singh v. Emperor*⁸ the accused, who was a Civil Surgeon in charge of a hospital, was convicted under ss. 409 and 477A of the Indian Penal Code without sanction for his prosecution under s. 197 of the Code of Criminal Procedure having been obtained. The case against him was that he had dishonestly removed certain medicines from the hospital and had converted them to his own use. It was held that the test for determining whether sanction for prosecution was or was not necessary, was whether the official capacity of the accused had been utilised or involved in the act which was complained of; if his office is involved, s. 197 of the Criminal Procedure Code applies and want of sanction is fatal; otherwise sanction is not necessary. On applying this test it was further held that the act of the removal of stocks of medicine did not involve any official capacity but the act of falsification of records was in its very nature such that employment of the official capacity of the accused was necessarily involved in that act and, therefore, no sanction was required for the prosecution under s. 409, but a sanction would be required for the prosecution under s. 477A of the Indian Penal Code.

In *Gill v. King*⁹ the charge was under s. 161 of the Indian Penal Code. Their Lordships made the following observations for holding that the offence of receiving a bribe did not require sanction under s. 197, Criminal Procedure Code (p. 494):

"...A public servant can only be said to act or to purport to act in the discharge of his official duty, if his act is such as to lie within the scope of his official duty. Thus a judge neither acts nor purports to act as a judge in receiving a bribe, though the judgment which he delivers may be such an act; nor does a Government medical officer act or purport to act as a public servant in picking the pocket of a patient whom he is examining, though the examination itself may be such an act. The test may well be whether the public servant, if challenged, can reasonably claim that, what he does, he does in virtue of his office."

This view was reiterated by their Lordships of the Privy Council in *Albert West Meads v. The King*.¹⁰ Their Lordships of the Supreme Court also followed these Privy Council decisions in *Ronald v. State of West Bengal*¹¹ for holding that no sanction was necessary under s. 197 of the Criminal Procedure Code for offences under ss. 120B and 161 of the Indian Penal Code. It would be seen from the aforesaid decisions that as pointed out by Varadachariar J. in *Hori Ram Singh v. Emperor*¹² the question regarding whether the tests prescribed in those rulings were satisfied or not, was treated as a question of fact to be determined with reference to the facts of each case.

The matter again came up for discussion before the Supreme Court in *Ramayya v. State of Bombay*.¹³ The question was whether sanction was necessary for

7 (1903) I.L.R. 27 Mad. 54.

8 [1939] A.I.R. F.C. 43.

9 (1948) 50 Bom. L.R. 487. s.c. [1948] A.I.R. P.C. 128.

10 [1948] A.I.R. P.C. 156.

11 [1954] A.I.R. S.C. 455.

12 [1939] A.I.R. F.C. 43 at p. 56.

13 [1955] A.I.R. S.C. 287, s.c. 57 Bom. L.R. 632, at p. 637.

prosecuting the accused under s. 409 of the Indian Penal Code and s. 5(2) of the Prevention of Corruption Act. Their Lordships made the following observations:

"...if s. 197, Cr. P. C. is construed too narrowly it can never be applied, for of course it is no part of an official's duty to commit an offence and never can be. But it is not the duty which the Courts have to examine so much as the act, because an official act can be performed in the discharge of official duty as well as in dereliction of it. The section has content and its language must be given meaning. The Courts have to concentrate on the word 'offence' in the section. An offence seldom consists of a single act. It is usually composed of several elements and, as a rule, a whole series of acts must be proved before it can be established. Where the elements alleged against the accused, a public servant in charge of Government stores, are first, that there was an 'entrustment' and/or 'dominion'; second, that the entrustment and/or dominion was 'in his capacity as a public servant'; third, that there was a 'disposal' and fourth, that the disposal was 'dishonest', it is evident that the entrustment and/or dominion here were in an official capacity, and it is equally evident that there could in this case be no disposal, lawful or otherwise, save by an act done or purporting to be done in an official capacity. Therefore, the act complained of, namely the disposal, could not have been done in any other way. If it was innocent, it was an official act; if dishonest, it was the dishonest doing of an official act, but in either event the act was official because the accused could not dispose of the goods save by the doing of an official act, namely officially permitting their disposal. Therefore, whatever the intention or motive behind the act may have been the physical part of it remained unaltered, so if it was official in the one case it was equally official in the other, and the only difference would lie in the intention with which it was done; in the one event, it would be done in the discharge of an official duty and in the other, in the purported discharge of it."

The matter again came up before their Lordships of the Supreme Court in *Amrik Singh v. State of Pepsu*.¹⁴ Relying on the earlier decisions of the Federal Court and the Privy Council, it was apparently urged that under no circumstances could it be said that misappropriation was within the scope of the duties of a public servant and, therefore, no sanction was necessary. While repelling this suggestion, their Lordships made the following observations (p. 312):

"We are of opinion that this is too broad a statement of the legal position, and that the two decisions cited lend no support to it. In our judgment, even when the charge is one of misappropriation by a public servant, whether sanction is required under S. 197(1) will depend upon the facts of each case. If the acts complained of are so integrally connected with the duties attaching to the office as to be inseparable from them, then sanction under S. 197(1) would be necessary; but if there was no necessary connection between them and the performance of those duties, the official status furnishing only the occasion or opportunity for the acts, then no sanction would be required." It would thus be seen that their Lordships liberalised the earlier view which appeared to be too rigid and stringent.

Mr. Mudholkar, Additional Government Pleader, then contended that the Supreme Court had again taken a narrower view on this point in *Satwant Singh v. State of Punjab*¹⁵ laying down the test that the act must bear such relation to the duty that the public servant could lay a reasonable but not a pretended or fanciful claim, that he did it in the course of the performance of his duty. I am afraid this would not be a correct interpretation of that decision. While dealing with the question of the necessity or otherwise of a sanction under s. 197 for an offence of cheating, their Lordships more or less summarised the views of that Court on this point. In para. 16 they made the following observations (p. 271):

"...We have no hesitation in saying that where a public servant commits the offence of cheating or abets another so to cheat, the offence committed by him is not one while

14 [1955] A.I.R. S.C. 309.

15 [1960] A.I.R. S.C. 266.

he is acting or purporting to act in the discharge of his official duty, as such offences have no necessary connection between them and the performance of the duties of a public servant, the official status furnishing only the occasion or opportunity for the commission of the offences (vide *Amrik Singh v. State of Pepsu*). The act of cheating or abetment thereof has no reasonable connection with the discharge of official duty. The act must bear such relation to the duty that the public servant could lay a reasonable but not a pretended or fanciful claim, that he did it in the course of the performance of his duty (vide *Matajog Dobey v. H. C. Bhari*)."

It was clear that their Lordships had not narrowed down the scope of their observations in the earlier case of *Amrik Singh* on a part of which they were again relying, in the above quotation. It appears that their Lordships summarised the view taken in the two cases mentioned therein without amending or overriding their earlier decision in *Amrik Singh's* case which lays down, as indicated above, that the question would depend upon the facts of each case. This decision in *Satwant Singh v. State of Punjab* cannot, therefore, amount to narrowing the view of the question as was suggested on behalf of the State.

On applying the test laid down by the Supreme Court as indicated above, the question to be determined even for the purpose of s. 197 of the Criminal Procedure Code would be whether the acts complained of are "so integrally connected with the duties attaching to the offence as to be inseparable from them". As I will show in greater detail in the sequel, the three accused were charged with the duty of proceeding with the investigation in connection with a suspected murder case and were questioning the suspects for that purpose. In order to enable them to carry out this duty, they wrongfully detained these persons and even assaulted them for the purpose of extorting statements or confessions in the course of that investigation. When that duty of investigation, which was entrusted to them, is viewed in its proper perspective, it would appear that this act of wrongful restraint and detention of the suspects and of causing hurt to them was integrally connected with the duty of questioning those persons for the purpose of investigation and it would not appear possible to separate it from their duty of investigation which they were carrying on at that time. Therefore, even according to the view of the Supreme Court with respect to sanction under s. 197 of the Criminal Procedure Code, the impugned acts would amount to offences performed while purporting to do the official duty and they would, therefore, necessarily fall under s. 197 of the Criminal Procedure Code for which a sanction would be necessary.

The three accused were not removable by the State or the Central Government, and, therefore, no sanction for their prosecution was necessary under s. 197 of the Code of Criminal Procedure. However, the District Superintendent of Police had accorded his sanction as per exh. 77 which is on page 262, of the paper book. It was not disputed that this sanction was meant or intended to be under s. 197 of the Code of Criminal Procedure. There was nothing in the record to support the contention of Mr. Palsikar that this sanction was given by the District Superintendent, only by way of abundant caution. The District Superintendent would not have proceeded to grant the sanction by way of abundant caution, if he had not considered it necessary. This sanction did not even mention the provision of law under which it was given or the grounds or reasons for which it was given. When there was no much lack of care in the matter of preparing that small sanction, it does not seem probable that it was given by way of abundant caution. This fact that the District Superintendent proceeded to accord a sanction apparently under s. 197, Code of Criminal Procedure, would necessarily mean that he considered that the impugned conduct of the accused was in purported discharge of their duties. This view of the immediate superior of the accused would discount the contention of Mr. Palsikar that the impugned acts were not in the purported discharge of their duty.

There is one other important indication in the record to show that the three ac-

cused were acting or purporting to act in discharge of the duties which were assigned to them. After completing the investigation against the three accused, the police put up the charge sheet which contains the following recitals:

"The case for the prosecution is that on 1-9-1962 witness No. 1 (Akaram) gave a report to the police station Jalgaon about the sudden suspicious disappearance of his brother Lahanu. That is registered in the Station Diary at Serial No. 5, dated 1-9-1962, and witness No. 22 (P.S.I. Dhoke) entrusted the enquiry into that application to the accused No. 1 (Atmaram). Accordingly, accused No. 1 made an enquiry and, on his entertaining a strong suspicion as a result of the enquiry that the witnesses Nos. 2 to 5 (Shevanti, Dwarki, Sheikh Jumma and Sakharam) were involved in the crime, he kept them under enquiry from the 3rd till the 4th of September 1962; in order to obtain real information about the murder of Lahanu and about the place of murder and the whereabouts of the dead body and for getting information on these points he kept them under custody in the Baithak of the witness No. 15 (Police Patil Sheshrao) and after that assaulted them at the Gram Panchayat Sungaon. He obtained from them written confession under pressure of beating by the police; thereafter on 7-9-1962 while bringing back witnesses Nos. 2 to 5 to Sungaon assaulted them on the road." (Details of assault are mentioned).

In view of these recitals in the charge sheet Mr. Palsikar did not dispute that the investigating officer treated these acts as having been done while performing the official duties assigned to the accused, but he contended that the opinion of the investigating officer should not bind this Court and the matter should be decided independently. Mr. Palsikar was not right in saying that the Sub-Inspector had given his opinion in the charge-sheet. Under s. 173(1) of the Criminal Procedure Code, he has to write the substance of his information which he gathers in the course of investigation. That recital is by way of substance of the information on facts which he had gathered in the course of investigation. The criticism of Mr. Palsikar on this point was not tenable.

I have already indicated the difference in the language of s. 197, Criminal Procedure Code, and s. 161 of the Bombay Police Act. Under the latter provision, with which I am concerned in this appeal, it has to be found whether the impugned acts were committed under colour of office or in excess of the duty or whether it appears to the Court that they were committed under the character of colour of duty or authority. The word "colour" in its legal sense is defined in Webster's Dictionary as "an appearance or semblance of a right, authority, office or the like." In Wharton's Law Lexicon, 14th Ed., page 214, "colour of office" is defined as follows:

"When an act is unjustly done by the countenance of an office, being grounded upon corruption, to which the office is as a shadow and colour."

In Stroud's Judicial Dictionary, 3rd ed., the word "colour" has been defined at page 521 as follows:—

"'Colour of office' is always taken in the worst part, and signifies an act evil done by the countenance of an office, and it bears a dissembling face of the right of the office, whereas the office is but a veil to the falsehood, and the thing is grounded upon Vice, and the office is as a shadow to it. But 'by reason of the office' and 'by virtue of the office' are taken always in the best part."

Their Lordships of the Supreme Court have observed in this connection, in *Virupacappa v. State of Mysore* in para. 10 as follows:

"It appears to us that the words 'under colour of duty' have been used in S. 161(1) to include acts done under the cloak of duty, even though not by virtue of the duty. When he (the police officer) prepares a false Panchanama or a false report he is clearly using the existence of his legal duty as a cloak for his corrupt action or to use the words in Stroud's Dictionary 'as a veil to his falsehood'. The acts thus done in dereliction of his duty must be held to have been done 'under colour of the duty'."

Mr. Phadke submitted that on applying these tests it would be clear that the acts of wrongful detention and assault were committed by the three accused persons in the course of their official duty of investigation and, though these

impugned acts were not by virtue of their duty, they were obviously under the cloak of duty even though they amounted to dereliction of their duty and, therefore, they will have to be treated as being within the meaning of s. 161 of the Bombay Police Act. Mr. Palsikar contended on the other hand that there was no integral connection of these impugned acts with the duty of investigation, and wrongfully detaining persons or assaulting them was not their duty and consequently they would not come under the cloak of duty within the meaning of s. 161 of the Bombay Police Act.

In making this submission Mr. Palsikar was treating the clause "under the cloak of duty" as synonymous with "by virtue of the duty". He did not show any authority to support that view. On the contrary, the observations from para. 10 in *Virupaxappa's* case quoted above, would show that the expression "under cloak of duty" is not equivalent to but is different from the expression "by virtue of duty". Wrongfully detaining these persons and assaulting them was certainly not the duty assigned to these accused, but they committed these acts for the purpose of carrying out their duty of collecting information and confessions, if possible, from these persons. Consequently, it will have to be held that these impugned acts, though they were not by virtue of their duty and though were in dereliction of their duty, were clearly under the cloak of duty within the meaning of s. 161 of the Bombay Police Act.

Mr. Palsikar then submitted that the view of the Supreme Court in *Virupaxappa v. State of Mysore* was modified and superseded by their later decision in *State of Andhra Pradesh v. Venugopal*. According to him, the impugned acts cannot be permitted by s. 161 of the Bombay Police Act because an action therefor cannot be lawfully brought for anything done or intended to be done under the provisions of any law for the time being in force conferring powers on the police. He further submitted that the Supreme Court decision in *Virupaxappa v. State of Mysore* was not in point and the matter was really covered by the opinion of the Full Bench in *Narayan v. Yeshwant: Dattatraya v. Annappa* on the second question referred by the Chief Justice in the First Appeal No. 346 of 1924.

Mr. Phadke, advocate for the appellants, met these contentions of Mr. Palsikar on the grounds that follow. The expression "any act done under colour of any such duty or authority" as appearing in s. 161 was explained by the Supreme Court in the case of *Virupaxappa v. State of Mysore* and that decision was exactly in point so far as the present case was concerned. The view of the Supreme Court in *Virupaxappa's* case was not modified or superseded in the later decision in *State of Andhra Pradesh v. Venugopal* but was specifically affirmed therein. In this later decision s. 53 of the Madras District Police Act, which was materially different from s. 161 of the Bombay Police Act was explained by their Lordships and the criticism of Mr. Palsikar based on the wordings of that s. 53 of the Madras District Police Act was not applicable to the facts of the present case. The other expression "in excess of any such duty or authority" as appearing in s. 161 of the Bombay Police Act was not considered by their Lordships of the Supreme Court in *Virupaxappa's* case as it was not necessary for the decision of the facts therein. The opinion which the Full Bench gave on the question referred in the First Appeal No. 346 of 1924 was not applicable as claimed by Mr. Palsikar because the facts which gave rise to the reference on the point were materially distinguishable.

The contention of Mr. Palsikar that the Supreme Court decision in *Virupaxappa's* case was modified and superseded by their later decision in *State of Andhra Pradesh v. Venugopal* was based on the assumption that the Supreme Court had interpreted s. 161 of the Bombay Police Act differently in the later case but that assumption was unwarranted. A perusal of the later decision would show that their Lordships were interpreting s. 53 of the Madras District Police Act and not s. 161 of the Bombay Police Act. That s. 53 of the Madras

District Police Act, as quoted in the aforesaid decision, is in the following terms:

"All actions and prosecutions against any person, which may be lawfully brought for anything done or intended to be done under the provisions of this Act or under the provisions of any other law for the time being in force conferring powers on the police shall be commenced within three months after the act complained of shall have been committed and not otherwise."

A comparison of this provision with s. 161 (1) of the Bombay Police Act would show that the two are widely different. Since the two provisions are not *in pari materia* it would not be permissible to apply the interpretation of that section while interpreting s. 161 of the Bombay Police Act.

Moreover, Mr. Palsikar was also not right in suggesting that the earlier decision in *Virupaxappa's* case was overruled or modified by their Lordships of the Supreme Court in their later decision. Paragraph 15 in the later decision was in these terms:—

"This aspect of the matter was emphasized by this Court recently in *Virupaxappa Veerappa v. State of Mysore*, when examining the language of a similar provision in the Bombay District Police Act."

The similarity referred to in the two provisions in s. 53 of the Madras District Police Act and in s. 161 of the Bombay Police Act was only with respect to the word "under the provision of law". I have already pointed out that the point to be considered in the present case was whether the impugned acts were or were not under colour of duty or authority of the accused and it would not be possible to agree with Mr. Palsikar that the impugned acts cannot be treated as under colour or in excess of the duty because they did not fall under the wordings of s. 53 of the Madras District Police Act or under the provisions of any other law for the time being in force.

Mr. Palsikar was not right in his submission that the decision in *Virupaxappa's* case which had interpreted the provisions of s. 161 of the Bombay Police Act was not in point. Their Lordships of the Supreme Court while considering the wordings of s. 161 of the Bombay Police Act have held as follows (p. 851):—

"The expression 'under colour of something' or 'under colour of duty', or 'under colour of office', is not infrequently used in law as well as in common parlance. Thus in common parlance when a person is entrusted with the duty of collecting funds for, say, some charity and he uses that opportunity to get money for himself, we say of him that he is collecting money for himself under colour of making collections for a charity. Whether or not when the act bears the true colour of the office or duty or right, the act may be said to be done under colour of that right, office or duty, it is clear that when the colour is assumed as a cover or a cloak for something which cannot properly be done in performance of the duty or in exercise of the right or office, the act is said to be done under colour of the office or duty or right. It is reasonable to think that the legislature used the words 'under colour' in S. 161(1) to include this sense. It is helpful to remember in this connection that the words 'colour of office' have been stated in many law lexicons to have the meaning just indicated above."

In the face of that direct pronouncement, there was no substance in the contention that the section had not been interpreted by the Supreme Court or that that decision of the Supreme Court was not applicable to the facts of the present case.

Mr. Phadke was right in pointing out that their Lordships of the Supreme Court had not explained the expression "in excess of any such duty or authority" as appearing in s. 161 in their decision in *Virupaxappa's* case, as that was not necessary for the decision of the facts therein. The provisions of s. 161 of the Bombay Police Act, 1951, are analogous to the provisions of s. 80 of the Bombay District Police Act, 1890. The question whether the acts of an investigating officer in deliberately taking down the statement of a witness incorrectly come within the expression "done under colour or in excess of a duty

imposed or any authority conferred" within the meaning of s. 80 of the Bombay District Police Act, 1890, had arisen in a criminal case. Upon a reference, the Full Bench gave its opinion on that question in *Narayan Hari v. Yeshwant Raoji*. The Full Bench did not explain the expression "in excess of duty or authority", but delivered the following opinion on that question:—

"Where an investigating police-officer reduces a statement of a witness to writing his act is one done under colour or in excess of a duty imposed or an authority conferred on him by s. 51(1), cl. (b), of the Bombay District Police Act, etc. whether he acts *bona fide* or otherwise, and even if he acts *mala fide* and in deliberate disregard of his proper duty or authority and deliberately takes down the statement of such witnesses incorrectly."

Relying on this opinion, Mr. Phadke contended that the impugned acts would be in excess of the duty or authority of the three accused. There is considerable force in this contention. The accused were entrusted with the duty of investigating the alleged offence of the murder of Lahauu. In furtherance of that duty, they called the witnesses for questioning them. They were not authorized to wrongfully detain those persons or to assault them for the purpose of carrying out their duty of investigation and yet they did wrongfully confine and assault those persons for the purpose of obtaining their statements in the course of investigation. These impugned acts would, therefore, clearly appear to be in excess of their duty or authority of questioning the witnesses for the purpose of investigation. Consequently, their acts would also be covered by the clause "in excess of the duty imposed or authority conferred on them" and, for that reason also, the acts would come within the ambit of s. 161 of the Bombay District Police Act.

I would next consider Mr. Palsikar's contention that the instant case was covered by the opinion of the Full Bench on the second question in the civil reference in *Narayan Hari v. Yeshwant Raoji*¹⁷. Two references were made to that Full Bench, one arising from the Criminal Revision No. 20/27 and the other arising from the First Appeal No. 346/24. I have already pointed out in the preceding paragraph what the reference in the criminal case was and what answer was given to it by the Full Bench. The facts which gave rise to the reference in the First Appeal No. 346/24 were the following: A Police Sub-Inspector and his assistant were engaged in investigating into certain charges of criminal offences committed by two members of the criminal tribe. It had been alleged that the plaintiff was harbouring these two persons and some offenders connected with them. One morning, the plaintiff happened to be passing by the office of the Sub-Inspector and he was called into the office. The Sub-Inspector, with the help of his assistant, then proceeded to question him as regards the two members of the criminal tribe, who were then in the office and put to him certain questions. The plaintiff denied any knowledge of the two persons in question, whereupon the Sub-Inspector accused him of telling lies. Afterwards, getting angry, the Sub-Inspector seized him by the moustache and pulled him into an upright position. Then defendant No. 2 at the instigation of defendant No. 1 beat him. The plaintiff then left the office and was again called back and was further threatened by the Sub-Inspector. On these facts two questions were referred to the Full Bench. Mr. Palsikar was relying only on the second question and the answer thereto. That question was in the following words:—

"Can the alleged assault or battery be said to have been committed under colour or in excess of such duty or authority?"

The answer of the Full Bench was that the alleged assault or battery cannot be said to have been committed under colour or in excess of such duty or authority. Mr. Palsikar was contending that this opinion on the second question and the ratio thereof should be treated as guides for deciding the instant case. In making that submission, he was not remembering that the facts lead-

ing to that reference and the ratio for the opinion of the Full Bench were materially distinguishable from the facts of the present case. As would be seen from the recitals of the facts therein, the acts of the Sub-Inspector from the summoning of the plaintiff upto questioning him were held by the Full Bench to be fully under colour of his duty or authority but the subsequent act of assault and battery were not in any manner connected with the discharge of his duties. It was not the case that he assaulted the plaintiff for the purpose of obtaining a statement from him. The matter of obtaining the statement had come to an end with the plaintiff's denial of any knowledge about the two members of the criminal tribe. Consequent on the answer given by the plaintiff the Sub-Inspector accused him of telling lies and afterwards getting angry, committed the acts of assault and battery. These acts were, therefore, entirely unconnected with the duty or authority which was imposed on him. The Full Bench had given the following reason for their opinion in the middle of the second column on page 361:

"In the second case, however, while the acts of the Sub-Inspector from the summoning of the plaintiff and questioning him also fell under colour of his duty or authority, by no process of reasoning can the alleged acts of battery and assault be said to fall under such colour or in excess of such duty or authority."

Since the acts were in no way connected with the duty or committed for the purpose of carrying out the duty, but were committed after the duty was over, no other answer could have been given. In view of that distinguishing feature that opinion cannot be applicable to the facts of the present case, in which the impugned acts were not unconnected with the duty but were committed for the purpose of discharging the duty. Mr. Palsikar's contention in this behalf must, therefore, fail.

In support of his contention, Mr. Palsikar was contending that the Full Bench had not given their opinion with reference to the particular facts, and even if they had given the opinion with reference to the facts of the case, the opinion of the Full Bench must be treated in the abstract without considering the facts on which it was based. Mr. Palsikar was obviously not right in saying that the opinion was not given on the facts of that particular case. In the order of reference, the facts were quoted and they were also considered by the Full Bench while delivering their opinion. The second question, which I have quoted above had referred to the "alleged assault and battery". That would necessarily mean that the question was only with reference to the facts of that case and was not meant or intended to be a general question without reference to facts. When an opinion was given on the particular facts placed before the Full Bench, it would not be permissible to say that the opinion, merely because it came from the Full Bench, should be considered in abstract without considering the facts giving rise to the reference or the facts of the case to be decided. This opinion was not meant or intended to lay down any general propositions but was with reference to the facts of that case and, therefore, it will be impossible to accept the contention that it should be applied to the present case without considering the facts either of the reference or of this case.

Mr. Palsikar was then contending that only this opinion on the second question in the civil reference would apply to the present case and the opinion of the same Full Bench in the criminal reference should not be applied. It was indeed difficult to accept or appreciate that submission. The opinion on the reference in the criminal case clearly showed that the acts of a police officer in making a false record of the statement of witnesses clearly amounted to an act done under colour of duty or in excess of duty and, therefore, s. 80(3) of the Bombay District Police Act came into operation. There was no warrant for the contention of Mr. Palsikar that this opinion in the criminal reference which was in point for the decision of the present case, should be left out of account and only the opinion on the civil reference, the facts of which were

materially distinguishable should be followed. That submission also must stand rejected.

The question whether the act of making a false report by a police officer in the course of investigation was covered by s. 161 of the Bombay Police Act had recently come before this Court in another case. Certain police officers who were convicted and sentenced under s. 218 read with s. 34, Indian Penal Code, for making false reports in the course of investigation had challenged their convictions and sentences. It was urged in the course of arguments before Mr. Justice Chitale that the impugned acts were done under colour of duty or authority and the prosecution was launched more than six months after the date of offence and, therefore, the prosecution was liable to be dismissed under s. 161 of the Bombay Police Act. The learned Additional Government Pleader who appeared for the State did not dispute that the alleged acts which constituted the offence of accused Nos. 2 and 3 under s. 218 read with s. 34, Indian Penal Code, were done under colour of their duty or authority and the charge-sheet was filed more than six months after the alleged act. The learned Additional Government Pleader, however, argued that s. 161, Bombay Police Act did not affect the State as it does not refer to the State either expressly or by necessary implication, with the result that the police prosecution filed after six months would not be barred under s. 161. Since the point was of considerable importance, Mr. Justice Chitale referred it to the Division Bench. The decision of the Division Bench is reported in *State v. Atmaram Mahadeo*.¹⁸ The Supreme Court decision in *Virupaxappa v. State of Mysore* was referred to. The learned Additional Government Pleader was challenging the *ratio decidendi* of the Supreme Court decision on the ground that the decision might have been different if arguments were addressed on the point raised by him. The Division Bench pointed out that the *ratio decidendi* of the case decided by the Supreme Court could not be challenged on that ground. The Division Bench after considering the law on the question held that the word "prosecution" in s. 161(1) necessarily implied that the State is referred to in that provision, and that every prosecution for an offence, whether initiated on the complaint or a police report will come under the mischief of that provision. That Division Bench decision will also repel the contention raised before me in this behalf.

Mr. Phadke then drew my attention to *Narhari v. State*. That application was for leave to appeal against my judgment whereby I had dismissed a prosecution in accordance with the provisions of sub-s. (1) of s. 161 of the Bombay Police Act with respect to an alleged offence under s. 161 of the Indian Penal Code read with s. 5(1)(d) and 5(2) of the Prevention of Corruption Act as it was instituted more than six months after the offence was committed by the police officer under colour of his duty. The learned Additional Government Pleader had also urged therein that the later decision in *State of Andhra Pradesh v. Venugopal* should be followed in preference to the earlier decision in *Virupaxappa v. State of Mysore*. It was pointed out in that decision delivered by Mr. Justice Wagle that their Lordships of the Supreme Court were considering a different provision of law in the later case, namely, s. 53 of the Madras District Police Act, and that the Supreme Court had not purported to override or dissent from its earlier decision. The case which had given rise to that application for special leave concerned a police officer, who was demanding a bribe for dropping or weakening the prosecution case which he himself was investigating. The following observations were made by Mr. Justice Wagle in that decision:—

"The result that was to be achieved in the Supreme Court case was also to lessen the gravity of the offence and the object of the police officer in the instant case was also a similar one, giving either complete relief to the accused or at least a partial relief. The facts of this case, therefore, would certainly bring it within the ratio of the decision of the Supreme Court in *Virupaxappa v. State of Mysore*."

It is, therefore, clear that the impugned acts of the three accused were committed under colour of office while discharging their duty and in excess of the authority vested in them. The prosecution was admittedly launched more than six months after the date of offence. Consequently, s. 161(I) of the Bombay Police Act would be a bar to entertaining the case and the prosecution ought to have been dismissed.

In the course of arguments, it had also been suggested that by giving special protection to police officers, s. 161 of the Bombay Police Act had made an invidious distinction between police officers and persons other than police officers who commit such offences. I do not think that it would be correct to say that any such invidious distinction had been made in favour of police officers by enacting s. 161. That enactment was based on a reasonable classification by giving protection to police officers so that they may not be harassed by such prosecutions, if they are made after a long lapse of time. It was also contended that interpreting s. 161 of the Bombay Police Act by giving protection to police officers would result in allowing several police officers to escape the clutches of law if only they can succeed in covering their offences for a period of six months or in managing to get the investigation delayed for more than six months. The idea of that provision is not to allow delinquent police officers to escape punishment for offences but to ensure that such police officers are not required to face prosecutions after a long lapse of time and are promptly brought to book. It was contended that the prosecution frequently find it difficult to complete the investigation within a period of six months and to put up a charge-sheet against police officers within that period. The difficulty in the way of the prosecution putting up a charge sheet within six months need not deflect the Court from arriving at a correct conclusion on the basis of the wordings of the statute. If the difficulties are genuinely felt, it would be for the Legislature to step in and amend the law as was remarked by his Lordship Mr. Justice Bhagwati in para. 17 of the Supreme Court decision in *Behram Pesikaka v. State of Bombay*.¹⁹

In the view that I am taking, I do not think it necessary to consider the submission of Mr. Phadke that the oral evidence on record did not establish the offences alleged against the accused. When s. 161(I) of the Bombay Police Act bars the jurisdiction of the Court to entertain the prosecution, there would also be no jurisdiction to decide questions of fact arising out of the allegations of the prosecution. Consequently, I refrain from entering into any discussion on the evidence on merits though I may mention that there is considerable force in the submission of Mr. Phadke that the oral evidence was highly interested and lacked corroboration in material particulars.

In the result, the appeal is allowed, the convictions and sentences of the three appellants are quashed and set aside and the prosecution of these three accused under the several sections of the Indian Penal Code is dismissed in accordance with the provisions of s. 161(I) of the Bombay Police Act. The bail bonds of the appellants shall stand cancelled.

Appeal allowed.

Before Mr. Justice Patel and Mr. Justice Bal.

JAGANNATH SONU PARKAR v. THE STATE.*

Sea Customs Act (VIII of 1878), Sec. 167(81)—Foreign Exchange Regulation Act (VII of 1947), Secs. 8(1), 23(1-A)—General Clauses Act (X of 1897), Secs. 8, 26—Offence under s. 167(81) of Sea Customs Act and under s. 8(1) of Foreign Exchange Regulation Act in relation to same article—Whether separate convictions for offence under each Act permissible.

There can be separate convictions for an offence under s. 167(81) of the Sea Customs Act, 1878, and an offence under s. 8(1) read with s. 23(1-A) of the Foreign Exchange Regulation Act, 1947, in relation to the same article or thing.

*Secy. of State v. H. C. I. Society*¹ and *Reoti v. Emperor*,² referred to.

ONE Jagannath (accused No. 1) and eight others were charged for various offences in connection with a large quantity of gold which was recovered on board a motor launch belonging to accused No. 1. The charges against all these accused were under s. 120-B of the Indian Penal Code read with s. 167(81) of the Sea Customs Act, 1878, read with s. 8(1) and s. 23 of the Foreign Exchange Regulation Act, 1947; under s. 167(81) of the Sea Customs Act, 1878, for defrauding the Government of the duty payable on the gold and also for evading the prohibition and restrictions for possession of gold, for being knowingly concerned at various ports, viz. Janjira, Dabhol, Deogad, in the fraudulent evasions of the duty chargeable on that gold and also prohibition and restriction in force in relation to the same and, lastly, for importing the said gold into India without the permission of the Reserve Bank of India under s. 8(1) of the Foreign Exchange Regulation Act read with s. 23(1-A) (a) of the same Act.

The trying magistrate acquitted accused Nos. 3, 7 and 9 and convicted the remaining accused of the aforesaid offences. The accused appealed to the High Court.

Criminal Appeal No. 1121 of 1963.

J. B. Khatu and *B. B. Kode*, for the appellants (original accused Nos. 1, 2 and 8).

Porus A. Mehta, with *Adi P. Gandhi*, Special Prosecutor (appointed), for Central Excise.

V. S. Deshpande, Assistant Government Pleader, for the State.

Criminal Appeal No. 1122 of 1963.

A. M. Shiroadkar, for the appellants (original accused Nos. 4, 5 and 6).

Porus A. Mehta, with *Adi P. Gandhi*, Special Prosecutor (appointed), for the Central Excise.

V. S. Deshpande, Assistant Government Pleader, for the State.

PATEL J. [His Lordship after considering the evidence in the case and upholding the convictions, proceeded.] Mr. Kode relying on the decision in *B. Ultrich v. Asst. Collector of Customs*,¹ contended that the learned Magistrate was in error in convicting the accused both under cl. (81) of the Schedule to s. 167 of the Sea Customs Act and also under s. 8(1) read with s. 23(1-A) of the Foreign Exchange Regulation Act, 1947. It seems to us that the contention is not well founded.

Section 8(1) of the Foreign Exchange Regulation Act, 1947, enables the Central Government by notification to order that no person shall, except with

*Decided, August 10/11, 1964. Criminal Appeal No. 1121 of 1963 (with Criminal Appeal No. 1122 of 1963), against the order of conviction and sentence passed by V. M. Gehani, Additional Chief Presidency Magistrate, 8th Court, Esplanade, Bombay, in Case No. 140/W

of 1963.

1 [1931] A.I.R. P.C. 149, s.c. 33 Bom. L.R. 1006.

2 [1933] A.I.R. All. 461.

1 [1960] A.I.R. Ker. 335.

the general or special permission of the Reserve Bank of India bring or send into India any gold or silver. Section 23, as it originally stood, provided for penalties and procedure for imposing the same and contained four sub-sections. Sub-section (1) provided a penalty of two years imprisonment or fine or both for any breach of any of the provisions of the Act or of any order, rule, direction made or issued under the Act. The other sub-sections are not necessary to be referred for the present purpose. By Act VIII of 1952 a new s. 23(A) was added. It is as follows:

"Without prejudice to the provisions, of section 23 or to any other provision contained in this Act, the restrictions imposed by sub-sections (1) and (2) of section 8,.... shall be deemed to have been imposed under section 19 of the Sea Customs Act, 1878 and all the provisions of that Act shall have effect accordingly except that section 183 thereof shall have effect as if for the word 'shall' therein the word 'may' were substituted."

It is evident that this section does not repeal s. 8(1) of the Act and introduce it in the Sea Customs Act or affect the penalty provision of s. 23(1). Maintaining the *status quo* it only introduces a fiction by which all restrictions introduced under s. 8(1) are deemed to be restrictions under the Sea Customs Act and the reasons are not far to seek. To discover any breach of such restrictions proper machinery is needed and this existed under the allied provisions of the Sea Customs Act and did not exist under the Regulations. In order to facilitate investigation of such breaches without the necessity of creating separate machinery, the restrictions were fictionally imported into the Sea Customs Act. But the breach of restrictions still continued to be an offence under s. 8(1) read with s. 23(1) which is made clear by the introductory saving clause "without prejudice to...section 23 or...Act".

It would seem that any breach of the restrictions under s. 8 of the Foreign Exchange Regulation Act which were deemed to be made under s. 19 of the Sea Customs Act, would be an offence under the latter Act, under cl. 8 of the schedule in s. 167 under which the penalty is one of fine and confiscation. By Act X of 1963, cl. 81 was introduced in the schedule to s. 167 of the latter Act. The clause is complicated and provides for a large many matters. It may be broken up into its constituent parts as follows:

(1) If any person knowingly or with intent to defraud the Government of any duty payable thereon acquires possession or is concerned in carrying or removing, depositing, harbouring or concealing or in any manner dealing with goods (a) which have been unlawfully removed from a warehouse (b) or which are chargeable with a duty which has not been paid (c) or with respect to the importation or exportation of which any prohibition or restriction is for the time being in force. (2) If any person knowingly and with intent to evade any prohibition or restriction for the time being in force under or by virtue of this Act with respect thereto acquires possession or is concerned in carrying, removing, depositing, harbouring, keeping or concealing or in any manner dealing with any goods (a) which have been unlawfully removed from a warehouse (b) or which are chargeable with a duty which has not been paid (c) or with respect to the importation or restriction of which any prohibition or restriction is for the time being in force as aforesaid. (3) If any person is in any way knowingly concerned in any fraudulent evasion or attempt at evasion (a) of any duty chargeable as aforesaid (b) or of any prohibition of this Act applicable to those goods.

Under this clause in all the offences intention is a necessary ingredient of the offence, which may be to evade duty or prohibition and restrictions. Moreover it is any one of the physical act in connection with the goods there referred to that is made an offence but it does not deal with the actual importation of gold contrary to the restrictions, for one may do any of the acts mentioned in the clause in connection with the articles without himself actually importing them into India which is an offence under the Foreign Exchange Regulation

Act. For the reasons stated above if the acts and omissions of the accused satisfied the requirement of each one of the enactments then he could be convicted under both since each one of the Acts continued to operate.

But by s. 10 of Act XXXIX of 1957, s. 23 of the Foreign Exchange Regulation Act was amended which recast sub-s. (1). The scheme under the amendment is to provide penalty for some offences separately. By sub-s. (1) two kinds of penalties for offences under ss. 4, 5, 9 and sub-s. (2) of s. 12 are prescribed and provision for its levy is made. Sub-section (1-A) is almost similar to original sub-s. (1). Clause (a) provides a penalty of two years' imprisonment and fine or both for contravention of any provisions of the Act or direction, rule etc. except of those referred in sub-s. (1) and s. 19 and as to the latter provided by cl. (b) only a penalty of a fine not exceeding two thousand rupees. By sub-s. (1-B) power is given to the Court or authority to make an order for confiscation.

Section 8 of the General Clauses Act provides that any references in any Act or instrument to any of the provisions of an enactment which is repealed and re-enacted with or without modification by another enactment shall be construed, unless a contrary intention appears, as references to the re-enacted provision. There is nothing in the amending Act XXXIX of 1957 indicating that reference to s. 23 in s. 23-A should not be read as references to the substituted sub-s. 23(1-A). The position, therefore, even after the amendment of s. 23 continued the same as before. In the case referred to by Mr. Kode the only question before the Court was whether a breach of regulation issued under s. 8(1) of the Foreign Exchange Regulation Act would be punishable under cl. (81) of schedule of s. 167 which the Court answered in the affirmative and indeed rightly. It is apparent that the decision in *Secy. of State v. H. C. I. Society*² can apply to cases of incorporation of the provisions of an earlier statute in another and the earlier is thereafter amended. On the other hand, it may be regarded as well settled that a deeming provision must have its full effect including all logical consequences flowing from it. In our view, therefore, apart from anything else, there can be separate convictions and sentences under both Acts.

Mr. Kode relies on s. 26 of the General Clauses Act in support of the same contention. For its application the section requires that "an act or omission constitutes an offence under two or more enactments" which means that the same set of facts must constitute offence under both the Acts. If the ingredients of the offences in each act are different then even if the offence is committed in relation to the same article or thing the section cannot apply. This interpretation has been accepted in *Reoti v. Emperor*.³ We have explained above that the ingredients for offences under each Act are different. In one case mere carrying or dealing with an article with the necessary intent is an offence while in the other bringing into India.

The charges against the accused are: (1) they conspired to bring gold into India with intent to defraud the Government and to evade the prohibitions and restrictions; (2) that for these purposes they acquired possession or were concerned in acquiring possession of gold; (3) that they were concerned at several places in fraudulent evasion or attempt at evasion of the duty chargeable thereat and prohibitions and restrictions relating to it; (4) that they imported the gold into India without the permission of the Reserve Bank of India. The charges being in respect of separate acts respecting evasion of duty and importation of gold, in our view separate sentences on both the counts are proper, though in the second and the third charges the words "in relation to evasion of restrictions" may as well have been omitted. In any case, the learned Magistrate has directed that sentences regarding conspiracy and the main offences under the Sea Customs Act the subject matter of the second and the third charges

² [1931] A.I.R. P.C. 149 s.c. 33 Bom. L.R. ³ [1933] A.I.R. All. 461.
1006.

run concurrent. If separate sentences could not be passed respecting the second and the third charges and the fourth charge, sentences regarding the first charge and that regarding the second, third and fourth could, in our view, have been directed to be consecutive in view of the gravity of the offence. The sentences are, therefore, legal.

We also cannot accede to the plea of Mr. Kode for reduction of sentence as the circumstances justify the sentences which in our view are not excessive.

Both appeals, therefore, fail and are dismissed. The accused to surrender to their bail.

Appeals dismissed.

APPELLATE CIVIL.

[NAGPUR BENCH]

Before the Hon'ble Mr. H. K. Chainani, Chief Justice, and Mr. Justice V. S. Desai.

LAXMAN DAMODHAR ZOTING v. SHAMRAO VISHWANATH.
JAWADE.*

Bombay Village Panchayat Election Rules, 1959—Ballot paper contained in ballot box of one constituency whether can be considered while counting votes in respect of another constituency.

Under the Bombay Village Panchayat Election Rules, 1959, a ballot paper contained in a ballot box for one constituency cannot be considered while counting votes of candidates from another constituency.

Therefore, if a voting paper issued to a voter from a certain ward is found in the ballot box pertaining to another ward, it cannot be taken into consideration in counting the votes of candidates who had stood for election from the former ward.

THE facts appear in the judgment.

P. B. Gadkari, for the petitioner.

R. N. Deshpande, for respondent No. 1.

CHAINANI C. J. The petitioner and opponents Nos. 1 to 3 stood as candidates for election from ward No. 2 to the Gram Panchayat of mouza Khadki. Two members were to be elected from this ward and one of the two seats was reserved for women. After the election, the petitioner and opponent No. 2 were declared elected. Subsequently, opponent No. 1 filed an election petition challenging the election of the petitioner. The learned Civil Judge, who heard the petition, found that 13 voting papers, which bore more than one stamp mark against the name of a candidate, had been wrongly rejected, as in his opinion the manner of stamping did not suggest that the voter in each of these cases intended to record more than one vote for the same candidate. His finding on this point has not been challenged before us. The learned Judge also found that one voting paper bearing No. 10 which had been issued to a voter from ward No. 2 had been found in the ballot box pertaining to ward No. 1. This voting paper had been rejected by the Returning Officer because it was not found in the ballot box for ward No. 2. It was admitted before the learned Judge that the ballot boxes for both the wards Nos. 1 and 2 had been kept in the same room. As the voting paper related to the same election, the learned Judge was of the opinion that this voting paper could not be rejected and it should be considered in counting the votes. The votes recorded on this voting paper were in favour of opponents Nos. 1 and 3. As a result of the recounting of the votes, including the votes recorded on this voting paper, the petitioner and opponent No. 1 were found to have polled equal number of votes. The learned

*Decided, September 12, 1964. Special Civil Application No. 37 of 1963.

Judge then drew lots and declared opponent No. 1 to be duly elected. He set aside the election of the petitioner.

Mr. Gadkari, who appears on behalf of the petitioner, has contended that the view taken by the learned Judge in regard to the voting paper No. 10 referred to above is wrong. It seems to us that his contention on this point must be accepted. Mr. Gadkari referred to r. 24 of the Bombay Village Panchayat Election Rules, 1959, which states that it shall be the duty of the presiding and polling officers and their assistants to see that votes are recorded with absolute secrecy, that only such persons as may be admitted to the polling booth under the rules are admitted thereto and that persons who have recorded their votes or against whom objections have been heard and upheld leave immediately. In the present case, it appears that the ballot boxes for both the wards Nos. 1 and 2 had been kept in the same room. But in para. 3 of the petition, it has been stated that there were separate booths and separate polling officers for each of these wards. That statement in the petition has not been denied. Having regard to the provisions of r. 24, it has been urged by Mr. Gadkari that the voter, to whom ballot paper No. 10 was issued, could not have himself gone to the wrong booth, i.e. to the booth for ward No. 1, and put the voting paper in the ballot box of that ward. It is, however, not necessary to speculate how this voting paper came to be placed in the ballot box for ward No. 1, because the election rules clearly contemplate that in counting the votes for any constituency, only the voting papers contained in the ballot boxes pertaining to that constituency should be taken into consideration.

Sub-rule (1) of r. 19 states that on the morning of the polling day, the presiding officers shall each be supplied with a ballot box with an aperture for receipt of voting papers, a copy of the sections of voters' list pertaining to their polling stations and a bound book or books of voting papers serially numbered in foil and counterfoils at the rate of one voting paper for each voter in the voters' list. Each polling station is, therefore, to be provided with a separate ballot box, with a copy of the section of voters' list pertaining to that polling station and a separate bound book or books of voting papers serially numbered at the rate of one voting paper for each voter in the voters' list. Separate voting papers are, therefore, provided for use at each polling station. Rule 22 states that every voter desirous of recording his vote shall attend for the purpose at the polling station for the ward for which he is entered in the voters' list. Clause (v) in r. 23 provides that the voter shall, after making his mark on the voting paper, fold the paper and insert the folded voting paper into the ballot box and without undue delay leave the polling room. It has been urged by Mr. Deshpande that these provisions are only directory and that failure to comply with them would not make the voting paper invalid. There might perhaps be some force in the argument, so far as the folding of the voting paper is concerned. But it seems to us to be an essential requirement of this rule that the voting paper must be put in the ballot box, for otherwise the secrecy of the voting cannot be maintained. It is also clearly implied in this rule that the voting paper must be put in the ballot box kept in the particular polling room. Sub-rule (1) of rule 30 states that the presiding officer shall, after the close of the poll, in the presence of any candidate or representative of a candidate, if present, seal the aperture of the ballot boxes and seal with his own seal and the seal of any candidate or representative, who may desire to affix his seal, each ballot box in use at the polling station. It is obvious that the candidate, who can be allowed to affix his own seal on a ballot box, must be a candidate from that particular constituency. Rule 32 provides for the inspection of the ballot boxes by the candidates and their agents, for the Returning Officer's satisfying himself that none of the boxes has in fact been tampered with, for the opening of the ballot boxes and taking out and counting the ballot papers contained therein and for the rejection of invalid voting papers. These rules suggest that in respect of votes recorded at a polling station, only the ballot papers contained in the ballot box kept at that polling station are to be

taken into consideration. Rule 33 mentions the grounds on which a ballot paper contained in a ballot box shall be rejected. This rule provides that a ballot paper contained in a ballot box shall be rejected if

“(b) it bears any serial number... different from the serial numbers... authorised for use at the polling station at which the ballot box in which it was found, was used.”

A ballot paper pertaining to any polling station must, therefore, be rejected if it is found in the ballot box of another polling station. It follows that a ballot paper contained in a ballot box for one constituency cannot be considered while counting votes of candidates from another constituency.

The voting paper No. 10 in this case was not found in the ballot box of ward No. 2. It could not, therefore, have been taken into consideration in counting the votes of candidates, who had stood for election from ward No. 2. The view taken by the learned Civil Judge on this point is, therefore, not correct.

If this voting paper is excluded as it must be, the position will be that the valid votes recorded in favour of the petitioner will be 33, while those recorded in favour of the opponent will be 32. The petition, therefore, succeeds. We set aside the order made by the Civil Judge setting aside the election of the petitioner and confirm the original declaration declaring the petitioner to be duly elected from ward No. 2. The petitioner to get his costs from opponent No. 1.

Petition allowed.

[NAGPUR BENCH]

Before the Hon'ble Mr. H. K. Chainani, Chief Justice, and Mr. Justice Paranjpe.

M/s. NARENDRASINGH BHASIN AND CO. v. S. N. LIMAYE.*

City of Nagpur Corporation Act (II of 1950), Sec. 374—Corporation alleging damages due to it for breach of contract—Whether Corporation can recover such damages by distress and sale of property from person alleged to have caused such breach of contract.

Section 374 of the City of Nagpur Corporation Act, 1948, does not empower the Corporation to recover damages or any other sum, which, according to the Corporation, is due to it on account of a breach of a contract entered into by the Corporation for carrying out a work on behalf of the Corporation, by distress and sale of the property of a person from whom such sum is alleged to be due.

Gajanan v. Municipal Commr.,¹ distinguished.

THE facts appear in the judgment.

G. S. Padhye, for the petitioner.

C. S. Dharmadhikari, for the respondents.

CHAINANI C. J. The petitioners are a partnership firm carrying on the business of building contractors in Nagpur. They entered into a contract with the Municipal Corporation of the City of Nagpur for constructing 100 quarters. They constructed 50 quarters. Thereafter disputes arose between the parties, on account of which the petitioners did not complete the work of the construction of the remaining 50 quarters. The Corporation, therefore, carried out the remaining part of the work departmentally. On August 28, 1962, the Corporation issued a notice to the petitioners under s. 374 of the City of Nagpur Corporation Act, 1948, informing the petitioners that the Corporation proposed to recover Rs. 8,225 from the petitioners on account of the non-fulfilment of the contract work of the construction of 100 quarters and that they proposed to do

*Decided, September 17, 1964. Special Civil 1 (1962) 64 Bom. L.R. 546.
Application No. 96 of 1963.

so by issue of a distress warrant as provided by s. 374 read with s. 154 of the Nagpur Corporation Act. The petitioners made certain representations against this notice, but these were of no avail. Subsequently, a distress warrant was also issued on February 7, 1963. The petitioners then filed the present special civil application in which they have prayed that the distress warrant dated February 7, 1963, should be quashed.

The question, which arises for determination in this application, is whether s. 374 of the City of Nagpur Corporation Act empowers the Corporation to recover damages or any other sum, which, according to the Corporation, is due to it on account of a breach of a contract entered into by the Corporation for carrying out a work on behalf of the Corporation, by distress and sale of the property of a person, from whom such sum is alleged to be due. Section 374 of the Act provides:

"In any case not expressly provided for in this Act or in any rule or bye-law made thereunder, any sum due to the Corporation on account of any charge, cost or costs, expenses, fees, rates or rent or any other account under this Act or under any such rule or bye-law, shall be recoverable by distress and sale of the movable property of the person from whom such sum is due, in the manner provided by Chapter XII."

This section, therefore, authorises the Corporation to recover in the manner specified any sum due to the Corporation on account of any charge, cost or costs, expenses, fees, rates or rent or any other account under this Act or under any rule or bye-law made under the Act. The sum which the Corporation claims on account of the breach of contract cannot be said to be of the nature of a charge, cost or costs, expenses, fees, rates or rent. It can only fall under the words "any other account under this Act or under any such rule or bye-law". The Corporation has no doubt the authority to enter into contracts for the purpose of carrying out certain works; but it will be difficult to hold that a sum, ascertained or unascertained, which the Corporation claims on account of a breach of contract, would fall under the words "any other account under this Act or under any such rule or bye-law." When a breach of contract is alleged, several questions of fact and law arise for consideration, such as, who broke the contract, when the breach took place, whether as a result of the breach, any loss has been sustained, and if so, how much. In the present case, for instance, the petitioners have alleged in the petition that it was the Corporation which was guilty of breach of the contract. They have also alleged in para. 14 of the petition that on account of the Corporation's failing to perform its part of the contract, they have suffered a loss of about Rs. 68,000. The Corporation had sent along with the notice issued to the petitioners a statement showing how the figure of Rs. 8,225 had been arrived at. Many of the items in this statement are not admitted by the petitioners. Disputed questions of fact and law will, therefore, have to be decided before it can be said that any particular sum is due to the Corporation. We do not think that it could possibly have been intended by the Legislature that in the absence of any express agreement between the parties, the Corporation should be the Judge in its own cause and determine who had broken the contract, the Corporation itself or the contractor, and also how much amount it should receive on account of damages from the contractor. In our opinion, therefore, s. 374 does not empower the Corporation to recover in the manner laid down in this section any amount, such as the one it proposes to recover in the present case.

On behalf of the Corporation, Mr. Dharmadhikari has relied upon *Gajanan v. Municipal Commr.*¹ In that case, the Corporation had given a block in a chawl belonging to the Corporation to the petitioner, who had executed an agreement of licence in favour of the Corporation for the period from February 3, 1960, to March 31, 1961. The petitioner vacated the block before the expiry of the period of the licence and handed it over to the Corporation. The Corporation then put the block to auction. Subsequently, the Corporation claimed

from the petitioner the amount of the loss which it had sustained, on account of the petitioner's vacating the block before the expiry of the period of the licence. Part of the claim related to the amount payable to the Corporation for the period the block remained unoccupied, while the rest of the claim was made as and by way of compensation, being the difference between the amount which the petitioner was liable to pay for the remaining period and the amount actually recovered from the new occupant. It was held that the amount claimed by the Corporation fell within the purview of s. 374, as being due on "any other account under this Act" within the meaning of s. 374. This case is clearly distinguishable from the one before us. In that case, the amount was claimed in respect of property of the Corporation, which had been given for use and occupation for a certain period on an agreement to pay a certain amount each month. The sum, which the Corporation claimed, was also an ascertained sum, being the difference between what the Corporation would have realized under the agreement from the petitioner, if he had continued in occupation for the whole period of the licence and the amount which actually it realised. This decision cannot, therefore, be relied upon in support of the contention that even in cases of breach of building contracts, such as the one in the present case, the Corporation could itself determine who had committed the breach of the contract and also assess the amount of damages, which might be due to it.

We, therefore, allow the petition and quash the distress warrant dated February 7, 1963, which the Corporation had issued in order to recover Rs. 8,225 from the petitioners. The petitioners should get their costs from the respondents.

Petition allowed.

FULL BENCH.

Before the Hon'ble Mr. H. K. Chainani, Chief Justice, Mr. Justice Tambe and Mr. Justice Chandrachud.

KEWALRAM GHANASHYAMDAS

v.

RAM MANOHARDAS KALYANDAS.*

Payment of Wages Act (IV of 1936), Secs. 15, 22—Suit for recovery of wages filed after period of limitation under s. 15(2) for making application to Authority or Authority refusing to condone delay in making application—Maintainability of suit.

A civil Court has no jurisdiction to entertain a suit by an employee against his employer for recovery of wages, after the expiry of the period of limitation prescribed by s. 15(2) of the Payment of Wages Act, 1936 for making an application to the Authority appointed under the Act, or after the Authority has refused to condone the delay in making such an application.

Special Civil Application No 879 of 1956, disapproved.¹

Bhagwat Rai v. Union of India,² approved.

THE facts appear in the judgment.

A. G. Kripalani and L. A. Kripalani, for the petitioners.

K. B. Sukthankar, for the opponent.

R. B. Kotwal, Government Pleader, appears.

CHAINANI C.J. The facts in this case are briefly these. On December 28, 1956, the respondent made an application to the Authority appointed under the Payment of Wages Act for recovering wages for the period August 1953

*Decided, October 23, 1964. Civil Revision on September 3, 1956 (Unrep.).
Application No. 411 of 1963. 2 [1953] Nag. 433.

¹ Decided by Chagla C.J. and Tendolkar J..

to December 1955, which according to him had not been paid to him by the petitioners. Under the first proviso to sub-s. (2) of s. 15 of the Act the application has to be made to the authority within one year from the date on which the payment of wages was due to be made. The second proviso permits an application to be made after the period of one year when the applicant satisfies the authority that he had sufficient cause for not making the application within such period. The authority refused to condone the delay in making the application for the period prior to December 1955. The authority directed the petitioners to pay to the respondent his wages for the month of December 1955, leave wages and notice pay. The respondent did not appeal against this order. On January 2, 1958, the respondent filed a suit in the Court of Small Causes, Bombay, for recovering the wages alleged to have been due to him for the period from December 1, 1954, to November 30, 1955. The applicants denied the respondent's claim. They also contended that the Small Causes Court had no jurisdiction to entertain the suit by reason of s. 22 of the Payment of Wages Act. This contention was accepted by the trial Judge and the suit was dismissed. An application was then made to a Bench of the Small Causes Court under s. 38 of the Presidency Small Causes Courts Act. Relying on the observations made in Special Civil Application No. 879 of 1956¹ the Bench of that Court held that the suit filed by the respondent was maintainable. The decree passed by the trial Court dismissing the suit was, therefore, set aside and the suit was remanded to the trial Court. Thereafter the petitioners filed the present civil revision application, in which it has been contended that the view taken by the Bench of the Court of Small Causes is erroneous. This civil revision application came up for hearing before a Division Bench of this Court, which decided to refer it to a Full Bench.

The question which arises for consideration by the Full Bench is as under :

"Whether a Civil Court has jurisdiction to entertain a suit by an employee against his employer for recovery of wages, after the expiry of the period of limitation prescribed by sub-section (2) of section 15 of the Payment of Wages Act, 1936 for making an application to the Authority appointed under this Act, or after the Authority has refused to condone the delay in making such an application."

Sub-section (1) of s. 15 of the Payment of Wages Act states that the State Government may appoint one or more persons to be the authority or authorities to hear and decide for any specified area all claims arising out of deductions from wages or delay in payment of wages to persons employed or paid in that area. Sub-section (2) of this section, in so far as it is material, provides :

"Where contrary to the provisions of this Act any deduction has been made from the wages of an employed person, or any payment of wages has been delayed, such person... may apply to such authority for a direction under sub-section (3)..."

Provided that every such application shall be presented within one year from the date on which the deduction from the wages was made or from the date on which the payment of the wages was due to be made, as the case may be:

Provided further that any application may be admitted after the said period of one year when the applicant satisfies the authority that he had sufficient cause for not making the application within such period."

Sub-section (3) states that where any application under sub-s. (2) is entertained, the authority shall hear the applicant and the employer or other person responsible for the payment of wages, or give them an opportunity of being heard, and after such further inquiry, if any, as may be necessary, may direct the refund to the employed person of the amount deducted or the payment of delayed wages. Sub-section (5) provides that any amount directed to be paid under this section may be recovered by the authority as an arrear of land revenue. This section, therefore, provides for the constitution of a special Tribunal to hear and decide all claims arising out of deductions from wages

1 Decided by Chagla C.J. and Tendolkar J. on September 3, 1956 (Unrep.).

or delay in payment of wages, as defined in the Act. The section also lays down that an application under this section must be made to the authority within one year from the date on which the deduction from the wages was made or from the date on which the wages were payable. The application may be made even after the expiry of one year, provided the employee satisfies the authority that he had sufficient cause for not making the application within such period.

Sub-section (1) of s. 17 provides for an appeal against an order made by the authority. Sub-section (2) of this section states that save as provided in sub-s. (1), any order dismissing either wholly or in part an application made under sub-s. (2) of s. 15, or a direction made under sub-s. (3) or sub-s. (4) of that section shall be final. This provision, therefore, gives finality to the order made by the authority under s. 15, unless it is set aside or modified in appeal under s. 17. Section 22 is in the following terms:

"22. No court shall entertain any suit for the recovery of wages or of any deduction from wages in so far as the sum so claimed—

(a) forms the subject of an application under section 15 which has been presented by the plaintiff and which is pending before the authority appointed under that section or of an appeal under section 17; or

(b) has formed the subject of a direction under section 15 in favour of the plaintiff; or

(c) has been adjudged, in any proceeding under section 15 not to be owned to the plaintiff; or

(d) could have been recovered by an application under section 15."

The marginal note to this section is: "Bar of suits." This section, therefore, ousts the jurisdiction of a civil court in respect of the matters specified therein. It cannot, therefore, be said that s. 15 provides a remedy in addition to that available under the ordinary law. Clause (a) bars a suit when the claim made under s. 15 is under investigation either before the authority or in appeal. Clause (b) does the same when the employee has succeeded in his application and has obtained a direction in his favour. In view of cl. (c) no suit can lie when in the proceeding under s. 15 it is found that no sum is due to the employee. Clause (d) bars a suit when the sum claimed could have been recovered by an application under s. 15. The question, which we have to determine, is in regard to the interpretation of this cl. (d).

In construing this clause it is necessary to bear in mind its phraseology. Omitting cls. (a), (b) and (c), the section reads:

"No Court shall entertain any suit for the recovery of wages or of any deduction from wages, in so far as the sum so claimed... could have been recovered by an application under section 15."

The significant words are "sum so claimed... could have been recovered by an application under section 15." The emphasis seems to be more on the mode of recovery specified in this clause, that is, by an application under s. 15 rather than on the time when the remedy is resorted to. If, therefore, the sum claimed could be or could have been recovered by an application under s. 15, a suit for the recovery of the same will be barred. Under the first proviso to sub-s. (2) of s. 15, an application under this section must be made within one year from the date on which the wages became due for payment or the date on which they are alleged to have been wrongfully deducted. It has not been disputed before us that during this period of one year the jurisdiction of the Civil Court is ousted. The same will be the position if the employee makes the application after one year and shows satisfactory cause for the delay in making it. It is difficult to see why the position should be different merely because of laches or negligence on the part of the employee in either not making an application to the authority or making it after the prescribed time but without there being a sufficient cause for not making it in time. His failure to take advantage of the special remedy provided cannot affect the jurisdiction of the Court. It seems to us, therefore, that if it was possible for the employee to recover the

amount by making an application for its recovery under s. 15 within the prescribed time before he institutes the suit, the Court will not be competent to entertain the suit. If the employee delays the making of the application until the period of limitation has expired, and if he is unable to show sufficient cause for the delay, it cannot be said that he could not have recovered the amount by an application under s. 15.

It has been urged that the word "recovered" indicates that cl. (d) has reference to the stage of recovery referred to in sub-s. (5) of s. 15, that is, when the amount directed to be paid under sub-s. (3) of s. 15 is to be recovered as an arrear of land revenue. This argument does not seem to be correct. The question of recovering the amount as an arrear of land revenue can only arise after a direction has been made under sub-s. (3) of s. 15. Clause (b) in s. 22 bars a suit when such a direction has been made. Apart from the fact that sub-s. (5) does not provide for a separate application for realising the amount directed to be paid, no suit can lie after such a direction has been made, whether the amount is or is not recovered. Clause (d) would, therefore, become redundant if the above view is accepted.

Having regard to the context, the words "sum so claimed... could have been recovered by an application under section 15," in our opinion mean "could have made an application for recovery of the sum so claimed under section 15." The test for determining whether a suit can lie, therefore, is not only whether on the date of the suit an application can be made to the authority under s. 15, but also whether such an application could have been made before the institution of the suit. The jurisdiction of the Civil Court to entertain a suit will not consequently depend upon the choice of the employee as to whether he should or should not apply to the authority. The Civil Court's jurisdiction will be ousted if the application could have been made to the authority before the suit is filed. If, therefore, an employee does not apply to the authority for recovering his wages within one year or if he applies to the authority after one year but fails to satisfy the authority that he had sufficient cause for not making the application within one year, he will not be able to maintain a suit for the same purpose.

The view, which we are taking, seems to be in accordance with the intention of the Legislature. The Act provides for the constitution of a special tribunal for deciding claims in regard to wages. The proceedings before the tribunal are cheap, because by reason of s. 15A the applicant is not liable to pay any Court-fees. The limitation of one year has been prescribed for making applications under s. 15, so that claims in regard to wages may be made and decided expeditiously. If, however, for any good reason an employee is not able to make the application within one year, he may do so after the expiry of this period by satisfying the authority on this point. Having provided a cheap and expeditious remedy and having constituted a special tribunal for this purpose, the Legislature intended that it should have exclusive jurisdiction in respect of matters, which it could entertain. Subject to appeal, finality has, therefore, been given to the decisions of the authority, while s. 22 deprives the Civil Court of its jurisdiction to deal with such matters.

Mr. Sukthankar has strongly relied on the following observations of Chagla C.J. in Special Civil Application No. 879 of 1956 decided on September 3, 1956:

"Now, as has been often pointed out, the Payment of Wages Act was enacted in order to confer upon the workers certain important rights. A quick and expeditious remedy was provided for recovering wages and a special tribunal was set up. But it would be entirely erroneous to suggest that any provision under the Payment of Wages Act was in derogation of the ordinary rights of employees. If an application could be made under section 15, then undoubtedly a civil court is debarred from entertaining a suit in respect of that cause of action. But in order that an application could be made under section 15, not only must the application refer to the subject matter referred to in that section, but the application must be within the time also mentioned in that section. In

other words, if an employee wishes to avail himself of this expeditious remedy and wishes to go before the special tribunal, he must go within one year. But if he fails to do so, it does not follow that he is debarred from going to the civil court within the period of limitation provided by the limitation Act to recover his wages."

With respect, it may be pointed out that s. 22 in terms takes away the remedy available to an employee under the ordinary law to the extent specified in the section. This section is, therefore, to the extent specified therein, in derogation of the ordinary rights of employees to approach a Civil Court. Clause (d) does not also say, "If an application could then be made under section 15." The words used are: "the sum claimed... could have been recovered by an application under section 15." If, therefore, when a suit is filed the Court finds that at any time before the institution of the suit it was possible for the employee to make an application for the recovery of the wages claimed under s. 15, it will have no jurisdiction to entertain the suit. With respect, therefore, we do not agree with the above observations. They also appear to be *obiter*, as they were not necessary for decision of the particular case, before the Division Bench.

In *Bhagwat Rai v. Union of India*,² a Division Bench of the Nagpur High Court has taken the same view as we are inclined to take. It was held in that case that s. 22(d) of the Payment of Wages Act excludes the jurisdiction of a Civil Court to entertain a claim, which could have been recovered by an application under s. 15 of the Act, that this exclusion is absolute and does not depend on the choice of the claimant and that the jurisdiction of the Civil Court is not revived by his omission to make an application under s. 15 within the time allowed by law.

The reply to the question, which we have formulated for our consideration, will, therefore, be in the negative. The matter may now be placed before a Division Bench for further orders.

APPELLATE CIVIL

Before Mr. Justice Chitale.

SHRI ADINATH TIRTHANKAR JAIN MANDIR

v.

SHRI SHANTAPPA DADA MADNAIK.*

Bombay Public Trusts Act (Bom. XXIX of 1950), Secs. 79, 80, 22A, 70A—Person not party to proceedings under Act finding his property registered as trust pursuant to such proceedings—Whether person precluded from filing suit for declaration of his title to property.

A person who was not a party to the proceedings under the Bombay Public Trusts Act, 1950, but finds that his property is registered as trust property pursuant to the said proceedings, is not precluded under ss. 79 and 80 of the Act from filing a suit for declaration of his title to such property in a Civil Court.

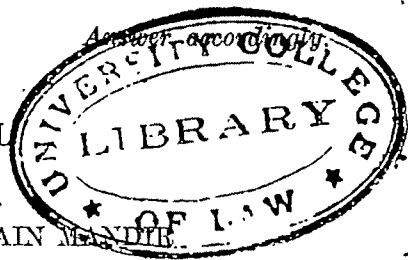
A Hindu widow who had inherited her husband's property donated it to a Jain Mandir by a gift-deed executed in 1945. After her death the plaintiff as one of the reversioners filed a suit for partition and separate possession of his share in the property on the ground that the widow who had a limited estate had no right to donate the property. On the question whether the Civil Court had jurisdiction to entertain and try the suit in view of s. 80 of the Bombay Public Trusts Act, 1950:—

² [1953] Nag. 433.

*Decided, June 20, 1964. Appeal from order No. 271 of 1962 (with A.O. No. 302 of 1962), against the decision of the Assistant Judge at

B.L.R.—4

Kolhapur, in Civil Appeal No. 116 of 1960, reversing the decree passed by B. P. Talathi, Civil Judge, Junior Division, at Jaysingpur, in Reg. Civil Suit No. 14 of 1957.



Held, that the question for determination in the suit was whether the widow had the authority to create the trust,

that the said question was not covered by s. 79 of the Act, and

that, therefore, the suit was not barred under s. 80 read with s. 79 of the Act.

Prataprao Marutao Pangavane v. Raje Lazmanrao Vyankatrao Deshmukh,¹ agreed with.

Shirgonda Kalgonda Patil v. Amritrao Anandrao Bhooperao,² distinguished.

Taraben Baldevdas v. Charity Commr.,³ *Gurusiddappa v. Miraj Education Society*,⁴ and *Kuberbbhai v. Purshottamdas*,⁵ referred to.

THE facts appear in the judgment.

N. S. Shrikhande, for appellants-defendants Nos. 1 to E.

K. B. Sukthankar, for respondent No. 1-plaintiff.

K. J. Abhyankar, for respondent No. 5-defendant No. 4.

CHITALE J. These are appeals by the trustees of 'Shri Adinath Tirthankar Jain Mandir' and the Charity Commissioner against the order of remand passed by the learned Assistant Judge, Kolhapur.

These appeals arise in this way. The suit property, which is land, originally belonged to one Devappa. After the death of Devappa and his son Annappa, Devappa's property was inherited by his widow Ratnabai. She donated the suit land to 'Shri Adinath Tirthankar Jain Mandir,' which is defendant No. 1 in the present suit. The gift-deed was executed on July 23, 1945. After the execution of that gift-deed Ratnabai died sometime later during the same year. The plaintiff alleges that he and defendants Nos. 2 to 4 are reversioners to the estate of Annappa. The plaintiff filed the present suit for partition and separate possession of his one-fourth share in the suit land. According to the plaintiff, Ratnabai as a widow in the joint Hindu family had a limited estate and she had no right to donate the suit land to the said Mandir. On these allegations, partition and separate possession of one-fourth share is claimed by the plaintiff. The Charity Commissioner is defendant No. 5 in the present suit.

The suit was contested on various grounds, one of them being that the Civil Court has no jurisdiction to entertain and try the present suit in view of s. 80 of the Bombay Public Trusts Act, 1950 (hereinafter referred to as "the Act"). The trial Court upheld that contention and dismissed the plaintiff's suit. Against this decision, the plaintiff preferred an appeal to the District Court, Kolhapur. The learned Assistant Judge, who heard the appeal, held that the present suit is not barred under s. 80 of the above-said Act. He, therefore, set aside the decree passed by the trial Court and remanded the suit to the trial Court for disposal on merits. It is against this decision, that Appeal from Order No. 271 of 1962 is preferred by the trustees of the above-said Mandir. Appeal from Order No. 302 of 1962 is preferred by the Charity Commissioner against the same decision.

Mr. Shrikhande, who appears for the trustees, and Mr. Abhyankar, who appears for the Charity Commissioner, both contend that the view taken by the trial Court is correct and that of the lower appellate Court is wrong. Reliance is placed on ss. 79 and 80 of the Act. It is urged that the question in the present suit is whether the suit land is the property of the plaintiff and defendants Nos. 2 to 4, or whether it is the property of a public trust in the name of defendant No. 1. This question must be decided by the Deputy or Assistant Charity Commissioner or the Charity Commissioner under s. 79, hence jurisdiction of the Civil Court is barred under s. 80 of the Act. I am unable

1 (1962) First Appeal No. 353 of 1959, decided by Patel and K. K. Dessi JJ., on November 19, 1962 (Unrep.).

2 (1960) Civil Revision Application No. 483 of 1960, decided by Gokhale J., on August

23, 1960 (Unrep.).

3 (1955) 57 Bom. L.R. 1060.

4 (1960) 63 Bom. L.R. 312.

5 (1961) 2 Guj. L.R. 564.

to accept this contention. Considering the allegations in the plaint in the present suit, it is clear that the question raised by the present suit is whether the author of the alleged trust, viz. Ratnabai, had the capacity to create the trust in question. According to the plaintiff, Ratnabai had no authority to create the trust, hence no trust exists in the eyes of law. That is the contention raised by the present suit. Thus the question for determination in these appeals is whether the above-said question, viz. whether Ratnabai had the authority to create the trust in question, is covered by s. 79 of the Bombay Public Trusts Act. It is urged by Messrs. Shrikhande and Abhyankar that under the Act, the Deputy or Assistant Charity Commissioner or the Charity Commissioner has to decide whether a public trust exists or not and while deciding that they have also jurisdiction to decide the above-said question. It is further urged that not only they have jurisdiction to decide that, but they are bound to decide it while arriving at the finding whether a public trust exists or not. In other words, while deciding whether a public trust exists or not, all other incidental questions could be decided, in fact they have got to be decided, by the Deputy or Assistant Charity Commissioner or the Charity Commissioner. In support of this contention, reliance is placed on a decision of this Court, viz. *Taraben Baldevdas v. Charity Commr.*¹ As pointed out by the learned appellate Judge, the question that arises in these appeals was not decided in that case and it was expressly left open. Reference is also made to *Gurusiddappa v. Miraj Education Society*.² In the first place, in that case the question that arose was whether the suit was barred, because the consent of the Charity Commissioner was not obtained, as provided by s. 50 of the Act. The question that arises in these appeals did not directly arise in that case. Mr. Justice Naik took the view that it is only in the cases of disputes arising out of administration and management of public trusts that the Charity Commissioner comes into the picture and s. 50 of the Act provides that the Charity Commissioner or with his consent two or more persons interested in the trust can file a suit for any of the various reliefs set out in sub-cl. (a) to (h) of cl. (iii) of s. 50. With these observations Mr. Justice Naik held that the claim in that suit did not fall within the scope of the said section. Messrs. Abhyankar and Shrikhande rely on a decision of Mr. Justice Gokhale in *Shirgonda Kalgonda Patil v. Amritrao Anandrao Bhoperao*.³ Some of the observations in that decision seem to favour the contention advanced by Messrs. Abhyankar and Shrikhande. It is, however, important to note that in that case an application under s. 72 of the Act was filed in the District Court. The petitioners before Mr. Justice Gokhale having come to know of that application under s. 72 of the Act applied to the District Court praying that they should be joined as parties to that application. That prayer was rejected and against that order a revision application was preferred to this Court. Thus, in that case the petitioners themselves wanted to have their claim adjudicated under the provisions of the Bombay Public Trusts Act and Mr. Justice Gokhale held that if a person feels aggrieved by the decision under the Act, he is entitled to apply to the District Court under s. 72 of the Act and have his claim adjudicated. But the point that arises in these appeals before me is whether a person, who was not a party to the proceedings under the Bombay Public Trusts Act, but finds that his property is registered as trust property pursuant to the said proceedings, is precluded from filing a suit for declaration of his title in a Civil Court in view of ss. 79 and 80 of the Act. In my opinion, the decision by Mr. Justice Gokhale can be distinguished on facts; in that case persons concerned wanted to be joined as parties to the proceedings under the Act.

Reliance is also placed on a decision of Mr. Justice Shelat, as he then was, in *Kuberbbhai v. Purshottamdas*.⁴ Here again it must be pointed out that the

1 (1955) 57 Bom. L.R. 1069.

2 (1960) 63 Bom. L.R. 312.

3 (1960) Civil Revision Application No.

483 of 1960, decided by Mr. Justice Gokhale, on August 23 1960 (Unrep.).

4 (1961) 2 Guj. L.R. 564.

plaintiffs in that case did file an application before the Deputy Charity Commissioner. That application was rejected, an appeal to the Charity Commissioner against that decision was also dismissed, but the plaintiffs did not pursue the further remedy by way of an application under s. 72 of the Act. Thus there was a decision in proceedings under the Bombay Public Trusts Act against the plaintiffs in that case. Mr. Justice Shelat at page 567 observes that inquiry under s. 19 of the Act is by no means an administrative or an executive inquiry, the inquiry is not only for the purpose of registration, but it involves adjudication of questions, viz. whether a trust exists, if a trust exists whether it is a public trust and what properties belong to that trust. Mr. Justice Shelat referred to the various provisions of the Act and then came to the conclusion that the Act provided certain remedies to a person affected by a decision in a proceeding under the Act, i.e. the Bombay Public Trusts Act. In this respect he referred to s. 22A of the Act. With regard to ss. 79 and 80 of the Act Mr. Justice Shelat observes:—

“...It would also appear that section 79 had to be inserted to make clear what section 80 provides. Section 79 therefore expressly provides that the Deputy or the Assistant Charity Commissioner or the Charity Commissioner shall have power to decide matters set out therein and having conferred that power on those officers, the Legislature by section 80 debars the jurisdiction of a Civil Court to decide or deal with any question in respect of which the decision or the order of such officer has been made final and conclusive under section 79(2). That was necessary because under section 9 of the Code of Civil Procedure, in spite of sections 19, 20 and 79, a civil Court would still have jurisdiction to entertain matters involving such questions. That jurisdiction under section 9 of the Code of Civil Procedure has been now taken away by the provisions of section 80 of the Act. It would also appear that whereas section 19 confers power upon the Assistant or the Deputy Charity Commissioner to ascertain the question as to whether a trust exists or not and if so, whether it is a public trust or whether a particular property is the property of such trust in an inquiry for registration, section 79 in express terms and with a view to avoid any possible ambiguity confers power upon these officers to decide the questions set out therein...”

Relying on these observations, it is urged that the present suit is barred under ss. 79 and 80 of the Act. With regard to s. 22A Mr. Justice Shelat observes (p. 571):—

“...Therefore, any person, not merely a trustee, can apply under section 22A for a change in the entry on a matter or a particular left out from consideration in a previous inquiry under section 19. If an order is passed under section 22A, and an applicant is aggrieved, he has the right of appeal under section 70. If he is dissatisfied by an order under section 70, a right has been conferred upon him to apply under section 72 to the District Court and thereafter in appeal to the High Court. Such a right is confined to the two questions set out in section 79(1). Therefore, there is a complete code provided in the Act for dealing with matters set out in sections 18 and 19 and recourse must be had to the procedure laid down in the Act...”

I may point out here that the scope of s. 22A is limited. Section 22A reads thus:—

“If at any time after the entries are made in the register under section 21 or 22 it appears to the Deputy or Assistant Charity Commissioner that any particular relating to any public trust, which was not the subject-matter of the inquiry under section 19, or sub-section (3) of section 22, as the case may be, has remained to be enquired into, the Deputy or Assistant Charity Commissioner, as the case may be, may make further enquiry in the prescribed manner, record his findings and make entries in the register in accordance with the decision arrived at or if appeals or applications are made as provided by this Act, in accordance with the decision of the competent authority provided by this Act. The provisions of sections 19, 20, 21 and 22 shall, so far as may be, apply to the inquiry, the recording of findings and the making of entries in the register under this section.”

From the wording of this section it is clear that s. 22A deals with a case,

where any particular relating to a public trust was not inquired into at the initial inquiry. The wording of s. 22A does not indicate that if a particular property is registered as property belonging to a public trust after inquiry under s. 19, further inquiry under s. 22A can be made merely because someone, who was not a party to the proceedings under s. 19, sets up a title to that property. The words 'which was not the subject-matter of the inquiry under section 19' are material. If after inquiry under s. 19 a particular property is held to be public trust property, it is difficult to see how it can be said that the title to that property is a particular, which was not the subject-matter of the inquiry under s. 19. Moreover, under s. 22A the Deputy or Assistant Charity Commissioner has discretion, he can refuse to make further inquiry. It is also important to note that the scope of the inquiry under s. 72 of the Act is a limited one, as is clear from the wording of s. 72. It is also pertinent to note that there is no provision for issuing a public notice in any of the proceedings under the Act. In view of all this, it cannot be said that s. 22A provides a remedy for a person who is aggrieved by the findings at an inquiry under ss. 18 and 19 of the Act, but was not a party to the proceedings under the said sections. In this respect reference is also made to s. 70A of the Act. Relying on s. 70A, it is urged that any aggrieved person, though not a party to the proceedings under ss. 18 and 19, may apply to the Charity Commissioner and have his claim adjudicated. It is, however, important to note that the remedy provided by s. 70A is not an adequate remedy, because under s. 70A the Charity Commissioner is not bound to re-open the inquiry. It merely confers discretion on the Charity Commissioner to re-open the inquiry if he finds it expedient to do so. It cannot be said that question of title of persons, who were not parties to proceedings under ss. 18 and 19 of the Act, was left merely to the discretion of the Charity Commissioner and that they would not have an unfettered right to have their title declared. Mr. Justice Shelat observes (p. 571) :

"...This is made clear by the provisions of section 80 which bar the jurisdiction of a civil Court in the two categories of matters, viz., (1) those questions left under the Act to be decided by the Assistant or the Deputy Charity Commissioner under sections 18 and 19, and (2) those which the Act has made final and conclusive under section 79(1) and section 21(2). The plaintiffs having had recourse to section 70 and not having followed up their remedy under section 72 are bound by the decision of the Charity Commissioner in their appeal before him."

The last observation of Mr. Justice Shelat will indicate that his decision was based upon the fact that the plaintiffs in that suit did not avail themselves of the remedy provided by s. 72 of the Act. Hence, in my opinion, the decision of Mr. Justice Shelat does not support the contention advanced in these appeals.

Here I may refer to the decision of this Court in *Prataprao Maruttrao Pangavane v. Raje Laxmanrao Vyankatrao Deshmukh*.⁵ In the judgment Mr. Justice Patel observes:—

"...It is difficult, however, to assert that the Charity Commissioners have got exclusive jurisdiction where titles of third parties may be involved. While requiring them to decide statutory issues, if finality were to be attached to certain matters, we would be permitting them indirectly to decide very complicated and important questions of facts of heredity and legitimacy as well, which, in all probability, in view of the wording of section 19, may not have been intended. Even apart from this, the procedure, prescribed is also a summary procedure, which is highly unsuited to any inquiry about the titles of third persons...."

With respect, I agree with these observations. It is pointed out that these observations are *obiter*. Even so, the view expressed in these observations seems to be a considered view and I am in agreement with that view. As pointed

⁵ (1962) First Appeal No. 353 of 1959, November 19, 1962 (Unrep.).
decided by Patel and K. K. Desai JJ., on

out by Mr. Justice Patel, even though s. 70A provides some sort of remedy to a person aggrieved by an inquiry under ss. 18 and 19 of the Act to which that person was not a party, that remedy seems to be inadequate. Unless the intention of the Legislature to exclude the jurisdiction of the Civil Court to decide title of persons, who are not parties to the proceedings of the inquiry under ss. 18 and 19 of the Act, is clear, either by an express provision or by necessary implication, it cannot be held that suits like the present one are barred under s. 80 read with s. 79 of the Act. It is urged that questions like the one that arises in these appeals may arise during inquiries under the Act. It is possible that such questions may arise, but the jurisdiction of the Civil Court cannot be held to be barred merely because such questions may arise during inquiries under the Act. Considering ss. 79 and 80 and other relevant provisions of the Act, I am of the opinion that the question that arises in the present suit, viz. whether Ratnabai, the author of the trust, was capable of creating the trust in question, cannot be said to be covered by s. 79 of the Act. In any case, the plaintiff in the present suit was not a party to the proceedings under s. 19 of the Act. By the present suit the plaintiff wants to establish his title to one-fourth share in the suit property on the ground that Ratnabai had no authority to gift the property in question and create a trust. For reasons indicated above, I am unable to hold that the present suit is barred under s. 80 read with s. 79 of the Bombay Public Trusts Act, 1950.

The learned appellate Judge has in a careful and considered judgment held that the present suit is not barred by s. 80 of the Act. That view seems to be correct.

I, therefore, confirm the order passed by the lower appellate Court and dismiss these appeals. Costs will be costs in the cause.

Appeals dismissed.

CRIMINAL APPELLATE.

Before Mr. Justice Tulzapurkar.

AMBALAL CHIMANLAL CHOKSHI v. H. R. JOKHI.*

Defence of India Rules, 1962 [Part XIA. Gold Control] Rules 126L, 126P—Constitution of India, Art. 20(3)—Search Authorization issued under r. 126L whether amounts to accusation of an offence—Whether r. 126P(1)(ii) attracted if person fails to furnish information when interrogated under r. 126L(4).

Any step or proceeding including a Search Authorization taken under rule 126L of the Defence of India Rules, 1962 (Part XIA. Gold Control) is of an exploratory nature for the purpose of ascertaining whether any contravention of the Rules has been committed or not and is not a step or proceeding amounting to an accusation of an offence.

In a Search Authorization issued under r. 126L of the Defence of India Rules, 1962 the mere use of the present tense to the effect "that gold...is secreted" and the further fact that the same was authorised to be seized, will not convert the Search Authorization into any accusation of an offence.

Bhagwandas v. Union of India,¹ referred to.

The penal provisions of rule 126P(1)(ii) of the Defence of India Rules, 1962, will be attracted if a person fails to furnish information by omitting to make statements when he is interrogated by the officer concerned under r. 126L(4) of the Rules.

THE facts appear in the judgment.

*Decided, September 22, 1964. Criminal Revision Application No. 716 of 1964, against the order passed by V. M. Gehani, Additional

Chief Presidency Magistrate, VIII Court Esplanade, Bombay, in Case No. 62/W of 1964 I [1961] A.I.R. Madras 47.

Poras Mehta, with *Krishnamurthi* and *H. G. Mehta*, instructed by *Gagrat & Company*, for the applicant-accused.

V. H. Gumaste, Additional Government Pleader, for the State.

Adi P. Gandhi, for the complainant.

TULZAPURKAR J. This revisional application raises a question of inadmissibility of certain statements made by the petitioner-accused to the Central Excise Officers, on the ground of immunity claimed under sub-cl. (3) of art. 20 of the Constitution of India. The relevant facts giving rise to the objection taken by the petitioner-accused to the admissibility of his certain statements under art. 20(3) of the Constitution may be stated: The petitioner Ambalal Chimanlal Chokshi is being prosecuted, on a complaint being filed on December 19, 1963, by the respondent (Shri H. R. Jokhi, Assistant Collector of Central Excise, Marine and Preventive Division, Collectorate of Central Excise, Bombay), for an offence under Rule 126 P of Part XII-A of the Defence of India Rules, 1962 (which Part contains "Gold Control Rules") and s. 135(b) of the Customs Act, 1962, (Act LII of 1962). The allegation made against the petitioner is that he had acquired possession and was concerned in carrying, removing, harbouring, keeping, concealing and otherwise dealing with smuggled gold and that he had not made any declaration about the said gold and had no permit as required under the Gold Control Rules. Before the complaint was filed on December 19, 1963, by the respondent for the alleged offence said to have been committed by the petitioner, on April 5, 1963, a written Search Authorization (exh. A) under Rule 126 L(2) of the Gold Control Rules was issued by Superintendent Wagh of the Central Excise, Central Intelligence Unit, Bombay, in favour of Shri V. B. Rane, Deputy Superintendent of Central Excise (Preventive and Marine Division, Bombay), authorising the latter officer to enter and search certain premises being the flat of the petitioner in building called 'Neeta' at 90, Marine Lines, behind Marine Lines Railway Station, Bombay, for the said gold and if found, to seize and produce the same before the Superintendent and in pursuance of this Search Authorization, the aforesaid premises of the petitioner were raided and during the course of such raid some gold was found on a ledge outside the balcony of one Kotak on the first floor and a bag containing currency notes and some other documents was found from the balcony of one Modi by the side of the balcony of the petitioner on the second floor. A search of the petitioner's flat was also conducted and some documents and other property along with the aforesaid gold and the bag of currency notes were seized under a *Panchnama* (exh. O), which was made at the spot. It appears that the petitioner was interrogated by Shri Rane, Deputy Superintendent in respect of the said gold as also the bag of currency notes at the time of making of the *Panchnama* and the statements made by the petitioner were incorporated in the *Panchnama*. It may be stated at this stage that as regards the gold (12 slabs) found outside the balcony of Kotak on the first floor, the petitioner stated that the same did not belong to him or anybody in his house or family and that he did not know anything about it; while regarding the currency notes found in a bag, which was recovered from the balcony of Modi, which was by the side of the balcony of the petitioner, the petitioner claimed that the money belonged to him together with the other contents of the bag and he further stated that the cloth bag had been put by him in his neighbour's flat across the balcony and without the knowledge of Mr. Modi when the officers went for search. Later on the Central Excise Officers summoned the petitioner and detailed statement of his was recorded by Deputy Superintendent Parekh under instructions of Superintendent Wagh, who interrogated the petitioner under the powers vested in them by law. With regard to the gold and the bag containing currency notes, the petitioner gave his version in his detailed statement recorded on this occasion, which was almost similar to that which he had given at the time of making of the *Panchnama*.

After completing the investigation, the respondent filed a complaint on December 19, 1963, against the petitioner for the alleged offences mentioned above, being Case No. 62/W of 1964, the trial whereof is being conducted by the learned Additional Chief Presidency Magistrate, 8th Court, Esplanade, Bombay. After fully setting out the manner in which the search of the petitioner's premises was carried out as also the circumstances in which the gold and the bag containing the currency notes were recovered during the raid and the statements made by the petitioner in connection therewith, the respondent categorically averred in his complaint as follows:

"In view of all the premises aforesaid the complainant says that it was the accused who threw or caused to be thrown the said gold in the two bags into the said shaft with a view to avoid the finding and seizure of the said gold in his flat by the Central Excise Officers just as he admittedly threw the theli (Bag) containing the currency notes into the flat of Shri C. U. Mody with a view to avoiding the finding and seizure of the said currency notes in his flat by the said officers, and the complainant accordingly prays that the necessary process be issued against the accused and that the accused be dealt with according to law."

It may be stated that the raid was not for the purpose of seizing the currency notes but admittedly was for the purpose of seizing gold in respect whereof contravention of Gold Control Rules and Customs Act was apprehended and it will appear clear from the aforesaid averments made in the complaint that though the petitioner-accused had disowned any connection with the gold that was found on a ledge outside the balcony of Shri Kotak, the respondent sought to establish petitioner's connection with that gold or rather his possession thereof in contravention of Gold Control Rules, by relying upon the admitted conduct on the part of the petitioner of throwing the bag containing currency notes into the flat of Shri Modi (which currency notes were claimed by him as his), thus rendering highly probable a similar conduct on his part in connection with the gold which he disowned. At the trial, therefore, the statement made by the petitioner and recorded in the *Panchnama* (exh. O) as well as the portions of his detailed statement recorded by Deputy Superintendent Parekh, were sought to be proved by tendering the same in evidence and the petitioner objected to the admissibility of these statements. A three-fold objection was raised by counsel on behalf of the petitioner before the learned Magistrate. In the first place, it was contended that these statements, which had been obtained from the petitioner under compulsion at a time when he was accused of offences under the Gold Control Rules and Customs Act, could not be used in evidence against him and were barred under art. 20(3) of the Constitution of India and the petitioner was entitled to claim immunity under the said provisions of the Constitution in respect of those statements and in this behalf reliance was placed upon the recitals and the operative part of the Search Authorization dated April 5, 1963, as well as the recitals in the *Panchnama* to show that at the material time the petitioner was accused of commission of offences under the Gold Control Rules and Customs Act. Secondly, it was contended that the Central Excise Officers, who recorded these statements were police officers, within the meaning of s. 25 of the Evidence Act and the statements made to them, therefore, would not be admissible and in that behalf reliance was placed upon a decision of the Supreme Court reported in *Raja Ram v. State of Bihar*¹ in which an Excise Officer under the Bihar and Orissa Excise Act, was held to be a police officer within the meaning of s. 25 of the Evidence Act. Thirdly, it was urged that the statements in question would be hit by the provisions of s. 162 of the Criminal Procedure Code, because they were recorded by officers who were in the position of a police officer and had powers of investigation analogous to those in Chapter 14 of the Criminal Procedure Code. These objections were heard by the learned Magistrate in great detail and by his order dated July 24, 1964,

he overruled the objections and ordered the statements to be admitted in evidence. Regarding the first contention he took the view that at the time when the *Panchnama* was drawn which incorporated certain statements of the petitioner as well as at the time when the detailed statement of the petitioner was recorded, the petitioner was not formally accused of any offence and that the petitioner had a formal accusation made against him for the first time when the complaint was filed against him by the respondent on December 19, 1963, which resulted in process being issued against him by the Court and that, therefore, the privilege contained in art. 20(3) of the Constitution could not be claimed by him. With regard to the argument under s. 25 of the Evidence Act, he held that the statements of the petitioner in question did not amount to a confession and at the highest the petitioner could be said to have made an admission of a gravely incriminating fact and, therefore, the statements were not hit by s. 25 of the Evidence Act. As regards the bar of s. 162 of the Criminal Procedure Code, he took the view that the Central Excise Officers, who had recorded the statements of the petitioner were not in the position of police officers, nor was investigation carried out by them under Chapter 14 of the Criminal Procedure Code and in that view of the matter, he held that the statements in question were not hit or rendered inadmissible under s. 162 of the Criminal Procedure Code. Consequently, he ordered that the statements objected to should be admitted in evidence. It is against this order of the learned Magistrate that the present revisional application has been preferred by the petitioner-accused to this Court.

At the outset Mr. Gumaste, the learned Additional Government Pleader, raised a preliminary objection against the maintainability of the revisional application on the ground that the order complained of merely decides the question of admissibility or otherwise of certain evidence at a trial which is still pending before the learned Magistrate and he, therefore, urged that at such interlocutory stage this Court should not interfere with the order in exercise of revisional jurisdiction. He further pointed out that the order of the learned Magistrate dealt with procedural points by overruling the objections raised by the petitioner to the admissibility of certain statements and it would not only be open to the petitioner but would be proper for him to raise these points in appeal after the trial before the learned Magistrate is concluded. On the other hand Mr. Porus Mehta contended that one of the objections raised to the admissibility of the evidence pertained to the fundamental right guaranteed to a citizen under art. 20(3) of the Constitution and, therefore, it was but proper for the petitioner to approach this Court at the earliest possible opportunity for vindicating his said right. Mr. Mehta fairly conceded that the objections to the admissibility of the evidence and the statements in question under s. 25 of the Evidence Act and s. 162 of the Criminal Procedure Code, may be regarded as procedural and he would not be in a position to ask this Court to interfere with the trial Court's order on those grounds, but since the objection to the admissibility of the statements under art. 20(3) of the Constitution had been raised before the Court and had been decided against his client by the trial Court, he should be permitted to argue that point and this Court would be perfectly justified in deciding that point in exercise of its revisional jurisdiction. I accepted the contention of Mr. Mehta in this behalf and I allowed him to argue the point in so far as the objection to the admissibility of evidence was based upon the provisions of art. 20(3) of the Constitution only. I must mention here that Mr. Mehta was not allowed by me to raise objections to the admissibility of evidence in question under s. 25 of the Evidence Act and s. 162 of the Criminal Procedure Code.

In order to substantiate his contention that at the material time, that is to say, when the statements of the petitioner were recorded, the petitioner had been accused with the commission of an offence, Mr. Mehta strongly relied upon the recitals as well as the operative part of the Search Authorisation

(exh. A) issued on April 5, 1963, pursuant to which the premises of the petitioner were raided by the Central Excise Officers. He also relied upon certain recitals which are to be found in the *Panchnama* (exh. O) itself, but before I discuss the contents of these documents, it would be convenient to set out the provisions of art. 20 of the Constitution and then to refer to the three decisions of the Supreme Court, which are of importance and have a bearing on the correct interpretation of cl. (3) of art. 20 and which decisions also set out the conditions which must be fulfilled before the immunity or privilege contained in that article could be invoked. Turning to the article itself, the marginal note is "Protection in respect of conviction for offences" and the three clauses run as follows:

"(1) No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

(2) No person shall be prosecuted and punished for the same offence more than once.

(3) No person accused of any offence shall be compelled to be a witness against himself."

Reading the aforesaid art. 20 as a whole, it is clear that it deals with and confers various privileges upon a person either in the conduct of a criminal proceeding itself or in respect of a criminal proceeding and cl. (3) of the article clearly confers a privilege upon an accused person that he shall not be compelled to be a witness against himself. In other words, it confers an immunity upon an accused person against testimonial compulsion.

Turning to the decisions of the Supreme Court, which have a bearing on the interpretation of cl. (3) of art. 20, there are three decisions which were cited before me. The first one is in *M. P. Sharma v. Satish Chandra*.² In this case Mr. Justice Jagannadhadas, while dealing with the provisions of cl. (3) of art. 20 of the Constitution has made the following observations (p. 303):

"Analysing the terms in which this right has been declared in our Constitution, it may be said to consist of the following components. (1) It is a right pertaining to a person 'accused of an offence'; (2) It is a protection against 'compulsion to be a witness'; and (3) It is a protection against such compulsion resulting in his giving evidence 'against himself'....

Broadly stated the guarantee in Art. 20(3) is against 'testimonial compulsion'. It is suggested that this is confined to the oral evidence of a person standing his trial for an offence when called to the witness-stand. We can see no reason to confine the content of the constitutional guarantee to this barely literal import. So to limit it would be to rob the guarantee of its substantial purpose and to miss the substance for the sound as stated in certain American decisions.... A person can 'be a witness' not merely by giving oral evidence but also by producing documents or making intelligible gestures as in the case of a dumb witness... or the like. 'To be a witness' is nothing more than 'to furnish evidence', and such evidence can be furnished through the lips or by production of a thing or of a document or in other modes....

The phrase used in Art. 20(3) is 'to be a witness' and not to 'appear as a witness'. It follows that the protection afforded to an accused in so far as it is related to the phrase 'to be a witness' is not merely in respect of testimonial compulsion in the Court room but may well extend to compelled testimony previously obtained from him. It is available therefore to a person against whom a formal accusation relating to the commission of an offence has been levelled which in the normal course may result in prosecution."

It is true that in the above case the question which directly arose for consideration was whether search and seizure of documents upon a search warrant having been issued was unconstitutional and the Supreme Court held that the same was not unconstitutional as that would not amount to compulsory produc-

tion of incriminating evidence. It may also be pointed out that in this case a regular first information report had already been lodged with the Inspector General, Delhi, Special Police Establishment by the Registrar of the Joint Stock Companies, Delhi, that Messers. Dalmia Jain Airways Ltd. had committed various offences and then after obtaining permission from the District Magistrate, Delhi, for investigation in respect of some of the non-cognizable offences mentioned in the First Information Report, an application for issue of search warrant was made on the basis of the First Information Report and pursuant to the search warrant issued, a search had been made and documents seized and on those facts the Court held that such search and seizure of documents was not unconstitutional as being hit by the constitutional guarantee contained in art. 20(3) of the Constitution, and in that sense the observations which I have quoted above were really not necessary for the decision of the case. But, as I shall point out presently, in its two subsequent decisions the Supreme Court quoted the above observations with approval though they were regarded as unnecessary for the decision of the case.

The second decision of the Supreme Court, cited was in *Mohamed Dastagir v. The State of Madras*.³ In this case the facts were that the appellant went to the bungalow of a Deputy Superintendent of Police and offered him a bribe in a closed envelope with a request that he might drop action registered against him but the police officer threw the envelope at the appellant; the envelope fell down and was picked up by the appellant; later while the appellant was still in the bungalow, he was asked by the police officer to produce the envelope which the latter had thrown down and the appellant took out of his pocket some currency notes and placed them on a table without the envelope; the notes were seized by the police officer and his office rubber stamp seal was placed on them. At the trial for the offence of offering a bribe, evidence of the police officer as to what transpired at his bungalow was given and the High Court, after accepting that evidence convicted the appellant and in the appeal before the Supreme Court, it was contended that on the aforesaid facts, the appellant must be regarded as a person who was accused of an offence at the time the police officer asked him to produce the money and that the circumstances also showed that the appellant did so on compulsion. That contention was negatived by the Supreme Court on the ground that there was no formal accusation against the appellant relating to the commission of the offence inasmuch as it did not appear from the evidence of the police officer that he had ever accused the appellant of having committed any offence and it was further held that even if it were assumed that the appellant was a person accused of an offence, the circumstances did not establish that he was compelled to produce the money which he had on his person. It was observed that no doubt the appellant was asked to do so but it was within his power to refuse to comply with the police officer's request. The Court, therefore, held that on the facts established in the case, the appellant-accused had not been compelled to produce the currency notes and, therefore, the provisions of art. 20(3) of the Constitution were not attracted. In support of the contention urged on behalf of the appellant-accused, reliance was placed upon the observations of Mr. Justice Jagannadhadas, which I have quoted above from *Sharma's* case and with reference to those observations the Supreme Court said as follows (p. 126):

"...These observations were unnecessary in *Sharma's* case, having regard to the fact that this Court held that the seizure of documents on a search warrant was not unconstitutional as that would not amount to a compulsory production of incriminating evidence. In the present case, even on what was stated in *Sharma's* case there was no formal accusation against the appellant relating to the commission of an offence."

It will thus appear clear that in *Mohamed Dastagir's* case the Supreme Court did not dissent from the observations of Mr. Justice Jagannadhadas in

Sharma's case but proceeded to distinguish the instant case before it from *Sharma's* case by pointing out that there was no formal accusation against Mohamed Dastagir relating to the commission of an offence as required under the observations of Mr. Justice Jagannadhadas. In other words, *Mohamed Dastagir's* case was decided on the peculiar facts obtaining in that case but there is no doubt that the observations which I have quoted above from *Sharma's* case were not dissented in that case. Further the Supreme Court has indicated what conditions must be fulfilled before art. 20(3) of the Constitution could come into play by observing as follows (p. 125):

"...Before this provision of the Constitution comes into play two facts have to be established (1) that the individual concerned was a person accused of an offence and (2) that he was compelled to be a witness against himself. If only one of these facts and not the other is established, the requirements of Art. 20(3) will not be fulfilled."

The third decision of the Supreme Court is *State of Bombay v. Kathi Kalu*.⁴ The question that arose in that case was whether by giving his specimen handwriting or impressions of his fingers or palms or foot, the accused person could be said to be furnishing evidence against himself within the meaning of art. 20(3) of the Constitution and the majority judgment held that giving thumb impressions or impressions of foot or palm or fingers, or specimen handwriting or showing parts of body by way of identification are not included in the expression "to be a witness" and it may be stated that the observations of Justice Jagannadhadas in *Sharma's* case were set out *in extenso* and approved. At the end of his judgment Chief Justice Sinha enlisted seven conclusions to which he arrived after considering the entire case law on the point and conclusion No. 7 which has material bearing on the question before me, was stated by him in the following words:

"To bring the statement in question within the prohibition of Art. 20(3), the person accused must have stood in the character of an accused person at the time he made the statement. It is not enough that he should become an accused, any time after the statement has been made."

In view of the aforesaid decisions it will be clear that before art. 20(3) is brought into play, it must be shown that the person must be accused of an offence at the time he made the statement and that he must have been compelled to make the statement. Therefore, in order to sustain successfully his objection against the admissibility of his statements in question, the petitioner in the present case will have to satisfy three conditions: (1) that at the time when he made those statements there was a formal accusation of commission of an offence against him, (2) that he was compelled to make those statements and (3) that the statements which are now being used against him at the trial are incriminatory in nature.

At this stage, it will be convenient to refer to the relevant provisions of the Gold Control Rules (Part XII-A of Defence of India (Amendment) Rules 1963) and of the Customs Act, 1962. The relevant rules of the Gold Control Rules are Rules 126I, 126L, 126M and 126P. Reference was also made by Mr. Mehta to Rule 142 of the Defence of India Rules, 1962, which contains a general provision for punishing any person, who voluntarily obstructs or offers any resistance to or impedes or otherwise interferes with the performance of any duties by lawful authorities under the said Rules. Rule 126I deals with declaration as to possession of gold other than ornament and sub-r. (1) runs as follows:

"Every person, not being a dealer or refiner required to apply for a licence, or licensed under this Part, shall within thirty days from the commencement of this Part, make a declaration to the Board in the prescribed form as to the quantity, description and other prescribed particulars of gold (other than ornament) owned by him."

⁴ [1961] A.I.R. S.C. 1808, s.c. 64 Bom. L.R. 240.

Then the material sub-r. is sub-r. (11) which runs as follows:

"(11) Any person in possession or control of any gold, not being ornament, shall be presumed, until the contrary is proved, to be the owner thereof."

It will be clear from the above provision that every person (not being a dealer or refiner—and it is not the case that the petitioner-accused is a dealer or a refiner and as such is admittedly covered by this Rule) is bound to make a declaration within the prescribed period of 30 days in the prescribed form as regards the quantity, description and other particulars of gold which is owned by him, to the Gold Board constituted under the Rules and under sub-r. (11) every person who is in possession or control of any gold, until the contrary is proved, shall be presumed to be the owner of such gold and as will be clear from Rule 126P, which deals with penalties, possession of gold by a person without making a declaration in that behalf, has been made a penal offence. Then comes Rule 126L, which deals with power of entry, search, seizure, to obtain information and to take samples and the relevant portion thereof, which is material to the present case is Rule 126L(2) which runs as follows:—

"Any person authorised by the Central Government by writing in this behalf may—

(a) enter and search any premises, not being a refinery or establishment referred to in sub-rule (1), vaults, lockers or any other place whether above or below ground;

(b) seize any gold in respect of which he suspects that any provision of this Part has been, or is being, or is about to be contravened, along with the package, covering or receptacle, if any, in which such gold is found and thereafter take all measures necessary for their safe custody."

Sub-rule (3) of Rule 126L provides that the provisions of the Criminal Procedure Code relating to search and seizure shall, so far as they are applicable, apply in relation to search and seizure made under this Rule. Sub-rule (4) of Rule 126L is very material and the same runs as follows:

"(4) Any gazetted officer authorised by the Board in this behalf may hold an inquiry for the purpose of ascertaining whether any contravention of any of the provisions of this Part has been, is being, or is about to be, committed and shall for the purposes of such inquiry have power to summon any person whose attendance he considers necessary either to give evidence or to produce any document or other thing."

Sub-rule (5) of Rule 126L provides that the Gold Board may call for information from any person for the purpose of ascertaining whether or not there has been any contravention of any of the provisions of this Part. Then there is the provision for confiscation of the gold seized and adjudication in the matter of such confiscation which is to be found in Rule 126M. Under sub-r. (1) of Rule 126M any gold seized under Rule 126L is liable to confiscation while under sub-r. (2) a provision has been made for adjudication of confiscation by certain officers and an appeal has been provided to the Board against every adjudication of confiscation made under sub-r. (2); and sub-r. (4) states that every person adjudicating any confiscation under this Rule and the Board hearing any appeal against such adjudication shall have all powers of a civil Court under the Civil Procedure Code in respect of matters like summoning and enforcing attendance of witnesses, requiring the discovery and production of any document, requisitioning any public record, receiving evidence on affidavits and issuing commissions for the examination of witnesses or documents. Then the penalties have been provided by Rule 126P and the relevant provision thereof may be set out:

"126P. Penalties.—(1) Whoever,—

(i) fails or omits to make...any declaration including a further declaration as required by rule 126 I without any reasonable cause, or makes any statement in such return or declaration which is false and which he either knows or believes to be false or does not believe to be true, shall be punishable with imprisonment for a term which may extend to one year or with fine or with both;

(ii) fails or omits to keep or to produce any account or other document or to furnish any information when required to do so under any provision of this Part, shall be

punishable with imprisonment for a term of not less than one month and not more than one year and shall also be liable to fine;

(iii)

(2) Whoever,—

(i) ...

(ii) has in his possession or under his control any quantity of gold in contravention of any provision of this Part,

(iii) sells or otherwise transfers or agrees to sell or transfer, or exposes or offers for sale or transfer, or delivers or otherwise parts with, any gold in contravention of any provision of this Part,

(iv) buys, or otherwise acquires, or accepts gold in contravention of any provision of this Part, ... shall be punishable with imprisonment for a term of not less than six months and not more than two years and also with fine."

In the present case, as I have stated above, the petitioner-accused has been charged for having committed an offence under Rule 126P(2)(iv) inasmuch as according to the prosecution he had acquired certain quantity of gold (12 slabs of gold weighing 6644 grams) in respect whereof no declaration had been made by him as required by Rule 126I (I) of the Gold Control Rules. As regards the offence said to have been committed by the petitioner-accused under the Customs Act, 1962, the allegation against him is that he had acquired possession and was concerned in carrying, removing, harbouring, keeping, concealing and otherwise dealing with the said smuggled gold, which he knew or had reason to believe to be liable to confiscation under s. 111 of the Customs Act, 1962, and that thereby he had committed an offence punishable under s. 135(2) of the Customs Act.

In support of his argument that the petitioner was accused of an offence at the time when he made the statements in question, Mr. Mehta strongly relied upon the recitals and the operative part of the Search Authorisation dated April 5, 1962 (exh. A) as well as on certain statements which are to be found in the *Panchanama* (exh. O) that was made on that date in the flat of the petitioner. The relevant portion of the Search Authorization No. 11 of 1963 that was issued under the signature and seal of Superintendent Wagh of the Central Excise may be quoted as follows:

"Whereas there is reason to believe that gold, in respect of which provisions of Part XIII A of the Defence of India Rules, 1963, have been, are being or are about to be contravened, is secreted in the premises of

Shri Ambalal Chimanlal

Neeta No. 90, Marine Lines, ... Bombay.

Now Therefore in exercise of the powers conferred on me by the Central Government by Notification No. ... dated 9th January 1963, I hereby authorise

Shri V. B. Rane,

Dy. Supdt. of Central Excise, ... to enter and search the premises mentioned hereinabove for the aforesaid gold and if found to seize and produce the same forthwith before me."

Mr. Mehta also invited my attention to the following recitals which are to be found in the *Panchanama*:

"The cloth bags together with the 12 (twelve) slabs of yellow metal appearing to be gold and the newspaper wrappings, paper slips, rubber band, have been taken into his possession by Superintendent Shri J. S. Wagh of Central Excise, under the reasonable belief that it is smuggled Gold and also in respect of which the D.I. Rules have been contravened."

Mr. Mehta contended that in view of the language used in the Search Authorization under which the search was carried out and in view of the language used in the recitals of the *Panchanama* quoted above, it is clear that there was a formal accusation against the petitioner even at the time of that search. In the first place Mr. Mehta pointed out that under Rule 126(2)(b) even if the person authorised by the Central Government in that behalf merely entertain-

ed a suspicion that any provision of this Part (meaning Part XIIA) had been, or was being or was about to be contravened, a Search Authorization to make entry, search and seize could be issued, but in the present case, the Search Authorization (exh. A) was issued not on mere suspicion but as the recital therein indicates, on the basis that *there was reason to believe* that gold in respect whereof a contravention of Part XIIA had been committed or was being committed or was about to be committed, was secreted in the premises of the petitioner and Mr. Mehta urged that the recital "whereas there is reason to believe" is stronger than mere suspicion that may be entertained by officer concerned in that behalf. Secondly, Mr. Mehta contended that though the three alternatives had been disjunctively used with reference to apprehended contravention of Part XIIA of the Defence of India Rules, present tense had been expressly used in regard to the impugned gold by reciting in exh. A as follows: "*gold* in respect of which... is *secreted* in the premises....". Thirdly, Mr. Mehta pointed out that the operative part of the Search Authorization expressly authorises Shri Rane, Deputy Superintendent "to seize and produce" the said gold before the Superintendent of the Central Excise. According to Mr. Mehta, these three aspects of the Search Authorization (exh. A) are clearly indicative of the fact that the petitioner was accused of commission of the offence of contravening the Gold Control Rules in respect of the gold that was said to have been secreted by him in his premises. Similarly, since in the *Panchanama* similar language had been used to the effect that the gold in question was taken into his possession by Superintendent Wagh "under reasonable belief that it is smuggled gold and also in respect of which D. I. Rules have been contravened", it would be clear that at the material time the petitioner was accused of an offence. Mr. Mehta, however, fairly conceded that in terms the Search Authorization was addressed by the Superintendent of Central Excise Shri Wagh not to the petitioner but to Shri V. B. Rane, the Deputy Superintendent of Central Excise, who was authorised to enter and search the premises of the petitioner for gold and to seize the same if found there, but according to him in view of the recitals and the operative part of the Search Authorization (exh. A), it was clear that at the material time information had been laid before the Superintendent of Central Excise, who issued the Authorization, on the basis of which the said officer had reason to believe that gold in respect of which provisions of Part XIIA had been contravened, was secreted by the petitioner-accused in his premises and as such the language of the Search Authorization clearly implies that the petitioner was accused of being in possession of the said gold without making the necessary declaration under Rule 126I and that thereby had committed an offence under Rule 126P(2). On the other hand, Mr. Gumaste, the learned Additional Government Pleader, contended that there are two indications in the Search Authorization itself which clearly show that the officer under whose signature and seal the Authorization was issued, was not certain whether there was a positive contravention of Gold Control Rules on the part of the petitioner at that time. He pointed out that in the first place, the recitals of the Search Authorization, which contain all the three alternatives in regard to the apprehended contravention of Gold Control Rules disjunctively, show that the officer was not sure whether in respect of the gold said to have been secreted by the petitioner, contravention had been committed or was being committed or was about to be committed. Secondly, he pointed out that the officer was not even sure whether the gold said to be secreted would be found in the premises of the petitioner and, therefore, the operative part of the Search Authorization stated that the said gold, if found, should be seized and produced before the Superintendent. He, therefore, contended that the mere use of a strong expression that there was reason to believe that gold was secreted, should not lead to the inference that the petitioner had a formal accusation of the commission of offence made against himself. He further relied upon the fact that throughout the Search Authorization

(exh. A), it has nowhere been stated that the gold was secreted by the petitioner but all that has been stated is that gold was secreted in the premises of the petitioner.

In my view, in order to decide the question as to whether the petitioner was accused of an offence at the time when the Search Authorization was issued and the search of his flat was made in pursuance thereof, not only the language used in the Search Authorization but the purpose or the object with which Rule 126L has been framed will have to be taken into consideration. The marginal note of Rule 126L, which is to the effect: "Power of entry, search, seizure, to obtain information and to take samples" clearly indicates that the provisions contained therein have been framed for the purpose of ascertainment of the fact as to whether any contravention of any of the provisions of Part XIIA, has been, or is being or is about to be committed by any person, in respect of gold. This is also clear from the contents of sub-rr. 1, 2, 4 and 5 thereof. Sub-rule (1) deals with the premises of a refiner or a licensed dealer in gold and under that sub-rule, power to enter and search a refinery of a refiner or the establishment of a licensed dealer is conferred upon an officer authorised by the Board in that behalf and power is also conferred upon such officer to seize any gold in respect of which he suspects that any provision of this Part has been, or is being or is about to be contravened. Sub-rule (2) deals with premises of any other person not being a refiner or a licensed dealer and under that sub-rule power is conferred upon an officer duly authorised in that behalf by the Central Government to enter and search such premises and to seize from such premises any gold in respect of which such officer suspects that any provision of this Part has been or is being, or is about to be contravened. The fact that both these sub-rules authorize seizure of gold even when a mere suspicion is entertained that in respect of such gold, contravention has taken place, or is taking place or is about to take place, clearly shows that such power to seize gold is conferred for ascertainment of the fact of contravention. Sub-rule (4) in terms says that the officer authorized by the Board in that behalf "may hold an inquiry for the purpose of ascertaining whether any contravention of any of the provisions of this Part has been, is being or is about to be committed" and such officer has been given the power to summon any person, either to give evidence or to produce any document for the purpose of such inquiry, that is to say, for the purposes of ascertaining the fact of such contravention. Similarly, sub-rule (5) expressly states that the Gold Board may call for information from any person "for the purpose of ascertaining whether or not there has been any contravention of any of the provisions of this Part." In other words, both the marginal note as well as the contents of sub-rules 1, 2, 4 and 5 of Rule 126L clearly indicate that whatever steps or proceedings are taken under this rule, they are for the purpose of ascertainment of the fact whether there has been any contravention of any provisions of Part XIIA or not. In other words, in my view any step or proceeding including a Search Authorization taken under Rule 126L is of exploratory nature for the purpose of ascertaining whether any contravention of Gold Control Rules has been committed or not and is not concerned with any accusation against the person whose premises are being searched or from whose premises gold is directed to be seized under sub-r. (1) or sub-r. (2), or from whom information is sought by an officer under sub-r. (4) or by the Board under sub-r. (5). It may be that as a result of such exploratory measures having been taken, the facts ascertained might disclose some offence and the facts so ascertained might form the basis of a future prosecution, which may be launched under Rule 126P but that would not make the step or proceeding taken under Rule 126L to be a step or proceeding amounting to an accusation of an offence. Having regard to the aforesaid object with which Rule 126L has been framed, therefore, it is clear that the Search Authorization (exh. A) in this case, which has been expressly and in terms issued under the said rule, will

have to be regarded as an exploratory step or proceeding taken with a view to ascertaining whether in respect of the gold which is said to have been secreted by the petitioner in his premises, the petitioner has committed, or is committing or is about to commit a contravention of any provision of Part XIIA and that the same was not concerned with any accusation against the petitioner of actual contravention.

Turning to the language used in the Search Authorization (exh. A), in my view the use of present tense to the effect "that gold in respect of which...is secreted" and the further fact that the same was authorised to be seized under exh. A, do not convert the Search Authorization into any accusation of commission of an offence against the petitioner, for under cl. (b) of sub-r. (2) of Rule 126L, even where gold is secreted by a person and a mere suspicion is entertained that in respect of such gold, a contravention of any provision of Part XIIA has taken place, an authorization to seize such gold could be given and the Search Authorization in that behalf, will contain similar provision as is to be found in exh. A. I do not think that if in exh. A instead of the recital "whereas there is reason to believe" the recital were "whereas there is reason to suspect" or "whereas it is suspected" and the remaining portion of the Search Authorization was the same as is to be found in exh. A, it could be seriously contended that such Search Authorization would amount to accusation of an offence against the petitioner. Therefore, merely because present tense in respect of secreting of gold has been used or merely because such secreted gold is directed to be seized it would not convert the Search Authorization into any accusation of an offence. The only ground on which Mr. Mehta strenuously contended that the Search Authorization in this case should be taken to contain an accusation of an offence on the part of the petitioner was that the Search Authorization (exh. A) contained a stronger recital viz. "whereas there is reason to believe." There is no doubt that the word "believe" is a much stronger word than "suspect" and the recital in exh. A is a strong recital but can it be said that because such recital is found in this Search Authorization, there is an implied accusation of the commission of an offence on the part of the petitioner? Unfortunately the materials on which Shri Wagh came to hold the reasonable belief that there might have been a contravention have not come on record. Further since all the three alternatives in regard to apprehended contravention have been disjunctively mentioned, it could be said that Shri Wagh had such materials before him that he could not positively say that there was in fact a positive contravention of the provisions of Part XIIA on the part of the petitioner and if Shri Wagh himself was not sure in that behalf, he could never have thought of accusing the petitioner of such contravention. In any case at the highest such a recital would show that information or material placed before him was such that as a reasonable man he (Shri Wagh) subjectively must have felt convinced that the secreting of the gold was in contravention of the rules which is far from saying that the petitioner was accused of such contravention. All that the Search Authorization at the highest means is that according to the reasonable belief of the issuing officer gold is secreted by the petitioner in his premises and it has been expressly so stated in the *Panchanama* (exh. O),—but that does not amount to any accusation being made against the petitioner that he has contravened any provision of Part XIIA. I do not think that the mere use of such a recital in the Search Authorization has the effect of converting it into any implied accusation of the commission of an offence on the part of the petitioner. I do not think that mere use of such a recital robs the Search Authorization of its exploratory character. Having regard to the object of Rule 126L under which this Search Authorization was issued and also the language used therein, it is clear to me that it was not concerned with making any accusation against the petitioner.

I may usefully refer to one decision of the Madras High Court in *Bhagwan-*
· B.L.R.—5

das v. Union of India.⁵ No doubt it was a case under Foreign Exchange Regulation Act of 1947 and the appellant Bhagawandas Goenka was convicted for contravening certain provisions of the said Act, but there the Reserve Bank had "received information that the accused unauthorisedly acquired dollars in the U.S." and on the basis of such information the Bank had issued certain directives in the form of interrogatories to the accused under s. 19(2) of the said Act and the accused had given replies thereto and the question arose whether the said replies of the accused were inadmissible in evidence under art. 20(3) and the Court held that the directives by the Bank were of exploratory character and were issued for ascertainment of facts and there was no accusation made against the appellant and as such the replies given were admissible in evidence. Head-note (d) of the report runs as follows:

"Even assuming that Art. 20(3) would be applicable not merely to judicial proceedings of any character, but to a multiplicity of situations in which judicial proceedings might be in prospect, it is still impossible to hold that, when certain facts are ascertained, it may be under an obligation to furnish an answer, in order to explore and determine if a person had committed an offence, this exploration itself already places him in the situation of a virtually accused person, and thus renders his explanations inadmissible in evidence. The directives of the Reserve Bank under S. 19, and the replies thereto are not inadmissible in evidence, under Art. 20(3) of the Constitution, as incriminating answers furnished by a party in the virtual position of an accused, under testimonial compulsion. The statements which a party makes under fear of penalties prescribed by the Act are not hit by Art. 20(3) and cannot be excluded from being used in evidence against him after he has become an accused and when he is on trial. The person is not in the position of an accused when he furnishes replies to the directives under S. 19. The protection or immunity under Art. 20(3) is available only to a person against whom a formal accusation relating to the commission of an offence has been levelled."

In view of the aforesaid discussion I am unable to accept Mr. Mehta's contention that at the material time i.e. when the *Panchanama* was made or when the petitioner's detailed statement was recorded the petitioner was accused of any offence or there was a formal accusation of commission of an offence levelled against the petitioner.

Mr. Mehta next contended that the petitioner was compelled to make those statements in question to the Central Excise Officers and in that behalf he fairly conceded that this was not a case where compulsion or duress in the sense of threats of physical injury or bodily harm or actual beating had been administered to the petitioner before he made the statements in question. In fact, he himself pointed out that at the end of the detailed statement of the petitioner, that was recorded by Deputy Superintendent Parekh under instructions of Superintendent Wagh on April 6, 1963 (exh. Z-10), the petitioner had stated that he had given that statement voluntarily, meaning thereby that there was no physical coercion exerted on him when he made that statement, but Mr. Mehta contended that there was legal compulsion upon the petitioner to make those statements both at the time of making the *Panchanama* as also on April 6, 1963, when his detailed statement was recorded, inasmuch as having regard to the provisions of Rule 126L(4) and Rule 126P(1)(ii), if he did not make a statement or furnish information as required by the officers concerned when he was interrogated by them, he was liable to be punished with imprisonment for a term of not less than one month and not more than one year and was also liable to be sentenced to pay a fine. In this behalf Mr. Mehta pointed out to me that both these statements which were made by the petitioner, first at the time when the *Panchanama* was being drawn up and secondly when his detailed statement was recorded by the Deputy Superintendent Parekh, he was interrogated by the two officers, who acted under the powers vested in them by the Defence of India Rules and the petitioner made these statements by

way of giving replies to such interrogation. It may be stated that Superintendent Wagh of the Central Excise, who gave evidence at the trial on behalf of the prosecution, clearly admitted in his evidence that at the time of making of the *Panchanama*, he questioned the petitioner with regard to the gold that was found in the pit (on the ledge) and he also questioned the petitioner about the currency notes and the other things found in the bag in Mody's house and the petitioner made statements in regard to both these items of property that was seized, in pursuance to his questions. Similarly, Superintendent Wagh further admitted that he questioned and interrogated the petitioner-accused on April 6, 1963, and the petitioner-accused gave replies which were recorded in the form of his detailed statement and Superintendent Wagh has further clarified the position by stating that all this inquiry and interrogation and recording of the statements made of the petitioner was done under the powers vested in the officers by virtue of the Gold Control Rules. This is what Superintendent Wagh has stated in his evidence in that behalf:

"I acted in this case under the powers of the Gold Control Rules and the Customs Act. All the enquiries subsequent to the seizure of gold were conducted in this case under Gold Control Rules and even the statements were recorded under Gold Control Rules. Under the powers of Gold Control Rules, I questioned the accused myself. He did give me replies to my questions. After this interrogation I asked Dy. Superintendent Parekh to record his i.e. accused's statement..."

In the course of inquiries in this case under the Gold Control Rules, I questioned Kotak and Mody also."

This evidence of Superintendent Wagh makes it amply clear that it was as a result of the interrogation that was done by the Central Excise Officers in exercise of the powers vested in them by virtue of Gold Control Rules, that the statements of the petitioner-accused both in the *Panchanama* as well as in his detailed statement came to be recorded and Mr. Mehta has contended that under the relevant provisions of Rules 126L and 126P the petitioner-accused was legally bound to make those statements on pain of being prosecuted if he did not give replies to the interrogation made by the Central Excise Officers and, therefore, there was legal compulsion on the petitioner-accused to make those statements and as such those statements cannot be used in evidence against the petitioner-accused in the case. I find considerable force in this contention of Mr. Mehta. Sub-rule (4) of Rule 126L empowers any gazetted officer duly authorised in that behalf by the Board to hold an inquiry and he has been further authorised to summon any person whose attendance he considers necessary either to give evidence or to produce any document for the purpose of such inquiry and Rule 126P(1)(ii) clearly provides that if any person so summoned by that gazetted officer, either fails to produce any document required to be produced or fails to furnish any information when required to do so under any provision of this Part (which would obviously include s. 126L(4)), he is liable to be punished with imprisonment for a term mentioned therein and also liable to pay fine. Mr. Gumaste, the learned Additional Government Pleader, contended that sub-rule (4) of Rule 126L authorises a gazetted officer, who is holding an inquiry to summon any person "to give evidence or to produce any document or other thing" and as such will not apply to a case of a person failing to furnish information when required to do so under any provisions of this Part as is contemplated under Rule 126P(1)(ii). He further pointed out that there are other provisions in this Part which require a person to furnish information and as an instance he pointed brought to my notice the provision of sub-r. (5) of Rule 126L itself, which provides that the Gold Board may call for information from any person for the purpose of ascertaining whether or not there has been any contravention of any provision of this Part and according to Mr. Gumaste, it was only when a person was required "to furnish information" either by the Board as per sub-r. (5) of Rule 126L or by any other officer, who has been empowered to

call for information, and if he failed to furnish any such information that he comes within the mischief of Rule 126P(1)(ii). I do not think that the expression "to give evidence" has been used in sub-r. (4) of Rule 126L in the narrow technical sense of giving evidence on oath either by affidavits or making statements on oath but that expression has been used in a wider sense so as to include the act of furnishing the statements or information. This is clear from the fact that sub-r. (4) not only uses the expression "to give evidence" but also the further expression "or produce any document or other thing" and it is clear that by producing a document or a thing a person furnishes information to the officer concerned. The marginal note of Rule 126L, which is to the effect "power of entry, search, seizure, to obtain information and to take samples" also makes this position clear. In my view, even under sub-r. (4) of Rule 126L the officer duly authorized in that behalf, who is holding an inquiry for the purpose of ascertaining whether any contravention of any of the provisions of this Part has been, or is being, or is about to be committed, is authorized to collect or gather information by means of obtaining statements or documents. In this view of the matter, it is clear that the penal provisions of Rule 126P(1)(ii) would be attracted if a person fails to furnish information by omitting to make statements when he is interrogated by the officer concerned under Rule 126L(4). It is, therefore, clear that since the petitioner-accused in the present case was interrogated by the Central Excise Officer, who were conducting the inquiries under powers vested in them by virtue of Gold Control Rules and was bound to give answers or replies to such interrogation, he was legally compelled to make the statements in question to the Central Excise Officers and, therefore, the relevant condition required by art. 20(3) of the Constitution for the applicability thereof could be said to have been fulfilled in this case.

On the point as to whether the statements in question, which are being used against the petitioner at the trial, are self-incriminatory or not, I do not think that there could be any doubt that those statements which are being sought to be proved against the petitioner are self-incriminatory. It was urged by Mr. Gumaste that actually in his statement, the petitioner had completely disowned any connection with the gold in respect whereof he is being prosecuted, while in regard to the currency notes, in respect whereof, there is no charge levelled against him, the petitioner has in his statement claimed that the money belonged to him and stated that the cloth bag which contained the currency notes had been put by him in his neighbour's flat across the balcony without the knowledge of that neighbour and that, therefore, it could not be said that the petitioner's statements were self-incriminatory. It is difficult to accept Mr. Gumaste's contention in this behalf. It is true that in regard to the gold in question the petitioner disclaimed any connection with the same but the latter part of the petitioner's statement in regard to the currency notes wherein he stated before the officers that he had put the cloth bag containing the said notes in his neighbour's flat across the balcony without the neighbour's knowledge, is being expressly relied upon by the prosecution for the purpose of rendering highly probable a similar conduct on the part of the petitioner in regard to the gold in question, for it is the prosecution case that just as he put the cloth bag containing currency notes in his neighbour's flat across the balcony the petitioner must have also thrown the gold in question on the ledge outside the balcony of another neighbour of his viz. Mr. Kotak and in fact as I have indicated earlier, in the complaint that has been lodged by the respondent against the petitioner in this case, it is in this manner that the possession of gold with the petitioner in contravention of Gold Control Rules is sought to be established by the prosecution. (See para. 16 of the complaint quoted above). There could be no doubt that this conduct on the part of the petitioner in throwing the bag containing the currency notes (which money is claimed by him as his) into his neighbour's flat across the balcony, which emerges from the statement

made by him to the Central Excise Officers, is gravely incriminating and it is clear that his statements which contain an admission of this conduct will have to be regarded as self-incriminatory statements. I may point out that even the learned Magistrate, while holding that the statements of the accused in question did not amount to a confession under s. 25 of the Evidence Act, took the view that those statements contained an admission of a gravely incriminating fact. There is no doubt, therefore, that the statements in question will have to be regarded as self-incriminatory.

Since however, I have held that the petitioner was not accused of an offence at the material time when the statements in question were made by him to the Central Excise Officers, it is clear that the privilege or the immunity claimed by the petitioner cannot be availed of by him. The statements in question, therefore, cannot be regarded as inadmissible in evidence under art. 20(3) of the Constitution.

The rule in the revision application is, therefore, discharged.

Rule discharged.

APPELLATE CIVIL.

[NAGPUR BENCH]

Before Mr. Justice V. S. Desai and Mr. Justice Wagle.

SALUBAI RAMCHANDRA v. CHANDU SADHU.*

Bombay High Court Appellate Side Rules, 1960. Chapter XVII. Rule 15-A—Constitution of India, Arts. 133, 225, 14—Validity of r. 15-A—Source of power of High Court to make rules—Nature, scope and extent of such power.

Rule 15-A in Chapter XVII of the Bombay High Court Appellate Side Rules, 1960, is valid and therefore all matters such as are specified in it are liable to be heard and disposed of by a single Judge on or after July 15, 1964.

Mahendra v. Darsan¹ and First Appeal No. 32 of 1962,² agreed with.

Gordhan Das-Baldev Das v. G.-G.-In-Council³ and Radhakisan v. Shridhar,⁴ dissented from.

Govindaraju v. State of Mysore,⁵ India Sugars & Refineries Ltd. v. State,⁶ Ram Autar v. State of U.P.⁷ and Indramani v. W.R. Natu,⁸ referred to.

NINE applications under arts. 226 and 227 of the Constitution of India were made to the Nagpur Bench of the High Court at Bombay challenging the validity of the amended rule 15A of Chapter XVII of the Bombay High Court Appellate Side Rules, 1960. These applications which arose out of orders made by the Revenue Tribunal, came up for hearing before Tambe J., who referred these to a larger Bench on July 16, 1964, observing as follows:—

TAMBE J. These nine applications under arts. 226 and 227 of the Constitution arise out of orders made by the Revenue Tribunal. Facts material for the purpose of considering the question in these applications are similar though not identical and I would be presently adverting to the facts of one of these nine applications. Under the amended r. 15A which came into force from July 1, 1964, these nine matters and some other similar writ matters were being placed before me for hearing as a single Judge. I was informed by the Office that a number of petitioners who had filed writ applications against the orders of the Revenue Tribunal were challenging the validity of the rule. I

*Decided, September 17, 1964. Civil Application No. 747 of 1964 and Civil Application No. 827 of 1964.

1 [1952] A.I.R. Patna 341, S.B.

2 Decided on June 25, 1962.

3 [1952] A.I.R. Punjab 103, F.B.

4 [1950] A.I.R. Nagpur 177, F.B.

5 [1963] A.I.R. Mysore 265.

6 [1960] A.I.R. Mysore 326.

7 [1962] A.I.R. All. 328, F.B.

8 [1963] A.I.R. S. O. 274, S.C. 65 Bom. L.R. 378.

had, therefore, directed the Office to place the matter for hearing before me as regards the objection to the validity of the rule, and I had also directed the Office to inform counsel in such cases who were raising similar objections. These nine petitioners have appeared before me who challenge the validity of the rule.

Now, the facts in Special Civil Application No. 92 of 1964 are these. The impugned order of the Revenue Tribunal was made on January 22, 1964. The petition was filed on February 20, 1964. Rule was issued by a Division Bench of this Court on March 2, 1964. On July 9, 1964, this petition and some other petitions were being placed before me for disposal when I was informed that petitioners in some other cases were challenging the validity of the rule. On my directions as aforesaid these petitions have come up to-day.

Now, the rule under which these petitions were placed before me for disposal reads as follows:

"15A. Notwithstanding anything contained in Rules, 1, 4 and 15 of this Chapter, applications under Article 226 or 227 of the Constitution or under Article 227 read with Article 226 of the Constitution arising out of the orders passed by the Maharashtra Revenue Tribunal... may be heard and finally disposed of by a single Judge to be appointed in this behalf by the Chief Justice

2. The above amendment shall come into force on and with effect from the 1st of July 1964, and shall be applicable to applications heard on and after the 1st of July 1964, notwithstanding that the applications were instituted prior to the 1st of July 1964, or that the applications arise from proceedings instituted prior to the 1st of July 1964."

Mr. Natu, learned counsel for the petitioner in Special Civil Application No. 92 of 1964, has formulated the following points on which he challenges the validity of this rule. According to him, the points so formulated are covered by the application jointly filed by the petitioner as well as the respondent on July 9, 1964. Mr. Natu stated before me that the petitioner was not challenging the rules that were in force prior to the date of amendment. His challenge is to the amended r. 15A. His grounds of challenge are:

- (i) After the promulgation of the Constitution the High Court has no power to make rules in respect of applications falling under arts. 226 and 227 of the Constitution;
- (ii) at any rate, the rule made is in excess of its rule-making power inasmuch as the High Court has no power to make rules retrospective in operation;
- (iii) the rule is *ultra vires* of the provisions of arts. 133 and 14 of the Constitution; and
- (iv) on construction it has no application to the hearing of petitions which had already been admitted by a Division Bench prior to the date of the amendment coming into force.

After Mr. Natu had formulated his grounds of attack as to the validity of the rule I asked counsel appearing in other cases whether they wanted to urge any additional ground of attack. Mr. Sanghi, learned counsel appearing in Special Civil Application No. 440 of 1962, stated that the petitioner wanted to raise some additional grounds. The petitioner, however, has not filed any application stating his grounds. I have directed the learned counsel to draft an application and file it by 2.15 P.M. when I would proceed with this order.

Mr. Sanghi has now filed an application adding one more ground to the challenge as to the validity of the rule. The ground is in the following terms.

"Rule-making power under the Letters Patents of the Bombay High Court did not extend to making rules regarding 'writ jurisdiction' since thereunder, the High Court had no writ jurisdiction at all and thus the impugned rule is *ultra vires*."

The petitioners in other seven cases have not filed any applications stating the grounds on which they challenge the validity of the rule. I, therefore, asked counsel in the remaining seven cases, what the nature of challenge raised by the petitioners in these cases is. Counsel in those cases stated before me that they raise the same grounds which have been raised by the peti-

tioners in the aforesaid two applications. They state that they have no additional grounds to raise.

Having regard to the fact that the challenge is as to the validity of the rule, in my opinion, it would be better if the preliminary objection raised as to the jurisdiction of the single Judge to hear these applications under r. 15A is decided by a larger Bench.

I direct that the papers be placed before my Lord the Chief Justice for constitution of a larger Bench.

Notice be issued to the Advocate-General.

The applications were heard by a Bench composed of V. S. Desai and Wagle JJ.

CIVIL APPLICATION No. 747 of 1964.

S. V. Nattu, for the petitioner.

C. S. Dharmadhikari, for opponent No. 1.

R. B. Kotval, Government Pleader, and *G. R. Mudholkar*, Additional Government Pleader, for opponent No. 3 and for the Advocate General.

CIVIL APPLICATION No. 827 of 1964.

B. A. Udhoji, for the applicant.

C. S. Dharmadhikari, for opponent No. 1.

R. B. Kotval, Government Pleader, and *G. R. Mudholkar*, Additional Government Pleader, for opponent No. 3 and for the Advocate General.

V. S. DESAI J. By these applications, the petitioners challenge r. 15-A in Chapter XVII of the Bombay High Court Appellate Side Rules, 1960. Chapter XVII, in which the said rule appears, contains rules made by the High Court for dealing with the applications under the jurisdiction and powers conferred upon it by arts. 226, 227 and 228 of the Constitution. The impugned rule which was published in Part IV-C of the Maharashtra Government Gazette, Extraordinary, on July 2, 1964, is as follows:

"Rule 15-A. Notwithstanding anything contained in Rules 1, 4 and 15 of this Chapter, applications under Article 226 or 227 of the Constitution or under Article 227 read with Article 226 of the Constitution arising out of the orders passed by the Maharashtra Revenue Tribunal under any enactment or out of the orders passed by any other authority or tribunal under the Bombay Tenancy and Agricultural Lands Act, 1948 or the Bombay Tenancy and Agricultural Lands (Vidarbha Region and Kutch Area) Act, 1958 or the Hyderabad Tenancy and Agricultural Lands Act, 1950 may be heard and finally disposed of by a single Judge to be appointed in this behalf by the Chief Justice."

The position under the rules, before this rule was added, was that under r. 1 of the said rules, an application for the issue of a direction, order or writ under art. 226 of the Constitution, if the matter in dispute was or had arisen substantially outside Greater Bombay, was to be heard and disposed of by a Division Bench to be appointed by the Chief Justice. Under r. 4, such application had to be heard and disposed of by a Division Bench, but a single Judge was entitled to grant a rule *nisi* though he could not pass any final order on that application. Under r. 15, an application invoking the jurisdiction of the High Court under art. 227 of the Constitution or under art. 227 read with art. 226 of the Constitution was required to be filed on the Appellate Side of the High Court and was to be heard and disposed of by a Division Bench to be appointed by the Chief Justice. It will thus be seen that, under the said rules, applications coming to the High Court under art. 227 or under art. 227 read with art. 226 of the Constitution from decisions of the Maharashtra Revenue Tribunal, or from decisions under various Tenancy Acts in force in the State, were required to be heard and disposed of by a Division Bench of the High Court on the Appellate Side. By the added r. 15-A, such matters are made capable of being heard and finally disposed of by a single Judge to be appointed in that behalf by the Chief Justice. Under para. 2 of the Notifica-

tion, the amendment effected by the rule is made to take effect from July 15, 1964, and has been made applicable to all applications heard on and after July 15, 1964, notwithstanding that the applications were instituted prior to July 15, 1964, or that the applications arose out of proceedings instituted prior to that date. The grounds, on which the rules are challenged, may be summarised as follows:

(1) The power of the High Court to make rules is subject to the provisions of the Constitution. The High Court, therefore, cannot make any rule which is inconsistent with any of the provisions of the Constitution. The present rule made by the High Court is inconsistent with art. 133 of the Constitution inasmuch as it interferes with and affects the right given under the said article. The rule, therefore, is invalid.

(2) Even assuming that the High Court could have made a rule, like r. 15-A, when it first made its rules relating to the disposal of applications under art. 227 of the Constitution, having once made the rule differently, it could not now alter it in the present form. The reason advanced for this argument is, when the rule was first made, it brought in the impact of art. 133 on all proceedings of the nature contemplated by the said rule and thus had the rights under the said article fastened to all such proceedings. The High Court thereafter could have no power to alter the rule, because that will have the effect of affecting the impact of art. 133 on proceedings of the nature to which the rule relates.

(3) The High Court cannot make a rule which can have a retrospective effect, because no organ of the Government except the Legislature, which has the plenary power of legislation, can make a rule or law which can have retrospective effect unless power to make such rule or law is conferred upon it in express terms. The High Court is not a Legislature having plenary power to legislate and the power to make rules, which has been conferred upon it by art. 225 of the Constitution, does not expressly give it the power to make rules having retrospective operation. Inasmuch as the present rule, which the High Court has made, has a retrospective operation, the High Court had no power to make it. It is also contended in this connection that even if the High Court could exercise the power to make a rule having retrospective operation, it could not make it so as to affect the rights created under art. 133 of the Constitution.

(4) The rule as framed is violative of art. 14 of the Constitution and is, therefore, void; and

(5) On the construction of the rule, if it is legal and valid, it can only apply to such matters as would come before the Court for hearing for the first time after July 15, 1964, and cannot apply to matters, which have been already heard for admission, though not finally disposed of before that date.

Before dealing with the several contentions, which are raised by the petitioners, it will be desirable to examine the source of the power of the High Court to make rules and the nature, scope and extent of the said power. The Act of the Parliament 24 & 25 Victoria, Chapter 104, passed on August 6, 1861, provided by s. 1 thereof for the establishment of the High Courts by grant of Letters Patent at Calcutta, Madras and Bombay. Under s. 13 of the said Act, it was provided that the High Court established under the Act may by its own rules provide for the exercise, by one or more Judges, or by Division Courts constituted by two or more Judges of the said High Court, of the original and appellate jurisdiction vested in such Court, in such manner as may appear to such Court to be convenient for the due administration of justice. The power conferred by this section was in terms of the widest amplitude and was made subject only to laws or regulations which may be made by the Governor General in Council. The Letters Patent, which were granted with its subsequent modifications from time to time, provided in cls. 36 and 37 of the said Letters Patent, that functions, which under the Letters Patent were

directed to be performed by the High Court in exercise of its original and appellate jurisdictions, may be performed by any Judge or any Division Court thereof, appointed or constituted for such purpose, in pursuance of s. 108 of the Government of India Act, 1915, and that it would be lawful for the High Court from time to time to make rules and orders for the purpose of regulating all proceedings in civil cases which may be brought before the said High Court, including proceedings in its Admiralty, Vice-Admiralty, intestate and matrimonial jurisdiction respectively. It may be pointed out that reference to s. 108 of the Government of India Act, 1915, in cl. 36 of the Letters Patent was because the Act of 1861 was repealed by the Government of India Act, 1915, and the latter Act provided for the matters, which were contained in the repealed Act. Under s. 106, sub-s. (1), of the Government of India Act, 1915, the High Courts were constituted Courts of Record having such jurisdiction, original and appellate, including admiralty jurisdiction in respect of offences committed on the high seas, and all such powers and authority over or in relation to the administration of justice, including power to make rules for regulating the practice of the Court, as were vested in them by Letters Patent, and, subject to the provisions of any such Letters Patent, all such jurisdiction, powers and authority as were vested in the Courts at the commencement of the Act. Section 108, sub-s. (1), of the Act provides:

"Each High Court may by its own rules provide as it thinks fit for the exercise, by one or more judges, or by division courts constituted by two or more judges of the High Court, of the original and appellate jurisdiction vested in the Court."

Under sub-s. (2) of s. 108, the Chief Justice of each High Court was empowered to determine what Judge in each case was to sit alone, or what Judges of the High Court whether with or without the Chief Justice, were to constitute the several Division Courts.

Section 223 of the Government of India Act, 1935, provided that the jurisdiction of, and the law administered in, any existing High Court, and the respective powers of the Judges thereof in relation to the administration of justice in the Court, including any power to make rules of Court and to regulate the sittings of the High Court and of members thereof sitting alone or in Division Bench, shall be the same as immediately before the establishment of the Dominion. Finally, under art. 225 of the Constitution it is provided as follows:

"Subject to the provisions of this Constitution and to the provisions of any law of the appropriate Legislature made by virtue of powers conferred on that Legislature by this Constitution, the jurisdiction of, and the law administered in, any existing High Court, and the respective powers of the Judges thereof in relation to the administration of justice in the Court, including any power to make rules of Court and to regulate the sittings of the Court and of members thereof sitting alone or in Division Courts, shall be the same as immediately before the commencement of this Constitution."

It will thus be seen that ever since the creation of the High Court, it has been given the power to make its own rules providing for the exercise of its original and appellate jurisdiction. It will also be seen that the conferment of the said power is in terms of widest amplitude and the only restrictions to which that power is subject, is firstly that it is subject to the provisions of the Constitution and subject to the provisions of any law of the appropriate Legislature made by virtue of the powers conferred on that Legislature by the Constitution. The power given under s. 108 of the Government of India Act, 1915, is preserved by reference to the said section in cl. 36 of the Letters Patent and has been kept alive and re-affirmed by the Government of India Act of 1935 and by the Constitution of India. Under s. 108, the High Court has power to make rules, as it thinks fit, for the exercise, by one or more Judges, of the original and appellate jurisdiction vested in the Court. There can be no doubt whatsoever that the words "vested in the Court" occurring in s. 108 do not mean only such jurisdiction as was vested in the High Court when the

Act of 1915 was enacted, but also such jurisdiction as may be vested in it from time to time. As observed by Mahajan J., as he then was, in *N. S. Thread Co. v. James Chadwick & Bros.*¹ (p. 360) :

"It is thus difficult to accept the argument that the power vested in the High Court under sub-s. (1) of S. 108 (of the Government of India Act, 1915), was a limited one, and could only be exercised in respect to such jurisdiction as the High Court possessed on the date when the Act of 1915 came into force. The words of the sub-section 'vested in the court' cannot be read as meaning 'now vested in the court.'"

His Lordship further observed, that s. 108 of the Government of India Act, 1915, conferred power on the High Court which that Court could exercise from time to time with reference to its jurisdiction, whether existing at the coming into force of the Government of India Act, 1915, or whether conferred on it by subsequent legislation. With regard to the range and ambit of the power conferred on the High Court by s. 108 of the Government of India Act, 1915, his Lordship observed (p. 361) :

"...Section 108 is an enactment by itself and is unrestricted in its scope, and covers a much wider field than is covered by S. 106 of the Government of India Act. ...It confers a power on the High Court to make rules in respect not only of the jurisdiction that it enjoyed in 1915 but it also conferred power on it to make rules in respect of jurisdiction which may hereafter be conferred on it by the enactments enacted by the Governor-General in Legislative Council."

As to the effect of the Government of India Act of 1935 and the Constitution of India on the said power conferred under s. 108 of the Government of India Act, 1915, his Lordship observed (p. 360) :

"...the power that was conferred on the High Court by S. 108 (Government of India Act, 1915) still subsists, and it has not been affected in any manner whatever either by the Government of India Act 1935 or by the new Constitution. On the other hand it has been kept alive and reaffirmed with great vigour by these statutes. The High Courts still enjoy the same unfettered power as they enjoyed under S. 108 of the Government of India Act, 1915 of making rules and providing whether an appeal has to be heard by one Judge or more Judges or by Division Courts consisting of two or more Judges of the High Court."

In view of the provisions which we have referred to relating to the power of the High Court to make rules and in view of the observations of Mahajan J. in the Supreme Court case, there can be no doubt whatsoever that the High Court has an unrestricted and unfettered power to make its own rules for the exercise of its several jurisdictions, the only limitations to the power being that the rules will be subject to the provisions of the Constitution and subject to any law made by the State Legislature.

It cannot also be denied that the rules made under the powers possessed by the High Court, are rules of internal management within the High Court and rules of procedure relating to the disposal of the matters which reach the High Court under its several jurisdictions. In *Har Prasad v. Bool Chand*² Sulaiman C. J. and Allsop J. observed (p. 192) :

"...Under section 108(1) of the Government of India Act, this High Court has made its own rules providing for the exercise of its appellate jurisdiction by one or more Judges or by Division Courts constituted of two or more Judges. This rule is exclusively for regulating the procedure in this Court as regards the constitution of Benches. We are unable to hold that the appellant has any vested right in such a constitution."

In *Mahendra v. Darsan*³ it was observed :

"A rule laying down the powers of a Single Judge is a rule of practice and procedure as to the internal arrangement within the Court for disposal of cases. No party can say that he has a right to be heard by a particular number of Judges. If, therefore, a change is made in the rules and an appeal is heard by a single Judge instead

¹ [1953] A.I.R. S.C. 357, s.o. 56 Bom. L.R. 21.

² [1937] All. 191.

³ [1952] A.I.R. Pat. 341, s.B.

of by two Judges, no party can object unless some vested right is affected, it being clearly understood that there is no vested right that an appeal to the High Court must be heard by a particular number of Judges."

In First Appeal No. 32 of 1962,⁴ decided by a Division Bench of this Court, of which one of us was a member, it was observed:

"There cannot be any doubt that whether or not an appeal should be heard by a single Judge or by a Division Bench is a matter of internal arrangement of the High Court."

The rules made by the High Court directing whether certain matters should be decided by a Division Bench or by a single Judge being thus rules of internal arrangement and rules of procedure, it cannot possibly be argued that these rules have the effect of creating any vested rights in the litigant. It is well settled that there can be no vested right in procedure. As was observed in *The Attorney General v. Sillem*⁵ (p. 764):

"The right of the suitor is to bring the action, and to have it conducted in the way and according to the practice of the Court in which he brings it; and if any act of the Parliament, or any rule founded on the authority of the Act of the Parliament, alters the mode of procedure, then he has a right to have it conducted in that altered mode. That, therefore, takes away nothing. The right of action does not constitute a title to keep all the consequences of the right as they were before. It gives the right to have the action conducted according to the rules then in force with respect to the procedure."

In *Anant Gopal Sheorey v. State of Bombay*⁶ it was observed:

"No person has a vested right in any course of procedure. He has only the right of prosecution or defence in the manner prescribed for the time being by or for the Court in which the case is pending and if by an Act of Parliament the mode of procedure is altered he has no other right than to proceed according to the altered mode. In other words a change in the law of procedure operates retrospectively and unlike the law relating to vested right is not only prospective."

It would, therefore, follow that if the rules made by the High Court are merely rules of procedure which gives no rise to any vested rights, the litigant will not be entitled to complain of any change made in the rules.

Having thus stated the source of the power of the High Court to make rules and the nature, scope and extent of the power, we will now come to the various grounds of attack which have been urged by the petitioners. With regard to the first complaint made by the petitioners with regard to the said rules, what is contended is that the power of the High Court to make rules is subject to the provisions of the Constitution, which necessarily include art. 133. The High Court, therefore, has no power to make a rule which is inconsistent with, or which affects the right given by art. 133 of the Constitution to the litigant. Since the impugned rule affects that right, the High Court has no power to make such rule. In order to understand the validity of this ground, it is necessary to consider the provisions of art. 133 of the Constitution. That provision, no doubt, relates to the right of a litigant to go in appeal to the Supreme Court from a judgment, decree or final order of the High Court in a civil proceeding. A right of appeal to go to a particular forum is undoubtedly a substantive right. It is also now well-settled that such a right comes into existence and vests in the litigant as soon as the *lis* commences. It is, however, to be remembered that a right of appeal is not an inherent right but is a creation of the statute. The right, which is a creation of the statute, will be available to the litigant only in the manner in which the law relating to the right makes it available. Now, the right of appeal to go to the Supreme Court, which is created by art. 133 of the Constitution, is conditioned by the very same article as being available only in the circumstances as mentioned therein. It is not, therefore, a clear and crystallised right, right from the inception of the commence-

⁴ Decided on June 25, 1962.

⁶ [1958] A.I.R. S.C. 915.

⁵ (1864) 10 H.L.C. 704.

ment of the *lis*, but is a right which is made available only on the fulfilment of certain conditions. An examination of the article would show that, in order that the said right may be available, the civil proceeding must, in the first place, reach the High Court and a judgment, decree or final order in the said civil proceeding must be passed by the High Court. Secondly, the civil proceeding must satisfy one or more of the further conditions which are laid down in the said article, namely, that if it is a civil proceeding reaching the High Court in appeal from a decree in a suit in the subordinate Court, the value of the subject-matter in dispute in the Court of the first instance and in dispute on appeal, must be in excess of certain specified pecuniary limits; if it is a proceeding reaching the High Court otherwise than in appeal from a decree of the subordinate Court, the judgment, decree or final order of the High Court must, directly or indirectly, involve some claim or question respecting property of the value exceeding certain specified pecuniary limits; or else, it must be a case fit one for appeal to the Supreme Court, with the additional condition that it must also involve a substantial question of law when the decree or final order of the High Court affirms the decision of the Court immediately below. Clause (3) of this article further provides that even though the other conditions specified in art. 133(1) are satisfied, there would be no right of appeal to the Supreme Court if the matter in the High Court is decided by a single Judge of that Court. It will be clear from the provisions of this article that although a right to go in appeal to the Supreme Court has been provided to the litigant, he will not be in a position to say, as soon as the *lis* commences, that the right will be available to him. It is a right, which he may have or he may not have, depending upon circumstances which exist at the time when the availability of that right or the exercise of that right comes to be considered. Article 133 provides for the circumstances in which the right to go in appeal to the Supreme Court will be available to the party. It says nothing with regard to how or in what manner the conditions entitling the litigant to go to the Supreme Court will be secured for him. It says that if a matter is decided by a Division Bench of the High Court, a right of appeal may be available to the party under this article. But if the matter is decided by a single Judge of the High Court, the right will not be available. It gives no directions as to which matters will be decided by a single Judge and which will be decided by a Division Bench. As we have already seen, that matter is left entirely to the High Court to be determined by rules made by the High Court as it deems fit. No doubt, the making of the rules is subject to the provisions of the Constitution and also subject to Acts of the appropriate Legislature. Indeed, some of the Acts of the Legislature have made such provisions, for instance, the Income-tax Act, the Press Emergency Act, the Stamp Act and the Divorce Act. The Constitution undoubtedly could make a provision with regard to the matter, and a reference to art. 145 will show that it has made such a provision in cl. (3) of the said article. There is no such provision made by the Constitution so far as the hearing of matters in the High Court is concerned. It is, however, argued on behalf of the petitioners that although no express provision is made by art. 133 providing that civil proceedings of any kind or type should be heard by a Division Bench of the High Court, it is implicit in the provisions of art. 133 that, matters of certain kinds should only be heard by a Division Bench. The argument in that connection is that the items (a), (b) and (c), enumerated in cl. (1) of art. 133, are matters where the Constitution has given a right to the litigant to go to the Supreme Court, as of right. Such a right exists where the value of the subject-matter in dispute, both in the original Court and on appeal, exceeds Rs. 20,000, or where the judgment, decree or final order, sought to be appealed from, involves directly or indirectly some claim or question in respect of property worth more than Rs. 20,000, or where a case is a fit one for appeal. The Constitution having intended that a right of appeal, as of right, should exist in such cases,

any rules, which the High Court can make, must be so made as to effectuate and carry out that intention and not to frustrate it. A rule made by the High Court, leaving even such matters to be decided by a single Judge, would have the effect of denying the right of appeal to the litigant and thus frustrating the intention clearly indicated by the provisions of the article. It is argued that, in matters coming to the High Court from the Maharashtra Revenue Tribunal or under the several Tenancy Acts, claims and questions involving, directly or indirectly, amounts exceeding Rs. 20,000 are quite capable of being involved, and inasmuch as the rule made by the High Court by allowing such matters to be disposed of by a single Judge, deprives the litigant of his right under art. 133, the rule is inconsistent with the said article and is, therefore, such as the High Court could not have made. In our opinion, the argument is not sound. The intention of art. 133 must be gathered by a perusal of the whole of the article. It is no doubt true that in cl. (1) of the said article, the conditions, on the fulfilment of which the right of appeal may be made available to a party, have been specified. Ordinarily, therefore, if the conditions in cl. (1) are satisfied, the party could have a right of appeal. Clause (3), however, is a overriding provision which starts with the *non obstante* clause "notwithstanding anything contained in this article". By cl. (3) of the said article, it has been made clear that notwithstanding the fulfilment of the conditions under cl. (1) of the same article, a party will have no right to go to the Supreme Court if his case is decided by a single Judge of the High Court. As we have already pointed out above, the right of the High Court to make rules, deciding which matters will be decided by a single Judge or by a Division Bench, is an unfettered right unless fetters are to be found on the said right, either in the Constitution or in any law made by the appropriate Legislature. So long as there is nothing said either in the Constitution or in any law of the appropriate Legislature limiting the said right, the right could be exercised by the High Court as it deems fit for the convenience of administration of justice. At the time of drafting the Constitution, the Constitution makers could not be said to be unaware of this very wide power of the High Court, and the possibility of the High Court making rules assigning any matters before it for decision and disposal to a single Judge. Even then, by cl. (3) of art. 133, it has been provided that there would be no appeal to the Supreme Court if the matter is decided by a single Judge of the High Court. If it was intended that, in any kind of specified matters, the right of the litigant to go to the Supreme Court should be secured and preserved for him, an appropriate provision could have been made providing that matters of any specific kind may not be heard by a single Judge. Having regard to the provisions of cl. (3) of art. 133, we do not think that it is possible to say that it is intended under the said article that in every case where the conditions specified in (a), (b) and (c) of cl. (1) of art. 133 are satisfied, a right, as of right, is intended to be conferred on the litigant. The conditions specified in (a), (b) and (c) are, no doubt, intended to specify the category of cases in which the right of appeal to go to the Supreme Court may be available to the litigant. But in view of cl. (3) of the article, from the said category are expressly excluded cases which are decided by a single Judge. The rules made by the High Court for disposal of cases, whether by a single Judge or a Division Bench, are rules made for the purpose of administration of justice and are made after having due regard to the considerations which are relevant in that connection. It would not, therefore, be unreasonable to suppose that, when art. 133, by cl. (3) thereof, made a provision that in matters decided by a single Judge, no appeal shall lie to the Supreme Court, it was intended that the fact that the matter was decided by a single Judge of the High Court was sufficient to characterise it as a matter not worthy of going on appeal to the Supreme Court as of right. In our opinion, therefore, the argument advanced on behalf of the petitioners that the provisions of art. 133 of the Constitution

impliedly indicate that the High Court shall not make a rule, so as to assign a case which may fulfil the conditions in cl. (1) of the said article for disposal to a single Judge cannot be sustained. The first contention raised by the petitioners, therefore, that the impugned rule made by the High Court is inconsistent with the provisions of art. 133 of the Constitution, and, therefore, invalid, cannot be accepted.

The second objection raised is that although the High Court may have the power to make a rule assigning applications arising under art. 227, or art. 227 read with art. 226, for hearing and disposal to a single Judge, at the time when it first makes the rule, if it once makes a rule assigning such matters to a Division Bench, it cannot subsequently change the rule because of the impact of art. 133 on the matters of the nature governed by the rule already made. The argument advanced in this connection is that once a rule assigning any such matters to a Division Bench is made, the civil proceedings of the nature covered by the said rule become categorised as civil proceedings which when they reach the High Court must be disposed of by a Division Bench. They thus acquire a character of being free of the disability which is introduced by sub-cl. (3) of art. 133 which attaches to matters decided by a single Judge of the High Court. A subsequent change in the rule has the effect of destroying the character obtained by the proceedings which qualifies them for being taken in appeal to the Supreme Court under art. 133 and this the High Court has no power to do. We think that the argument is much too ingenuous to deserve any serious consideration. A right of appeal, as we have already stated, is a creature of statute. It comes into existence at the earliest when the *lis* commences but at no time earlier than that. It is impossible to say that a right of appeal exists in the litigant in respect of proceedings which he has not even commenced. The question whether the change of rule affects the right of appeal can be considered only in respect of the right of appeal, then existing. There is no right of appeal until the proceedings, in which the right of appeal arises, has commenced. The argument, therefore, that a rule once made cannot be thereafter altered because it affects the right of appeal under art. 133 in respect of the civil proceedings of the nature to which the rule applies, cannot be accepted.

It is then argued that even if the High Court has power to make a change in the rule, the change which it can make, can have only prospective operation and cannot be made so as to have retrospective effect. In other words, it is argued that the new rule made by the High Court can only apply to applications coming to the High Court in proceedings in which *lis* commences after the making of the rule. It is argued that the right of appeal is a substantive and vested right and the point of time when it gets vested is the commencement of the *lis*. The right of appeal, which thus vests at the commencement of the *lis*, is governed and regulated by the law in existence at the time when the *lis* commences. Any change in the law made subsequently cannot affect that right unless the change of law could be made retrospectively. It is argued that the rule by providing that it will apply to all matters which will be heard in the High Court on or after July 15, 1964, has given the rule a retrospective operation inasmuch as it will apply to a large number of proceedings in which the *lis* had commenced before July 15, 1964, and in which the right of appeal had already accrued to and vested in the party. The argument that the High Court cannot make a rule having retrospective operation, is advanced on two different grounds. It is said in the first place that the rule made by the High Court has the force of law and, therefore, is law made by the High Court. The only organ of the Government, which can make a law which could have retrospective or retroactive operation, is the Legislature which has the plenary power to legislate. No other organ of the Government can have such power unless such power is expressly conferred upon it. The High Court, it is said, is not a Legislature, and art. 225 of the Constitution, which confers the power to make

rules on the High Court, does not in express terms give it a power to make rules retrospectively. The High Court, therefore, cannot make the present rule. The second line of argument advanced in this connection is that the High Court, by making a rule which has a retrospective or retroactive operation, can only affect the rights which have been created under its own rules. It cannot, however, by such rules affect any rights which the party affected by the rules, has under any other statute. The rule made by the High Court has the effect of affecting the rights of the litigant, not only under the rules made by it formerly but under art. 133 of the Constitution, and therefore, the High Court cannot make such a rule.

With regard to the first submission in this connection, namely, that no organ of the Government, excepting the Legislature, has power to make a legislation having restrospective and retroactive operation, reliance is placed on the decision of the Mysore High Court reported in *Govindaraju v. State of Mysore*.⁷ In that case, it was held that a Governor acting under the proviso to art. 309 of the Constitution does not have the power to make a rule which takes away from Government servants a right already acquired by them under the pre-existing rules or previous transactions as from a date anterior to the promulgation of that rule or to make a rule validating what was invalid at its inception. The power to make rules under art 309 was derived by the Governor under the Constitution and not as a delegate of the Legislature. The exercise of the powers of the Governor was, therefore, an exercise of primary powers possessed by the Governor and not under powers derived by him through or delegated to him by the Legislature. It was held by the learned Judge of the Mysore High Court that even then there was a difference between the powers of a legislative body and those of any other rule-making body which was not a Legislature. Whereas the legislative body can always legislate retrospectively unless there is any prohibition under the Constitution, any other rule-making body cannot exercise the power retrospectively unless the law conferring that power expressly mentions that such power can be exercised retrospectively. The principle on which this distinction is founded is that in democratic constitutions where the law-making power of the body politic is vested in Legislatures, the Legislatures acting within the sphere of legislative power allotted to them by the Constitution exercise a defined portion or part of the supreme sovereign power of the body politic. There was no such assumption possible in the case of non-legislative bodies or any other organ of Government by reason only of the fact that such bodies or organs may be invested with the power of making rules having the force of law although while exercising those powers they are really exercising the power of legislation. In taking this view, the learned Judges relied on an earlier decision of the Mysore High Court reported in *India Sugars & Refineries Ltd. v. State*.⁸ That decision, however, related to powers of a delegate from the Legislature and did not deal with the case where the power exercised was not as a delegate of the Legislature but directly under the Constitution itself.

A Full Bench of the Allahabad High Court in *Ram Anwar v. State of U.P.*⁹ has taken a contrary view. It has been held in that case:

"The rule-making power conferred by Art. 309 on the Governor or his nominee is not confined to prospective rule-making and appears to be wide enough to include the making of rules with retrospective effect. The Legislature can legislate prospectively as well as retrospectively. The powers of the Governor under the proviso to Art. 309 being identical with that of the legislation under the main article the Governor can make rules with similar effect."

The Full Bench decision of the Allahabad High Court was cited before the Mysore High Court. The learned Judges of the Mysore High Court, however, did not agree with the said decision. We do not propose to go into the conflict of deci-

7 [1963] A.I.R. Mysore 265.

8 [1960] A.I.R. Mysore 326.

9 [1962] A.I.R. All. 328, F.B.

sions between the Mysore High Court and the Allahabad High Court on the question whether the legislative power of any other organ of the Government, apart from the Legislature, which is derived by it not as a delegate of the Legislature but directly under the Constitution is identical with that of the Legislature so far as it relates to the making of a law having a retrospective or retroactive effect, although we may observe that we feel ourselves inclined to agree with the view taken in the Allahabad High Court in preference to that enunciated by the Mysore High Court in the case referred to by us. Even if it were assumed that the rule made by the High Court has retrospective operation and that the High Court, not being a Legislature, does not possess the power to make a retrospective rule unless it is given such power, in our opinion, the power to make a retrospective rule has been given to it under art. 225 of the Constitution, if not expressly, at any rate, by necessary intendment.

In *Indramani v. W. R. Natu*¹⁰ the view of the Court as per the majority of the Judges, who decided that case, is that even when a rule making authority which derives its power to make rules by an Act of the Legislature exercises that power it can make a rule having retrospective effect if such power is delegated to it under the Act not only by express words but even by necessary implication. The argument advanced before the Court was that while the Legislature, which had plenary power, could enact a statute having a retrospective operation, subordinate legislation, be it a rule, a by-law or a notification, could not be made so as to have retrospective operation and that to that extent the rule, bye-law or notification would be *ultra vires* and would have to be struck down, and reliance was sought to be placed on *Indian Sugars & Refineries Ltd. v. State* which was the case relied upon by the Mysore High Court in a subsequent decision to which we have already referred. In the majority judgment, their Lordships observed (p. 286):

"...We do not, however, consider it necessary to canvass the correctness of this decision or the broad propositions laid down in it. It is clear law that a Statute which could validly enact a law with retrospective effect could in express terms validly confer upon a rule-making authority a power to make a rule or frame a bye-law having retrospective operation and we would add that we did not understand Mr. Pathak to dispute this position. If this were so the same result would follow where the power to enact a rule or a bye-law with 'retrospective effect' so as to affect pending transactions, is conferred not by express words but where the necessary intendment of the Act confers such a power."

When a rule making body which does not derive its power directly under the Constitution but has the power entrusted to it by an Act of the Legislature can exercise the power so as to make a rule having a retrospective effect if the Act of the Legislature confers such power either in express words or even by necessary implication there can be no doubt whatever that a body deriving its power to make rules directly under the Constitution could have the power to make rules having retrospective effect if the provision of the Constitution confers such power upon it either by express words or by necessary intendment. Mr. Natu has invited our attention to the observations in the dissenting judgment of Justice Subba Rao in the said case. His Lordship has observed as follows (p. 290):

"...Learned counsel for the respondents contends that, as the Legislature can make a law with retrospective operation, so too a delegated authority can make a bye-law with the same effect. This argument ignores the essential distinction between a Legislature functioning in exercise of the powers conferred on it under the Constitution and a body entrusted by the said Legislature with a power to make subordinate legislation. In the case of the Legislature, Art. 248 of the Constitution confers a plenary power of legislation subject to the limitations mentioned therein and in other provisions of the Constitution in respect of appropriate entries in the Seventh Schedule. This Court, in

The Union of India v. Madan Gopal Kabra,^{10a} held that the Legislature can always legislate retrospectively, unless there is any prohibition under the Constitution which has created it. But the same rule cannot obviously be applied to the Central Government exercising delegated legislative power, for the scope of their power is not co-extensive with that of the Parliament."

Mr. Natu has relied on these observations of Subba Rao J. in support of his proposition that the powers of the Legislature are different from the powers of any other rule-making body, and while the Legislature can legislate retrospectively, no other rule-making body can do so. We are afraid that the observations relied on by Mr. Natu do not yield the result, such as is contended for by him. The difference in the powers considered by Subba Rao J. was a difference in the power possessed by the Legislature and the delegate from the Legislature. It has been pointed out by his Lordship that while the Legislature derives its power under the Constitution, the delegate from the Legislature derives its power not primarily but as subordinate to the Legislature, and the view expressed is that while a legislative body deriving its power to legislate directly under the Constitution can exercise such power retrospectively unless there is any prohibition under the Constitution which has conferred the power upon it, a delegate from the Legislature cannot do so unless that power is given to it in express words. According to Subba Rao J., therefore, while legislative power derived directly under the Constitution can be exercised retrospectively, in the absence of prohibition, delegated legislative power cannot be so exercised unless it is given in express words. The source of the power possessed by the High Court is, after the Constitution, under art. 225 of the Constitution. That is the primary power possessed by the High Court and flows directly from the Constitution and not as the delegate of the Legislature. There is nothing in art. 225 or any other provision of the Constitution which prohibits its exercise with retrospective effect. Even on the view taken by Subba Rao J., therefore, the High Court can make a rule having a retrospective effect under its power under art. 225 of the Constitution.

Secondly, as we have already said, art. 225, which confers the power on the High Court, by necessary implication and intendment, gives power to make rules having retrospective effect. As we have already pointed out earlier, art. 225 preserves and reaffirms the power possessed by the High Court under s. 108 of the Government of India Act, 1915. That power is unfettered and unrestricted in its ambit and, as observed by Mahajan J. in *N. S. Thrad Co. v. James Chadwick & Bros.* had got to be conferred upon the High Court in such widest terms in the very nature of things. The making of rules by the High Court for the exercise of its several jurisdictions is for the purpose of administration of justice and, in the exercise of its power, the High Court is empowered to assign matters to single Judges or Division Benches as it may deem fit for the purpose of due and proper administration of justice. It is impossible to say that the High Court can decide once and for all times which matters will be decided by a single Judge and by a Division Bench or Division Court. That will have to be decided from time to time as circumstances may change and especially so as far as the applications under art. 227, or art. 227 read with art. 226, are concerned. At the time, when the jurisdiction under arts. 226 and 227 was conferred for the first time upon the High Court by the Constitution, the High Court thought it fit to make a rule directing that matters arising under this jurisdiction which was conferred upon it by the Constitution for the first time, should be dealt with by a Division Bench as several new and complicated points were likely to arise until certain principles governing such matters get properly settled. The High Court advisedly, therefore, made a rule that all such matters should be decided by a Division Bench. When the rule came to be changed in July 1964, there can be no doubt whatsoever that the rule was changed in the context of the changed circumstances between the

time the jurisdiction was first conferred and the time when the change was thought desirable. The High Court has now thought it fit that it is no more necessary for the Division Bench to deal with such matters and the matters can as well be disposed of by a single Judge. The power to make rules granted to the High Court, ever since it has come to be established, has been always contemplated to be exercised by the High Court as it deems fit from time to time. In the exercise of the powers, in our opinion, it is implied in the very nature of things that the power should also be exercised, if necessary, so as to have retrospective operation. The argument, therefore, that the High Court cannot make a rule having retrospective operation, cannot be sustained.

With regard to the other branch of the argument relating to this point, the rule made by the High Court, as we have already pointed out, is a rule of procedure in which there can be no vested rights. It was not possible for the petitioners or any litigant to say that it could have a vested right to have his proceeding, after it had reached the High Court, heard by a particular number of Judges. His substantive right is to go in appeal to the High Court. How his appeal would be dealt with will depend upon the practice and procedure of the High Court which may vary from time to time. No complaint possibly, therefore, could be made by the litigants that their right to have the appeal decided by a Division Bench which existed at the time when they entered the High Court, or when the *lis* out of which the proceeding in the High Court had resulted, had commenced, because there was no such vested right in the party at any time. The other argument is that the rule has the effect of taking away the vested rights under art. 133 of the Constitution. In our opinion, no vested rights under art. 133 have been taken away. We are, in that respect, in complete agreement with the view expressed by the Special Bench of the Patna High Court in *Mahendra v. Darsan*. Dealing with the similar argument, the learned Judges of the Patna High Court observed:

"Such a rule cannot be said to have affected the right of appeal given under Art. 133 of the Constitution of India read with Sections 109 & 110, Civil P. C. Leave to appeal to the Supreme Court is granted either when the case fulfils the requirements of Section 110 of the Code of Civil Procedure or when it is otherwise a fit case for appeal to the Supreme Court. In either case, the petitioner has to apply for a certificate and has to satisfy the Court that the requisite conditions are fulfilled. The right is thus a limited right, . . . The right is to ask for a certificate that the appeal fulfils the requirements of Section 109 or Section 110 of the Code of Civil Procedure, but the right is only given in such cases as are heard in the High Court by two or more Judges: There is no such right in a case which is heard by a Single Judge, there being a different right of appeal with regard to Single Judge decisions under clause 10 of the Letters Patent. If it is conceded that no party has a vested right to be heard by two or more Judges in the High Court it follows as a necessary corollary that a change of Rules with regard to the powers of a single Judge does not affect the right of appeal given by the Statute. That right still remains the same as before. All that happens is that the statutory prohibition under Section 111 of the Code of Civil Procedure, now clause (3) of Art. 133 of the Constitution comes into operation."

A similar view has also been taken by a Division Bench of this Court in First Appeal No. 32 of 1962. We are aware that there is a conflict of views on this point, and a contrary decision has been taken by the Full Bench of the Punjab High Court in *Gordhan Das-Baldev Das v. G.-G.-In-Council*.¹¹ There is also a decision from the Nagpur High Court in *Radhakisan v. Shridhar*.¹² Having regard, however, to the Division Bench decision of this Court and the decision of the Patna High Court in *Mahendra v. Darsan* with which we find ourselves in agreement, we are of the opinion that the contention raised by Mr. Natu that the rule framed by the High Court is invalid in so far as it affects proceedings in respect of which the *lis* has com-

11 [1952] A.I.R. Punjab 103, F.B.

12 [1950] A.I.R. Nag. 177, F.B.

menced prior to the date on which the rule comes into operation, because in respect of such matters, it affects the vested rights of the litigants under art. 133 of the Constitution, cannot be sustained.

The next point urged before us is that the rule contravenes art. 14 of the Constitution and is, therefore, void. In our opinion, the point is utterly devoid of any substance. The argument in this connection is advanced on two grounds. It is said that while all decisions under the Tenancy Acts of any authority are brought under the purview of the new rule, so far as some other Local Acts are concerned, not all decisions but only decisions of the Maharashtra Revenue Tribunal under the said Acts are governed by the rule. We do not understand how any ground of discrimination can be urged on this basis. It is well settled that if there is any reasonable or clear classification, an attack on the ground of discrimination under art. 14 cannot be available. Different treatment of matters arising out of different Acts dealing with different subjects cannot give rise to any challenge on the ground of discrimination, nor can the fact that the application from the different Acts decided by different authorities ultimately reach the High Court under its jurisdiction under art. 227 require all such matters to be treated alike by the High Court in their disposal. The second argument is that under certain provisions of some of the Acts from which matters go to the Maharashtra Revenue Tribunal, under the same provisions, matters also go to the Commissioner and whereas matters dealt with by the Revenue Tribunal are brought under the rule, those that do not go to the Revenue Tribunal but to some other authority are not brought under the rule. It is contended that while matters, which after going to the Revenue Tribunal, come to the High Court on an application under art. 227 of the Constitution, will be treated under the new rule as liable to be disposed of by a single Judge, similar matters, which go to the other authorities under the said Act and thereafter enter the High Court on an application under art. 227, will be treated differently by being disposed of by a Division Bench. This, it is urged, constitutes discrimination under art. 14 of the Constitution. We do not think that the contention is tenable. Even though the matters, which arise under the same provisions are similar, at their inception they are processed differently before they reach the High Court. The provisions of the various Acts, which permit these different processes and different channelling of the matters before they reach the High Court, have not been challenged and must, therefore, be regarded as good and valid law. The different processes to which the cases have been subjected will be a sufficient reason to regard them as requiring different treatment when they come to the High Court. Thus while cases which have proceeded through the channel of the Revenue Tribunal have the advantage of the decision of the members of the Revenue Tribunal and the procedure prescribed by the Revenue Tribunal, the matters, which have been dealt with by the other authorities, have not that advantage. It cannot be denied that the manner in which the matter comes to be treated in its earlier processes will be a relevant matter to be considered how it should be treated at subsequent stages. Thus, for instance, a monetary claim may, at the initial stage, be tried as a small cause suit if the Judge trying it is invested with the necessary Small Cause Court powers. A similar claim may also have to be treated by a Judge as a regular suit where he has not the requisite Small Cause Court powers. In one case, the claim having been tried as a small cause claim, no appeal will lie to the superior Court and the remedy available will be by way of a revision under the Small Cause Courts Act. In the other case, there will be a regular appeal to the District Court. It cannot be argued that because of this different treatment of similar claims resulting in different consequences, there is discrimination which offends against art. 14 of the Constitution. It is obvious that, where the claim is allowed to be treated as a small cause claim, adequate care is taken to see that a person, who is allowed to try it as a small cause, has

the necessary suitability and experience. The fact that the matter has been treated by a Judge, who has been considered as sufficiently suitable and experienced to treat it as a small cause, has given the matter a character which does not require to be taken further in appeal to the District Court. On the other hand, when the claim is considered by a Judge who has not been given the necessary powers which imply that he has not the necessary suitability and experience to try it as a small cause matter, it is thought advisable that the matter should be decided as a regular suit and the right of appeal to the District Court should be given to the litigant. It would thus be seen that the further different treatment of similar claims is based on the reasonable basis and, therefore, involves no discrimination. In making the rule the matters which come to the High Court from the decisions of the Revenue Tribunal should be disposed of by a single Judge due regard has been given to the earlier stages through which these matters have passed. In our opinion, therefore, the argument urged under art. 14 of the Constitution also fails.

Coming now to the last point which relates to the construction of the rule framed, what is urged is that r. 15-A provides that all matters, which are specified in the said rule, will be heard and finally disposed of by a single Judge. The words "heard and finally disposed of" contemplate the preliminary hearing by way of admission and the final hearing at the time of the disposal. Under r. 15-A, therefore, what is contemplated is that the hearing at both stages will be done by a single Judge. Paragraph 2 of the notification provides for coming into operation of this rule as from a certain date and the applicability of the rule to the pending matters. What is stated in para. 2 is that the new rule will come into effect from July 15, 1964, and will apply to all applications which will be heard on and after that date. The contention is that having regard to the use of the word "heard" in r. 15-A and having regard to the meaning which it has under the rule, that word must be understood as having the same meaning even in para. 2 and, therefore, what is meant by the word "heard" in para. 2 is "heard for the purpose of admission." In other words, the new rule is made applicable to all such matters which come for preliminary hearing on or after July 15, 1964, and cannot apply to matters which have already been heard for admission before that date. In our opinion, the argument advanced require the word "heard" to be understood as meaning "heard for the first time". We do not think that any such restricted meaning of the word "heard" is intended in making the rule. "Heard," in our opinion, would mean "heard at any time in the process of hearing until the matter is finally disposed of". A matter before it is finally disposed of may come for hearing a number of times. After the rule comes into operation, all matters governed by the rule are directed to come for hearing before a single Judge. The mere circumstance that a matter has been heard for admission by a Division Bench, will not make it a matter which is not thereafter capable of being heard by a single Judge if it is actually within the list of matters which is capable of being disposed of by a single Judge. Undoubtedly, if a matter is before a Division Bench and has been part-heard by the Division Bench, the Division Bench no doubt, will be entitled to retain the matter before it and dispose of it itself without sending it to the file of the single Judge, because matters in the list of a single Judge are also capable of being disposed of by a Division Bench, the rule empowering a single Judge to dispose of the matters being only an enabling one. There is, however, nothing to prevent a Division Bench even in matter which it has heard for sometime to send it to the file of a single Judge if it finds that the matter is capable of being disposed of by a single Judge. We do not, therefore, think that the fact that the matter has been heard for admission by a Division Bench will require it to be retained as a Division Bench matter or that the rule has intended that such matters should not be disposed of by a single Judge. In our opinion, therefore, under the rule as it is framed,

all matters such as are specified in the said rule will be liable to be heard and disposed of by a single Judge on or after July 15, 1964.

In the result, therefore, all the contentions, which have been raised by the petitioners challenging the validity of the rule, fail and the applications, therefore, must be dismissed. We accordingly discharge the rule issued on these applications. There will be no order as to costs.

Applications dismissed.

ORIGINAL CIVIL.

Before Mr. Justice Kotval and Mr. Justice Palekar.

KAMALABAI HARJIVANDAS PAREKH v. T. B. DESAI.*

Requisitioning and Acquisition of Immovable Property Act (XXX of 1952), Sec. 8(3)(b) — Constitution of India, Arts. 31, 226—Whether s. 8(3)(b) ultra vires art. 31—Petition under art. 226 raising constitutional validity of legislation—Delay in presenting such petition whether affects its maintainability.

Clause (b) including the words "whichever is less" of sub-s. (3) of s. 8 of the Requisitioning and Acquisition of Immovable Property Act, 1952, is *ultra vires* of art. 31 of the Constitution of India (as it stood prior to its amendment in 1955), and is, therefore, void.

*The State of West Bengal v. Bela Banerjee,*¹ *Than Singh v. Union of India,*² *H. P. Khandewal v. State of U.P.,*³ *Chhaya Devi v. State of Bihar,*⁴ *Ramdas Nathubhai Shah v. P. M. Shahane,*⁵ *M/s. W.R.E.D. Co. Ltd. v. State of Madras,*⁶ *State of Madras v. Nama Sitaya Mudaliar*⁷ and *Namaswaya v. State of Madras,*⁸ referred to.

Where a constitutional objection to the validity of a legislation is in question, question of mere delay will not affect the maintainability of a petition under art. 226 of the Constitution of India.

THE facts are stated in the judgment.

S. J. Sorabji, with A. J. Rana, instructed by *Jestharam & Co.*, for the petitioner.

H. G. Advani, instructed by G. M. Divekar, for the respondents.

KOTVAL J. The petitioner claims to be the owner of a piece of land admeasuring 2 gunthas 5 annas, out of S. No. 29A at Juhu. The land originally belonged to her husband, and after his death she claims to have succeeded to it by virtue of a will. The respondents have not admitted her title, but the question is hardly material to the points raised in the present petition.

On May 2, 1942, this piece of land was requisitioned for the purposes of the Union, under r. 75A(1) of the then existing Defence of India Rules. The notification (exh. 1) stated that it was required for military purposes, and it has now been explained that it was required for the construction of a road leading to the military aerodrome at Juhu during the period of the emergency occasioned by the last war. The owner of the plot was receiving the usual compensation for requisitioning until December 29, 1952, when a notification was issued under s. 7 of the Requisitioning and Acquisition of Immovable Property

*Decided, August 7, 1964. O.C.J. Miscellaneous Petition No. 378 of 1962.

1 [1954] S.C.R. 538.

2 [1955] A.I.R. Punjab 55.

3 [1955] A.I.R. All. 12.

4 [1957] A.I.R. Pat. 44.

5 (1962) Special Civil Application No. 121 of 1962 (with Special Civil Applications

Nos. 627, 698, 699, 706, 1026, 1141, 1145, 1150, 1168, 1171, 1346, and 1457 of 1962), decided by Patel and Palekar JJ. on December 11, 1962 (Unrep.).

6 [1962] A.I.R. S.C. 1753.

7 (1964) Civil Appeals Nos. 6 to 12 of 1963, decided on March 3, 1964 (Supreme Court).

8 [1959] A.I.R. Mad. 548.

Act, 1952 (XXX of 1952). That Act had been enacted by the Parliament on March 14, 1952, and by virtue of s. 24 thereof, it replaced several enactments which were passed after the operation of Defence of India Rules expired. The notification under s. 7 of the Act stated that the land, which was part of a much larger area at one time, and which had been requisitioned on May 2, 1942, was now being acquired by the Government of India, Ministry of Works, Housing and Supply. The land would ordinarily vest in the Government of India from the date of the notification under s. 7 and the notification itself so declared the land to have vested in the Central Government.

Consequent upon this notification, the only right which the owner of the land had, was to claim compensation, and accordingly compensation was offered by the Collector of Bombay, respondent No. 2 to the petition, by his letter dated February 20, 1961, at the rate of Rs. 11 per sq. yd. According to this valuation, the petitioner would have got Rs. 3,080 for the land. The petitioner, however, wanted compensation for the land at a much higher rate. She claimed it at the rate of Rs. 100 per sq. yd.; which would give her an amount of Rs. ... plus the usual 15 per cent. solatium for compulsory acquisition. Since there was no agreement, the Chief Judge, Court of Small Causes, Bombay, Mr. T. B. Desai, who is respondent No. 1 to this petition, was appointed the Arbitrator under s. 7. The Arbitrator gave notice to the petitioner to put in her claim, and also to respondent No. 3, the Government of India, to put in its statement of valuation. Accordingly, the petitioner put in a statement claiming compensation at the rate of Rs. 75 per sq. yard, plus 15 per cent. solatium for compulsory acquisition and the State offered in its statement compensation at the rate of Rs. 11 per sq. yd. which according to it was the "fair value according to the said Act". Respondent No. 3 also denied the petitioner's claim for the 15 per cent. solatium for compulsory acquisition. Before the matter could proceed much further before the Arbitrator, the petitioner preferred the present Miscellaneous Petition in this Court on September 18, 1962.

In this petition, the petitioner challenges these provisions of the Requisitioning and Acquisition of Immoveable Property Act, 1952, whereby the compensation is to be assessed. We will first refer to the provisions of the Act, and then indicate the precise nature of the objection and the question raised in the present petition.

Act XXX of 1952 was enacted to provide for the requisitioning and acquisition of the immoveable property for the purposes of the Union, and it was brought into force for a limited duration. By an amendment to s. 1 made by another Central Act No. XLVIII of 1963, the Act was to cease to have effect on March 14, 1970, with certain exceptions in favour of the things done or omitted to be done in the past. Section 3 deals with the power to requisition immoveable property, and s. 4 prescribes that consequent upon requisitioning the competent authority may take possession of the property by such force as may be necessary after requiring the owner to deliver possession by a notice served on him. Section 5 confers rights on the State to use the property for the purpose for which it was requisitioned and provides for repairs to the requisitioned property. Section 6 provides for the release of the property from requisitioning when the purpose for which it was requisitioned has been fulfilled.

Then follow the provisions regarding acquisition. Section 7(1) says that where any property is subject to requisition, the Central Government may, if it is of opinion that it is necessary to acquire the property for a public purpose, at any time acquire such property. In order to do that, it has to publish a notice in the Official Gazette, which we have stated was done in the instant case, on April 2, 1953. There is proviso to s. 7(1) which provides the usual safeguard of hearing the person interested before issuing the notification, and considering the cause shown by him, if any, against acquisition. Sub-section (2) of s. 7 declares that upon the notification being issued under sub-s. (1), the

property vests in the Central Government absolutely and free from all encumbrances, and from the date of vesting, the period of requisition of such property shall end. There are certain conditions to the acquisition of property under s. 7, and these are indicated in sub-s. (3) thereof. Sub-section (4) enacts that the decision or determination of the Central Government in regard to whether the property should be acquired or not is final.

Next follow the provisions as to the award of compensation and it is with those provisions that we are principally concerned in the present petition. It will be convenient to reproduce here the provisions of s. 8 entirely in order to appreciate the points argued:—

“8. (1) Where any property is requisitioned or acquired under this Act, there shall be paid compensation the amount of which shall be determined in the manner and in accordance with the principles hereinafter set out, that is to say,—

(a) where the amount of compensation can be fixed by agreement, it shall be paid in accordance with such agreement;

(b) where no such agreement can be reached, the Central Government shall appoint as arbitrator a person who is, or has been, or is qualified for appointment as, a Judge of a High Court;

(c) the Central Government may, in any particular case, nominate a person having expert knowledge as to the nature of the property requisitioned or acquired to assist the arbitrator and where such nomination is made, the person to be compensated may also nominate an assessor for the same purpose;

(d) at the commencement of the proceedings before the arbitrator, the Central Government and the person to be compensated shall state what in their respective opinion is a fair amount of compensation;

(e) the arbitrator shall, after hearing the dispute, make an award determining the amount of compensation which appears to him to be just and specifying the person or persons to whom such compensation shall be paid; and in making the award, he shall have regard to the circumstances of each case and the provisions of sub-sections (2) and (3), so far as they are applicable;

(f) where there is any dispute as to the person or persons who are entitled to the compensation, the arbitrator shall decide such dispute and if the arbitrator finds that more persons than one are entitled to compensation, he shall apportion the amount thereof amongst such persons;

(g) nothing in the Arbitration Act, 1940 shall apply to arbitrations under this section.

(2) The amount of compensation payable for the requisitioning of any property shall consist of—

(a) a recurring payment, in respect of the period of requisition, of a sum equal to the rent which would have been payable for the use and occupation of the property, if it had been taken on lease for that period, and

(b) such sum or sums, if any, as may be found necessary to compensate the person interested for all or any of the following matters, namely:—

(i) pecuniary loss due to requisitioning;

(ii) expenses on account of vacating the requisitioned premises;

(iii) expenses on account of reoccupying the premises upon release from requisition; and

(iv) damages (other than normal wear and tear) caused to the property during the period of requisition, including the expenses that may have to be incurred for restoring the property to the condition in which it was at the time of requisition.

(3) The compensation payable for the acquisition of any property under section 7 shall be—

(a) the price which the requisitioned property would have fetched in the open market, if it had remained in the same condition as it was at the time of requisitioning and been sold on the date of acquisition, or

(b) twice the price which the requisitioned property would have fetched in the open market if it had been sold on the date of requisition, whichever is less."

Sections 10 and 11 make the usual provisions regarding right of appeal. No right of appeal is prescribed against an order of acquisition though a right of appeal is prescribed in s. 10 from an order of requisitioning.

Now, it will be noticed that s. 8(1), in its opening clause, enacts that compensation shall be paid of an amount which is to be determined (a) in the manner and (b) in accordance with the principles hereinafter set out. The section, therefore, in express terms, deals with the manner of determination of compensation and the principles on which the compensation is to be determined—both being the plenary requirements of art. 31(2) of the Constitution. Sub-section (1) mostly deals with the procedure to be followed by the Arbitrator in arriving at the figure of compensation, excepting cl. (e), to the important provisions of which we will presently refer. Sub-section (2) deals with the principles of compensation when the property is requisitioned. Actually we are not concerned in the present petition with sub-s. (2), but reference was made to it only on a matter of construction of the other sub-sections of s. 8.

Sub-section (3) is the crucial provision by which the petitioner's case is governed. It opens with the words: "The compensation payable for the acquisition of any property under section 7 shall be" and then prescribes two modes of ascertaining that compensation. Clause (a) prescribes that the compensation shall be the price which the property would have fetched in the open market, "if it had remained in the same condition as it was at the time of requisitioning and been sold on the date of acquisition." In other words, all that cl. (a) of sub-s. (3) enacts, is that the property should be valued at the market value on the date of acquisition, but in the condition in which it was on the date on which it was requisitioned. Clause (b) of sub-s. (3) however introduces a wholly different principle. It refers to twice the price which the requisitioned property would have fetched in the open market, if it had been sold on the date of requisition. Thus sub-s. (3)(b) has reference to the price on the date of requisition and it says that the compensation shall be twice that price. It is clear that the two clauses of s. 8(3) lay down two radically different principles for the determination of compensation. Clause (a) speaks of the market price on the date of acquisition, while cl. (b) speaks of the market price on the date of requisition. The provision for twice the price in the latter case affects merely the quantum of the compensation but not the principle of determination.

Now, between these two radically different principles of assessing compensation the choice is in favour of the State and not in favour of the person whose property is acquired. By sub-s. (3) the two principles are made alternative by the use of the word "or", but what is of prime importance in considering the constitutionality of these provisions are the concluding words of sub-s. (3) "whichever is less". The total effect, therefore, of sub-s. (3) of s. 8 is that substantially the valuation has to be made for the purposes of compensation upon one of the two alternative principles—(a) either the value on the date of acquisition, or (b) twice the market value on the date of requisition, but the person whose property is being acquired is to be paid that amount "whichever is less".

It is cl. (b) of sub-s. (3), which is attacked as being *ultra vires* of the provisions of art. 31 of the Constitution. We may add that originally in the petition the attack was against both the cls. (a) and (b) of sub-s. (3), but Mr. Sorabjee on behalf of the petitioner has with much discretion limited the argument to cl. (b) of sub-s. (3) only. For the purposes of the decision of the constitutional question, which has been raised, it may be stated here that it is contended by counsel for both the parties before us that the constitutionality of the provisions affected falls to be determined under art. 31 as it stood prior

to the Constitution (Fourth Amendment) Act, 1955. Prior to that amendment, cls. (1) and (2) of art. 31 ran as follows:

"(1) No person shall be deprived of his property save by authority of law.

(2) No property, moveable or immovable, including any interest in, or in any company owning, any commercial or industrial undertaking, shall be taken possession of or acquired for public purposes under any law authorising the taking of such possession or such acquisition, unless the law provides for compensation for the property taken possession of or acquired and either fixes the amount of the compensation, or specifies the principles on which, and the manner in which, the compensation is to be determined and given."

Now, it is argued that cl. (2) of art. 31 says that no property shall be taken possession of or acquired for public purposes unless two conditions are fulfilled viz., (1) that the law provides for compensation for the property, and (2) either fixes the amount of compensation or specifies the principles on which and the manner in which the compensation is to be determined and given. In any case, what is to be given under cl. (2) of art. 31 is "compensation", and it has been urged that upon the interpretation placed upon the word by the Supreme Court, it is clear that it means the just equivalent of the property to be taken, or, in other words, the fair market value of the property. It is further contended that the provisions of cl. (b) of sub-s. (3) of s. 8 make it impossible to give fair compensation or a true market value.

Reliance has been placed in this respect upon the leading case—*The State of West Bengal v. Bela Banerjee*.¹ That also was a case in which art. 31 prior to its amendment by the Constitution (Fourth Amendment) Act, 1955, came up for consideration before the Supreme Court. In that case, the provisions of s. 8 of the West Bengal Land Development and Planning Act, 1948, were challenged. It provided for the determination of the amount of compensation, and it was challenged as *ultra vires* of art. 31. The proviso (b) to that section limited the compensation payable to an amount not exceeding the market value of the land on December 31, 1946, and it was urged on behalf of the owners that fixation of assessment of compensation as on December 31, 1946—a completely arbitrary date—and having regard to the fact that the State may actually acquire the property much later, the compensation payable would not be a full and fair money equivalent of the property to be taken. It was argued on behalf of the State in that case that compensation could not mean the full cash equivalent, but that it would mean such compensation as was determined on principles laid down by the law enacted in exercise of the legislative power conferred by Entry 42 of List III (the Concurrent List). The learned Chief Justice, who delivered the judgment on behalf of the Court, repelled the latter argument as follows (p. 563):

"We are unable to agree with this view. While it is true that the legislature is given the discretionary power of laying down the principles which should govern the determination of the amount to be given to the owner for the property appropriated, such principles must ensure that what is determined as payable must be compensation, that is, a just equivalent of what the owner has been deprived of. Within the limits of this basic requirement of full indemnification of the expropriated owner, the Constitution allows free play to the legislative judgment as to what principles should guide the determination of the amount payable. Whether such principles take into account all the elements which make up the true value of the property appropriated and exclude matters which are to be neglected, is a justiciable issue to be adjudicated by the court."

Having regard to this important pronouncement of the Supreme Court, it must be taken now as settled beyond any controversy that the word "compensation" as used in art. 31, cls. (1) and (2), prior to the fourth amendment, means nothing more or less than the just equivalent of the property taken by acquisition. We shall show that in a subsequent judgment, the latter expression has

been used interchangeably with the "just equivalent". Therefore, any law for acquisition of property which made a provision, whereby it was possible that the just equivalent would not be paid to a citizen prior to the Fourth Amendment would necessarily be *ultra vires* of art. 31.

The other point that was raised in *Bela Banerjee's* case, and which is also of importance in the present petition, was that the fixation of an arbitrary date on which the compensation is to be assessed, which has no reference to the point of time when the property is actually acquired, is *prima facie* bad and it must be assumed that it would result in the "just equivalent" not being given to the citizen. In this respect, the Supreme Court did not in terms say that the fixation of an arbitrary date of this kind would in every case be bad, but the principle which they laid down was stated thus (p. 564):

"...Considering that the impugned Act is a permanent enactment and lands may be acquired under it many years after it came into force, the fixing of the market value on December 31, 1946, as the ceiling on compensation, without reference to the value of the land at the time of the acquisition is arbitrary and cannot be regarded as due compliance in letter and spirit with the requirement of article 31(2). The fixing of an anterior date for the ascertainment of value may not, in certain circumstances, be a violation of the constitutional requirement as, for instance, when the proposed scheme of acquisition becomes known before it is launched and prices rise sharply in anticipation of the benefits to be derived under it, but the fixing of an anterior date, which might have no relation to the value of the land when it is acquired, may be, many years later, cannot but be regarded as arbitrary."

We have quoted not merely the principles laid down but also the illustration given by the learned Chief Justice *in extenso*, because, as we shall presently show, giving of the illustration to indicate a possible exception has resulted in giving rise to a large volume of discussion in subsequent authorities. The true principle, however, is as indicated by the learned Chief Justice in the first sentence of the passage we have quoted, that

"the fixing of the market value on December 31, 1946, (an arbitrary date), as the ceiling on compensation, without reference to the value of the land at the time of the acquisition is arbitrary and cannot be regarded as due compliance in letter and spirit with the requirement of article 31(2)".

The statement of the principle in *Bela Banerjee's* case declared the fixing of an arbitrary date as not in compliance with the letter and spirit of art. 31 (2), but in subsequent decisions, it is made clear that the effect of mentioning an arbitrary date of this kind as the date on which compensation is to be assessed gives rise, so to say, to a presumption that the just equivalent is not being paid unless the State establishes *aliunde* that what it is paying is the just equivalent. Subsequent to the decision in *Bela Banerjee's* case, several High Courts have applied it. Some of those decisions were cited and they are: *Than Singh v. Union of India*,² *H. P. Khandewal v. State of U. P.*,³ and *Chhaya Devi v. State of Bihar*.⁴ The decision was also applied by this Court in *Ramdas Nathubhai Shah v. P. M. Shahane*⁵ a judgment to which my learned brother was a party. In that case, this Court was concerned with the provisions of the recent enactment necessitated by the bursting of the Panshet dam at Poona. Consequent upon that disaster, it became necessary to provide for the reconstruction of the devastated area and controlling the developed area by acquiring the lands on the two banks of the Mutha river. The Act known as the Poona Mutha River Flood Limits (Prohibition of Building) and Provision for Alternative Building Sites Act, 1961, was passed on September 25, 1961. In that Act the principle of compensation was laid down in s. 7 read with s. 23 of the Land Acquisi-

2 [1955] A.I.R. Punjab 55.

3 [1955] A.I.R. All. 12.

4 [1957] A.I.R. Pat. 44.

5 (1962) Special Civil Application No. 121 of 1962 (with Special Civil Applications Nos.

627, 698, 699, 706, 1026, 1141, 1150, 1168, 1171, 1346, and 1457 of 1962), decided by Patel and Palekar JJ., on December 11, 1962 (Unrep.).

tion Act. The provision made was that the property should be valued and compensation paid in accordance with the value prevailing on the date on which a declaration is made in the Act or January 1, 1948. It was argued that the fixation of such a date was arbitrary, and this Court accepted the argument and struck down the provision. The important difference, however, between that case and the present one was that, in that case the Division Bench was concerned with a law which was passed subsequent to the Constitution (Fourth Amendment) Act, 1955. By that Act, an important change was made in cl. (2) of art. 31, by the addition, *inter alia*, of the following clause:

"...and no such law shall be called in question in any Court on the ground that the compensation provided by that law is not adequate."

Thus, after the amendment, mere deficiency or inadequacy of compensation is not a question which can go to show the unconstitutionality of any Act dealing with the acquisition of property. Despite that fact the Division Bench in that case took the view that the fixation of the arbitrary date as the date on which the value for the purposes of the compensation has to be assessed was unconstitutional, and the reasoning was thus stated by Mr. Justice Patel, who delivered the judgment on behalf of the Division Bench:

"In our view, once the interpretation put upon the word 'compensation' by the Supreme Court is accepted, it would not be possible to sustain this contention. It may not be the exact equivalent but it must in fairness amount to compensation before it can be declared valid. There would, therefore, be no difference in the approach to the case merely because in this case the principles have been fixed. If any thing that is called a principle of valuation is arbitrary then it ceases to be a principle and must be declared to be invalid."

It was contended in that case also that the fixation of the value of the property acquired by reference to a date much anterior to the date of acquisition is a recognised mode of doing it, at least in national emergencies, but after considering several foreign and other authorities, the learned Judges stated the principle thus:

"It seems that article 31 with the amendment embodies these principles only and is not intended to permit expropriation of property by providing the payment of nominal compensation... such compensation as cannot reasonably be called compensation."

Accordingly, the Division Bench held that s. 7 of the Act before them offended against art. 31, and was, therefore, *ultra vires* and void.

The decision shows that even after the amendment of art. 31 by the Constitution (Fourth Amendment) Act, 1955, the law still is that what is to be paid for the acquisition of property by the State is the true equivalent or the market value of the property to be acquired, and that fixing of an arbitrary date, on which such property is to be valued, which date is anterior to the date of acquisition, is bad. Thus, whether before or after the amendment of art. 31, the view has been taken that what is to be paid for the acquisition of property is a just equivalent; and that if a date is fixed arbitrarily on which the valuation is to be reached, which date is anterior to the date of acquisition, then, by the fixation of such date, fair market value or full equivalent cannot be paid and so would be hit by art. 31.

We may at once say that it is not necessary for us, in the present case, to consider the position after art. 31 was amended in 1955, for, in the present case, the acquisition is of 1952, and under an enactment which is also of 1952. The decisions also show that the principle of *Bela Banerjee's* case is not affected by the Fourth Amendment.

On behalf of the respondents, strong reliance was placed by Mr. Advani on a recent decision of the Supreme Court in *M/s W. R. E. D. Co. Ltd. v. State of Madras*,⁶ to urge that the principle is not as stated above but is different.

In that case, the provisions of Madras Electricity Supply Undertakings (Acquisition) Act, (29 of 1954), were challenged. By s. 5 of that Act provision was made for the payment of compensation to licensees whose undertakings were acquired under the provisions of the Act, and Mr. Justice Gajendragadkar, as he then was (now Chief Justice), who delivered the judgment on behalf of the Court, indicated the bases laid down in s. 5 for the payment of compensation in paras. 22, 23 and 24 of his judgment. It appears that the compensation was payable at the option of the licensee under any one or more of the three bases prescribed by s. 5. The three bases A, B and C were, to state them briefly, that compensation was to be paid (A) at 20 times the average net annual profit of the undertaking during a period of five consecutive account years immediately preceding the vesting date, (B) the aggregate value of the shares constituting the share capital of the undertaking reckoned in a certain manner, and (C) the aggregate value of the amount of the book value of all works in gross, the book value of all stores, the book value of all other fixed assets, of all plants and equipment, the book value of all intangible assets, and the amount due from consumers subject to certain limitations prescribed. The over-riding provision, however, was that it was for the licensees i.e. the party whose property has been taken, to avail of the option given to choose any one or more of the three bases. These provisions were attacked as unconstitutional on the ground that they did not afford a just equivalent of the property to be taken or, in other words, the market value.

Now, it has to be noticed that here again the Supreme Court was dealing with a pre-amendment statute. The Madras Electricity Supply Undertakings (Acquisition) Act was Act 29 of 1954 and was, therefore, passed prior to the Constitution (Fourth Amendment) Act, 1955, and the case, as their Lordships in terms pointed out, fell to be determined upon the provisions of the unamended art. 31. The Supreme Court did not in any way comment upon or touch the principle laid down in *Bela Banerjee's* case, that by the word 'compensation' is implied a just and fair equivalent of the property to be taken, or, in other words, the market value. Mr. Justice Gajendragadkar, after considering all the provisions of the Act impugned before him, and particularly s. 5 thereof, held in para. 25 that the legislation itself showed that it was possible thereunder to give a fair and just equivalent of the property to be taken, or in other words, the market value. The learned Judge held thus (para. 25):—

"It is true that in none of the three bases does the Legislature refer to the market value of the undertaking, but that itself cannot justify the argument that what is intended to be paid by way of compensation must necessarily mean much less than the market value. The failure of the legislature to refer to the fair market value cannot, in our opinion, be regarded as conclusive or even presumptive evidence of the fact that what is intended to be paid under S. 5 does not amount to a just equivalent of the undertaking taken over. After all, in considering the question as to whether compensation payable under one or the other of the bases amounts to just equivalent, we must try to assess what would be payable under the said basis."

Then the learned Judge pointed out that the real difficulty in the way of the appellant-company in the case before him was that the company had produced no material before the Court on which its plea could be sustained, and that in the absence of any satisfactory material, it would be difficult for the Court to come to any definite conclusion on the question whether just equivalent is provided for by s. 5 or not. It may, first of all, be noticed that in the whole of this case, the Supreme Court, after noticing the decision in *Bela Banerjee's* case, did not say a word in modification of any principle laid down therein, but, on the other hand, reaffirmed it. In para. 20, the Supreme Court said (p. 1762):

"...In support of his argument, Mr. Nambiar has relied on the decision of this Court in *State of West Bengal v. Mrs. Bela Banerjee*. In dealing with the question

about the scope and effect of the provisions of art. 31(2) in so far as they referred to the payment of compensation, this Court observed that though entry 42 of List III conferred on the Legislature the discretionary power of laying down the principles which should govern the determination of the amount to be given to the owner of the property acquired, art. 31(2) required that such principles must ensure that what is determined as payable must be 'compensation', that is, a just equivalent of what the owner has been deprived of. That is why in considering the validity of any statute in the light of art. 31(2) it would be open to the Court to enquire whether all the elements which make up the true value of the property acquired have been taken into account in laying down the principles for determining compensation".

In this particular case upon the facts we have shown that the Supreme Court held that in that case the impugned statute had made it possible for a citizen to receive the just and true equivalent of the property to be taken from him. As to whether that was so or not in fact, the Supreme Court said that there was no material placed before it. Therefore, the *West Ramnad* case, in our opinion, did not alter the principle in *Bela Banerjee's* case. On the other hand, it affirmed it. Of course, in that case, the statute was held to be *intra vires* because those provisions were held not to infringe the provisions of art. 31(2) as interpreted in *Bela Banerjee's* case. We may also point out here that the *West Ramnad* case was a case where the provisions of the impugned statute were radically different from the provisions of the statute which is impugned before us, or the statute in *Bela Banerjee's* case. In *West Ramnad's* case, no question of the statute laying down an arbitrary date ever arose for consideration. There is one circumstance, however, which we may note here while we are discussing that authority, and that is the provisions in the Madras Electricity Supply Undertakings (Acquisition) Act, 1954, challenged in that case, laying down three alternative principles upon which compensation would be assessed, but unlike the Act before us, offering an option, to accept any one alternative, to the citizen or the third party, whose property has been acquired, and not, as in the present case, providing that only compensation under that alternative should be paid "whichever is less". That was one of the important considerations which weighed in the decision of that case, and which also serves to distinguish the facts of that case from the facts of the present case.

Thus, barring the decision of this Court in the *Poona Mutha River* case (Spl. C.A. No. 121/62 and others), all the decisions to which we have so far referred were decisions turning upon the provisions of art. 31(2) before its amendment by the Constitution (Fourth Amendment) Act, 1955.

We now turn to an important case which considered all these previous decisions and resulted in the latest decision by the Supreme Court on this question. That is the decision of the Supreme Court in *State of Madras v. Nama Sivaya Mudaliar*.^{7a} The appeals were against the decision of the Madras High Court in *Namasivaya v. State of Madras*.⁸ In that case, the Court was concerned with the acquisition of certain land, which was lignite bearing land, and the State Government, with a view to controlling lignite resources, proceeded to acquire the lignite bearing areas. To enable the State to do so, the Madras Lignite (Acquisition of Land) Act XI of 1953 was passed. That Act directed that compensation was to be paid on the basis of the value of the land on April 28, 1947. The provisions as to the payment of compensation and the fixation of that date were challenged. It was explained that as soon as valuable lignite was discovered there was a great boom in the value of the lands and speculators were dealing in it, and therefore, on October 6, 1948, Government had issued a press-note warning the speculators that the lands would be taken over by Government, and advising the owners not to part with them. It was argued on behalf of the State that the

^{7a} (1964) Civil Appeals Nos. 6 to 12 of 1963 8 [1950] A.I.R. Mad. 548.
decided on March 3, 1964 (Supreme Court).

date in the Act was fixed with reference to the date when lignite was first discovered in the area, and that, therefore, it was not just an arbitrary fixation of any date, but the date was referable to an intelligible principle. Nonetheless the Madras High Court struck down the fixation of that arbitrary date, observing (p. 551):

"...This is a date which has no bearing on the value of the land at the time it was acquired. It is a wholly irrelevant circumstance. Since that date the value of the land—leaving out all speculative elements—may have gone up owing to quite legitimate causes. To deprive a person of the value that has accrued to his property owing to natural and lawful causes is also unconstitutional."

This decision of the Madras High Court was confirmed by the Supreme Court in *State of Madras v. Nama Sivaya Mudaliar*, and after pointing out that the result of the Madras Act in that case was to freeze for the purpose of acquisition the prices of land in the area to which it applied, and to deprive the owners of the benefit of the appreciation of land-values since April 28, 1947, Mr. Justice Shah, who delivered the judgment on behalf of the Court, re-affirmed the principle in *Bela Banerjee's* case, saying that the principles laid down in an enactment for compensation must ensure that "what is determined as payable must be a just equivalent of what the owner has been deprived of", and that "subject to this basic limitation the Constitution allowed free play to the legislative judgment as to what principles should guide the determination of the amount payable." The Supreme Court also emphasized another point, viz., that the impugned Act was a permanent Act, and that under it lands may be acquired many years after it came into force, and many years after the freezing of the market value on a particular date. Both these important considerations are, as we shall presently show, applicable to the enactment impugned before us. As regards the fixation of the date, the Supreme Court observed in the case referred to above:

"It would be impossible to hold that a law which authorises acquisition of land not for its true value, but for value frozen on some date anterior to the acquisition, on the assumption that all appreciation in its value since that date is attributable to purposes for which the State may use the land at some future date must be regarded as infringing the fundamental right."

Elaborating this, the learned Judge observed a little further in the judgment:

"But any principle for determination of compensation denying to the owner all increments in value between a fixed date and the date of issue of the notification under s. 4(1), *prima facie*, must be regarded as denying to him the true equivalent of the land which is expropriated and it is for the State to show that fixation of compensation on the market value on an anterior date does not amount to a violation of the constitutional guarantee. No materials have been placed by the State before this Court which would support any such case."

It will be noticed that the rule here stated is in less wide terms than the rule stated in *Bela Banerjee's* case. There, the Supreme Court did not advert to any possibility of the State providing anything otherwise if an arbitrary date was fixed by the Legislature but in *Namasivaya's* case, the Supreme Court has stated that fixation of an arbitrary date like this is to be regarded *prima facie* as denying to the citizen a true equivalent of the land which is expropriated. What is more, the last sentence in the passage quoted above indicates that the state could have shown that the fixation of compensation on the market value on an anterior date does not amount to a violation of the constitutional guarantee by reason of sufficient material before the Court. In *Bela Banerjee's* case, no doubt the Chief Justice Patanjali Shastri did give an illustration of a possible exception in the second sentence of the passage from his judgment, which we have already quoted, and presumably the principle as stated in *Namasivaya's* case is based upon that illustration.

The principles that these cases lay down, therefore, are well settled and

clear. These principles as they appear to us on an analysis of these decisions are as follows:—

1. In all cases governed by art. 31 prior to its amendment by the Constitution (Fourth Amendment) Act, 1955, the compensation payable for acquisition of any land must be the just equivalent of what is being taken or the market value of the property on the date of acquisition. That in its turn means that a citizen, whose property has been taken, is entitled to a just indemnification for loss and for the appreciation in the market value of the land till the date of acquisition.

2. That where the law fixes a date for the assessment of compensation anterior to the date of acquisition and leaves the State free to acquire property at any time it chooses, then, *prima facie*, the law does not ensure a fair and just equivalent, and therefore in such a case, it is for the State to show that the legislation does nonetheless give a fair and just equivalent of the property to be taken.

3. That the mere use or non-use of the words "market value" or "fair or just compensation" in a legislation does not make it just or fair or vice versa but in every case the fair and just equivalent must be objectively established.

We turn then to apply these principles to the provisions of s. 8, and particularly to the provisions of sub-s. (3), cl. (b). It is quite clear that, so far as cl. (a) of sub-s. (3) is concerned, what is provided to be paid by that clause is the price which the requisitioned property would have fetched in the open market on the date of acquisition, as if the property had remained in the same condition as on the date on which it was requisitioned. There can be no quarrel with that principle. It clearly gives the compensation on the basis of a fair market value or the "just equivalent". That is precisely what the authorities show should be given under art. 31. But cl. (a) is followed by cl. (b), and the two clauses are connected by the word "or"; and cl. (b) provides an alternative principle for payment of compensation viz., twice the market price on the date of requisition. Now, it is quite clear that though a date is prescribed in cl. (b), it is not a date with reference to acquisition, and there appears no particular reason in fastening upon the date of requisition as the date on which to freeze the compensation payable.

We have already referred to the provisions of ss. 4 and 5 of the Act. The only effect of requisitioning is that the State or its officers can take possession of the property and use it for the public purposes for which it was acquired, but the property actually vests in the State not by virtue of its requisitioning, but by virtue of its acquisition, that is, by the provisions of sub-s. (2) of s. 7. Therefore, although the requisitioning only goes to justify the taking possession of the property, its ownership still remains with the party from whom it is requisitioned until the notification is issued, stating that it is being acquired. It is from the date of that notification that the property vests in the State. If then the true principle is that the citizen from whom the property is being taken is entitled to compensation which is the just and fair equivalent of what is being taken from him on the date of acquisition, we can see no point in arbitrarily fixing the date of requisition as the date for the purpose of assessing the compensation. That would be, in our opinion, as arbitrary as if the actual date had been fixed. Since requisitioning does not result in the property vesting in Government and the property vests only on the date of acquisition, it is with reference to that date that compensation must be provided. Thus, the provision of cl. (b) of sub-s. (3), which awards compensation on the date of requisition is, in our opinion, arbitrary, and *prima facie*, indicates that the law is not awarding a just and fair compensation thereby. The arbitrariness lies in this that it all depends upon the whim of the particular officer requisitioning the property and fixing a date for requisitioning, while the actual taking or acquisition of the property would be later on a date which is wholly uncertain.

But the matter becomes much worse when we turn to consider the impact of the total provisions of the entire sub-s. (3) of s. 8. As we have shown, cl. (a) gives a fair market price on the date of acquisition, but cl. (b) gives twice the price on the date of requisition. We presume that by these clauses it was intended to provide a fair equivalent of the property to a citizen whose property is acquired, and indeed that was the contention of Mr. Advani on behalf of the State. If then both the cls. (a) and (b) give what the Legislature consider a fair or just equivalent of the property which is being taken, then we can see no point whatsoever in the law providing further that of the two alternative principles of assessment indicated in the sub-section that compensation is to be paid to the citizen "whichever is less". The very fact that as between two alternative modes of assessment of compensation that mode is to be preferred by the law which results in the lesser payment being made to the citizen, shows clearly, in our opinion, that the fair or just equivalent of the property is not being paid to the citizen. This is the second ground on which the provisions of s. 8(3)(b) would be rendered unconstitutional under art. 31(2).

We may here emphasise that in the case before the Supreme Court in *M/s. West Ramnad Electric Distribution Co. Ltd.* the provision of the Madras Electricity Supply Undertakings (Acquisition) Act, was the exact reverse. There, of the three alternatives provided as the bases on which compensation was to be assessed, it was the citizen who was given the option to accept the basis which he preferred; whereas here the legislation has itself provided that as between the two standards of computation of compensation, that standard is to be preferred, which gives less to the citizen. It seems to us that nothing could be more eloquent than this that the just or fair equivalent is not being paid to the citizen when of two alternatives that alternative is to be preferred which gives less to the citizen. In that view, it seems to us clear that under art. 31(2) read in the light of the authorities to which we have referred, cl. (b) of sub-s. (3) of s. 8 must be declared to be *ultra vires* of art. 31 of the Constitution.

Nothing moreover turns upon the fact that this Act is only put into force for a limited period, that is to say, up to March 14, 1970. In so far as the constitutional guarantee given by art. 31 is being infringed by the law, it is immaterial that it results in any infringement only up to a limited time and not for ever; and the offending clause would all the same be *ultra vires*. Where acquisition takes place the citizen loses his property or property right for all time and it profits him little to know that the Act is of temporary duration.

Realising these difficulties, Mr. Advani on behalf of the respondents, sought to steer clear of all the constitutional objections by seeking to give to the section an interpretation, which, if accepted, would obviate all the said constitutional objections. The argument is based upon the provisions of s. 8(1)(e). We have already shown that sub-s. (1) of s. 8 begins with the preamble that it is enacting the manner in which and the principles in accordance with which the compensation will be determined, and in cl. (e) of sub-s. (1), the arbitrator, assessing the compensation, is enjoined to determine "the amount of compensation which appears to him to be just." Then follow the words: "and in making the award, he shall have regard to the circumstances of each case and the provisions of sub-section (2) and (3), so far as they are applicable." What Mr. Advani says is that the opening words of cl. (e): "the arbitrator shall.... make an award determining the amount of compensation which appears to him to be just...." are the key words which govern all subsequent principles laid down in the rest of the provisions of s. 8. He, therefore, urges that there is a clear direction to the arbitrator that he must award the amount of compensation which is just, and if that be so, then every requirement of art. 31 as also all the conditions indicated by the authorities, to which we have referred, are fulfilled, and it is immaterial, therefore, if sub-

s. (3) provides for some other mode of evaluating the compensation. When this argument was advanced, Mr. Sorabjee, on behalf of the petitioner, pointed out that if this is the stand which the State wishes to take and if it is prepared to concede that position, then the petitioner would have nothing more to say and would consider withdrawing the petition, for, he urged, the substance of the grievance which brought the petitioner to the Court would be met by the concession. He says that if the State were to say that that compensation will be determined which is just, in spite of the other provisions of s. 8, and the arbitrator would act upon that principle, he would accept the compensation so determined. Mr. Advani on behalf of the State was not prepared to state it as a concession but he stated that he was merely urging it as legal argument on the basis of the statute before the Court, and that he on his part would leave it to the Court to determine what is its true construction. In that view of the matter, it seems to us that we must consider the construction put forward as a matter of argument by Mr. Advani.

An analysis of cl. (e) shows that it refers to three things—(1) firstly, the amount of compensation which appears to the arbitrator to be just; (2) secondly, the circumstances of each case, and (3) thirdly, the provisions of sub-s. (2) and (3). In the first sub-clause of cl. (e), the arbitrator is directed to determine the amount of compensation which appears to him to be just; but, in the second sub-clause, he is not merely directed, but enjoined that in making the award (1) "he shall have regard to the circumstances of each case", and (2) that he shall have regard to the "provisions of sub-sections (2) and (3)". We do not think that the language of cl. (e) at all indicates that one or other of these three conditions is overriding, governs or controls the others. On the other hand, the clause appears to be dealing with these three concepts in equal terms. The effect of this clause, therefore, is, firstly, that the arbitrator must determine the amount of compensation which appears to him to be just, but in making his award he must have regard to the circumstances of each case and to sub-ss. (2) and (3).

We have already referred to the provisions of sub-s. (3), and to its alternative clauses. Considering sub-s. (3) in the light of the provisions of cl. (e) of sub-s. (1) of s. 8, it is clear that the arbitrator, though enjoined to determine the amount of compensation which appears to him to be just, cannot act outside the scope of sub-s. (3). If he has to have regard to sub-s. (3)(b) as sub-s. (1)(e) directs him to do it, he must award to the person whose property has been acquired, twice the price on the date of requisition, and within the principle of *Bela Banerjee's* case, that is *prima facie* not just compensation. Therefore, though cl. (e) directs him to be just, in awarding compensation, in following sub-s. (3)(b), he cannot but be unjust.

The contention of Mr. Advani that the opening words of s. 8(1)(e) "determining the amount of compensation which appears to him to be just" are plenary and govern the rest of the provisions of s. 8 fails if we consider the provisions of sub-s. (2) of s. 8. It is clear that cl. (e) refers to sub-s. (2) in the same breath as sub-s. (3). Clause (b) of sub-s. (2) says that the amount of compensation payable for the requisitioning of any property shall consist of such sum or sums, if any, as may be found necessary to compensate the person interested for all or any of the following matters, and then follow the four clauses which provide, *inter alia*, for (1) pecuniary loss due to requisitioning; (2) expenses on account of vacating the requisitioned premises; (3) expenses on account of re-occupying the premises upon the release from requisition, and (4) damages, and other normal wear and tear. Now, cl. (b) of sub-s. (2) in terms says that such sum or sums of money shall be awarded as may be found necessary to compensate a person interested for all or any of the following matters etc. We cannot understand how, if the opening words of cl. (e): "determine the amount of compensation which appears to him to be just" are plenary and all pervasive, the Land Acquisition Officer can award only such sum or sums of money as may be found

necessary for the four matters specially stated. There is a vast difference between finding out a sum which is just and finding out a sum which is necessary to compensate for our stated items only. Thus, the provisions of sub-s. (2) clearly show that the injunction in cl. (e) to find out the just compensation, cannot possibly control sub-s. (2). On the other hand, sub-s. (2) controls sub-s. (1)(e), just as we have shown that sub-s. (3) controls sub-s. (1)(e). We have referred to the provisions of sub-s. (2) only in order to indicate a point of construction. We are not concerned with them as such here. It seems to us that cl. (e) of sub-s. (1) cannot control the provisions of sub-s. (3) of s. 8 also. No doubt, sub-s. (3) is referred to in cl. (e), but it is referred to in cl. (e) only in order to indicate that in his duty to award just compensation one of the matters which the arbitrator shall have regard to is the provision of law in sub-s. (3). The other matter he shall have regard to is the circumstances of each case. We have already shown that the provisions of cl. (b) of sub-s. (3) are such that they cannot possibly result in the assessment of just compensation. The construction, therefore, for which Mr. Advani contends cannot be accepted.

In order to reinforce the argument, reference was made to the words in cl. (e) "shall have regard to". Mr. Sorabjee on behalf of the petitioners urged that the words meant "shall not disregard", whereas Mr. Advani said that it simply implies that he must be guided by those principles, but is not bound by them. He referred in this respect to two decisions—one of this Court in *Bai Dahi v. Ghanashyam*⁹ and another of the Judicial Committee of the Privy Council in *Ryots of Garabandho v. Zemindar of Parlakimedi*.¹⁰ We accept it that the true construction is as indicated by their Lordships of the Judicial Committee of the Privy Council in the *Garabandho's* case at pages 169-170. At page 170, their Lordships said:

"...The expression 'have regard to', or expressions very close to this, are scattered throughout this Act, but the exact force of each phrase must be considered in relation to its context and to its own subject-matter. Any general interpretation of such a phrase is dangerous and unnecessary, but it is fairly clear, as a matter of English, that the view taken by the majority of the Collective Board is nearer to the ordinary meaning of the phrase 'have regard to', when it appears in a statute, than is that of the dissentient member."

In that case, their Lordships held that the words occurring in the statute before them meant that the authority was only "to be guided by" those provisions. Their Lordships have themselves indicated that the exact force of each phrase "must be considered in relation to its context and to its own subject-matter." We do not think that the enactment before us, namely, the Requisitioning and Acquisition of Immovable Property Act, is in any sense *in pari materia* with the Act before the Privy Council in *Garabandho* case. That was an Act providing for the enhancement of rent fixed by a settlement, whereas, the present Act is an Act providing for compensation payable for property acquired, which property is protected by the constitutional guarantee of a fundamental right. We have no doubt here that the word "shall" in the expression "shall have regard to" shows that the arbitrator cannot in any case disregard sub-ss. (2) and (3). But even assuming that we are wrong and that the words "shall have regard to" occurring in cl. (e) of sub-s. (1) of s. 8 mean that "the arbitrator shall be guided by," still it is clear that he has to be guided by the circumstances of each case and by the provisions of sub-ss. (2) and (3) as much as by the principles of determining the amount of compensation which is to be just, and this in itself would result in inequity in the award of compensation for if sub-s. (3)(b) results in the award of compensation which is not just being "guided by", it will have the same result. There is also another consideration which we may here emphasise: where the arbitrator is enjoined to fix the amount of compensation which appears to him to be

just, the whole clause is also preceded by the word "shall". The composite expression used (shorn of inapplicable verbiage) is "shall...make an award determining the amount of compensation which appears to him to be just". Upon the argument advanced on behalf of the State, the word "shall" in this clause indicates a mandate which cannot be disobeyed. Any other argument would destroy their case that just compensation is compulsorily to be given. If so, is it to be supposed that the word "shall" in the subsequent expression "shall have regard to" occurring in the same sub-section imports only a direction which may or may not be obeyed? and that it really means "may". We cannot accept such a construction. We have already said that the provisions of sub-s. (3)(b) must result in the award of some compensation which is not just upon the meaning given to it by the Supreme Court. If so, making use of sub-s. (3)(b) in any particular case must result in compensation which is not just. Now if the expression "shall have regard to" means as is contended "may be guided by", then, having regard to its vitiating tendency which we have pointed out, it must always be disregarded, otherwise the award of just compensation is not possible. That would render the provisions of sub-s. (3)(b) nugatory. Such a construction, therefore, cannot be placed.

At any rate, if sub-s. (3) is to be a guiding principle for the arbitrator in assessing the compensation, then, having regard to the provisions of cl. (b) thereof, it is clear that the arbitrator will have to take it into consideration, at least, and the moment he takes it into consideration, we think that he cannot but reach a conclusion where the compensation which he awards will not be the just equivalent of the property acquired.

In answer to this point as to the construction of sub-s. (3) read with cl. (e) of sub-s. (1), Mr. Sorabjee referred to the opening words of sub-s. (1) and he pointed out that the opening words in terms say that they are providing for two matters—(1) the manner in which the amount of compensation shall be determined, and (2) the principles in accordance with which the compensation shall be determined. He says that the perusal of the remaining provisions of s. 8 indicate that sub-s. (1) in substance deals only with the manner in which the compensation is to be determined and it is only the provisions of sub-ss. (2) and (3) which deal with the principles in accordance with which the compensation shall be determined. In other words, the counsel argues that there is no principle involved in sub-s. (1) at all. It only deals with the manner of determination of compensation, and, therefore, any provision of that sub-section can have no effect so far as the principles laid down in sub-s. (3) are concerned.

Curiously enough, the opening words of sub-s. (1), upon which reliance has been placed, give no indication as to what subsequent portions of the section each of its clauses refers to. It rather seems to us on a perusal of the sub-section as a whole that the draftsman made several provisions both of procedure and principle, and did not incorporate them disjunctively or separately in different clauses of sub-sections. It seems to us that he relegated the principles of payment of compensation for requisitioning to sub-s. (2) and the principles for the payment of compensation for acquisition to sub-s. (3), but because of those provisions we cannot hold that he did not state any principles in sub-s. (1) at all. On the other hand, the provision in cl. (e) of sub-s. (1) enjoining on the arbitrator to determine the amount of compensation which appears to be just, could well be said to be a principle, and so too the direction to the arbitrator that he shall have regard to the circumstances of each case as well as the direction that he will have regard to sub-ss. (2) and (3). We cannot say that that clause, therefore, is not concerned with any principle at all. If it was the intention of the Legislature that sub-s. (1) was only a sub-section dealing with the manner of determining the compensation, then, nothing could have been easier than to say in the opening words of sub-s. (1) "there shall be paid compensation, the amount of which shall be determined in the manner prescribed in sub-section (1) and in accordance with the principles prescribed in sub-sections (2) and (3)." But that clear-cut demarcation was not possible

for the reason that the draftsman realised that some principle is intermingled with the provisions as to the manner in which the compensation shall be determined, and therefore, he generally stated in the opening words of sub-s. (1) the provisions both regarding the "manner" as well as regarding the "principles". What the counsel urged is no doubt true so far as the other clauses of sub-s. (1) of s. 8 are concerned, but not so far as cl. (e) is concerned.

There then remain to be considered two other short points which were raised on behalf of the respondents. It was urged that the petitioner has come to the Court prematurely, since the arbitrator has not even proceeded to consider the claim to compensation, or the objection to the valuation by the State. It was argued that the petitioner could only come when compensation was assessed in accordance with certain principles and she had a grievance against some definite amount assessed. It was urged that she may get the compensation which she asks for, in which case there would be no likelihood to approach this Court. A shade of the same argument is that so far as the constitutional objection is concerned, the unconstitutionality, which is being pointed out upon the provisions of s. 8 (3) (b), arises because cl. (b) gives a compensation which may be different from the figure of compensation arrived at under cl. (a). But it was urged that it may be possible that the actual amount arrived at, whether under cl. (a) or under cl. (b), would be the same, in which case, the constitutional objection would fail.

We do not think that where the question involved is as to the constitutionality of a provision of law, we can have regard to any particular case or make it dependent upon the determination of the amount of compensation. It is clear that even if the amount was the same as is to be found under sub-cl. (a) if it is given on the basis that it is twice the price on the date of requisition, it would all the same infringe art. 31 of the Constitution. We do not think that simply because no actual assessment has been made by the arbitrator, a constitutional objection of this kind cannot be sustained *in limine*, when the aggrieved party approached this Court under art. 226.

The other objection is as to the delay in approaching this Court. It was urged that the petition is filed after inordinate delay. The original acquisition was made on December 29, 1952, when the notification under s. 7 (2) was promulgated. So far as the compensation is concerned, it was urged, that the arbitrator was appointed on June 21, 1961, and when pursuant to the provisions of s. 7, the arbitrator was appointed for the purpose of assessment of compensation, whatever constitutional objection the petitioner had, arose, and therefore, she should not have waited till September 18, 1962, to file the present petition. This argument is the very reverse of the argument which we have just disposed of. There the objection was that the petition was premature, here the objection is that it is delayed. It seems to us that where a constitutional objection of this kind to the validity of a legislation is in question, what is involved is infringement of a fundamental right under the Constitution. In such a case, question of mere delay would hardly affect the maintainability of the petition, for, whether we consider the infringement of a fundamental right or consider the question of *ultra vires*, the objection is fundamental and omnipresent. It must be met and negatived or it remains at all future stages of a proceeding. It must be met at any subsequent stage of the litigation between the parties. In that view, we do not think that delay as such would be a good ground to defeat a constitutional objection of that kind.

Moreover, in the circumstances of the present case, we do not think that there has been in fact any delay. On behalf of the petitioner, it has been explained that the ground upon which the constitutional challenge arose was disclosed only when the respondents filed their statement before the arbitrator in reply to the petitioner's claim for compensation. That was on July 2, 1962. It was only when the Collector valued the compensation, and on behalf of respondent No. 3 it was offered to the petitioner at the rate of Rs. 11 per sq. yard, and the petitioner knew the basis upon which that valuation was made, that she realised

that it was being valued contrary to the principles of art. 31. If July 2, 1962 is the date on which the constitutional objection arose from which to approach this Court, the petition filed on September 18, 1962, can hardly be said to be delayed. In any case, having regard to the importance of the points raised, and assuming that there was any delay, we would certainly condone the delay.

For the reasons given, therefore, we allow the petition and make the rule absolute. We hold that cl. (b) including the words "whichever is less" of sub-s. (3) of s. 8 of the Requisitioning and Acquisition of Immovable Property Act, 1952 (XXX of 1952) is *ultra vires* of art. 31 of the Constitution, and is, therefore, void. The assessment of compensation will, therefore, have to be made subject to this declaration.

The petitioner will be entitled to her costs from the respondents. We quantify these costs at Rs. 500.

Petition allowed. Rule made absolute.

APPELLATE CIVIL.

Before Mr. Justice Kotval and Mr. Justice Palekar.

SADRUDDIN SULEMAN JHAVERI v. J. H. PATWARDHAN.*

Land Acquisition Act (I of 1894), Secs. 4, 6, 9, 17, 3(f)(2), 3(aa)—Bombay Commissioners of Divisions Act (Bom. VIII of 1958), Sec. 3—Constitution of India, Arts. 14, 19, 31, 254(2)—Maharashtra Industrial Development Act (Maharashtra III of 1962), Secs. 14, 15, 21—Delegation of State Government's power to acquire land to Commissioners under Bom. Act VIII of 1958 whether in excess of powers of State Legislature—Whether amendments effected in Land Acquisition Act by State Government under s. 3(4) of Bom. Act valid—Sections 4 and 6 of Land Acquisition Act whether infringe art. 19 of Constitution—Whether purposes included in s. 3(f)(2) of Land Acquisition Act as amended by Bombay Amendment Act, 1953, public purpose within art. 31 of Constitution—Section 6 of Land Acquisition Act read with s. 3(f)(2) of Act whether infringes art. 14 of Constitution—Discretion under law whether can be equated with discrimination—Section 3(f)(2) whether intra vires of art. 31 of Constitution and s. 6 of Land Acquisition Act—Public purpose whether can be determined merely upon recitals in notification—Money advanced by State to Corporation for acquisition of land by Corporation whether compensation wholly or partly out of public revenues within proviso to s. 6 of Land Acquisition Act—Question whether land waste or arable under s. 17(1) of Land Acquisition Act justiciable—Agricultural land whether arable land within s. 17(1)—Construction of statute—Dictionaries differing in meaning of word used in statute—Importance of judicial interpretation in "persuasive" precedent.

The amendments effected in the Land Acquisition Act, 1894, by the State Government by virtue of s. 3(4) of the Bombay Commissioners of Divisions Act, 1957, empowering the Commissioner to acquire land under ss. 4, 6, 9 and 17 of the Land Acquisition Act, are valid amendments so far as the State is concerned.

*In re the Delhi Laws Act, 1912,*¹ *Rajnarin Singh v. The Chairman, Patna Administration Committee, Patna,*² *The Queen v. Burah,*³ *State v. Heman Alreja,*⁴ *Edward Mills Co. Ltd. v. The State of Ajmer,*⁵ *Gulam Mohammad v. State of Bombay*⁶ and *Patna Improvement Trust v. Lakshmi Devi,*⁷ referred to.

Sections 4 and 6 of the Land Acquisition Act, 1894, do not infringe art. 19 of the Constitution of India.

*Somavanti v. State of Punjab,*⁸ and Civil Appeal No. 322 of 1961,⁹ referred to.

*Decided, 28-31 July, 1964. Special Civil Application No. 1024 of 1963.

1 [1951] S.C.R. 747.

2 [1955] I S.C.R. 290.

3 (1898) L.R. 5 I.A. 178.

4 (1961) 53 Bom. L.R. 837, at p. 850.

5 [1955] 1 S.C.R. 735.

6 [1962] 2 S.C.R. 659.

7 [1963] A.I.R. S.C. 1077.

8 [1963] A.I.R. S.C. 151.

9 Decided on December 1, 1962. (Supreme Court).

Sub-clause (2) of s. 3(f) of the Land Acquisition Act, 1894, added by the Land Acquisition (Bombay Amendment) Act, 1953, which includes certain purposes within the definition of public purpose are within the connotation of that expression in art. 31 of the Constitution of India.

Section 6 of the Land Acquisition Act, 1894, read with s. 3(f)(2) of the Act as amended by the Land Acquisition (Bombay Amendment) Act, 1953, does not infringe art. 14 of the Constitution of India.

A discretion given under a law, however wide it may be, cannot necessarily be equated with discrimination, and in so far as there is a possibility of the misuse of a discretion the normal presumption of law is that the authority invested with a discretionary power will act fairly and honestly and not abuse it. If it does however abuse it in a given case, that is an indication of human frailty rather than the power being discriminatory.

*Pannalal Binjraj v. Union of India*¹⁰ and *Niemla Textile Finishing Mills Ltd. v. The 2nd Punjab Industrial Tribunal*,¹¹ referred to.

The definition of "public purpose" in s. 3(f) of the Land Acquisition Act, 1894, as amended by the inclusion of cl. (2) therein by the Land Acquisition (Bombay Amendment) Act, 1953, is *intra vires* of art. 31 of the Constitution of India as well as s. 6 of the Land Acquisition Act.

The question whether there is a public purpose or not does not fall to be considered merely upon the recitals of the particular notification impugned, but must be gathered from the facts and circumstances before the Court.

*Hamabai v. Secretary of State*¹² and *Babu Barkya Thakur v. The State of Bombay*,¹³ referred to.

When moneys are advanced by the State to a Corporation for the payment of compensation for lands acquired by the Corporation, the compensation to be awarded cannot be said to be paid "wholly or partly out of public revenues" within the meaning of that expression in the proviso to s. 6 of the Land Acquisition Act, 1894.

Pandit Jhandu Lal v. The State of Punjab,¹⁴ discussed.

Valjibhai v. State of Bombay,¹⁵ referred to.

The conditions in s. 17(1) of the Land Acquisition Act, 1894, namely (1) the existence of urgency, (2) a direction from the appropriate Government or Commissioner, (3) waste or arable land, (4) need for a public purpose and (5) need for a company, are all conditions prescribed for the exercise of the power or jurisdiction of the Collector to take the citizens' property under those provisions. Upon the non-fulfilment or non-existence of any one of those conditions the exercise of the power must be interdicted. The conditions must be strictly fulfilled and are not left to the subjective satisfaction or opinion of the authority concerned.

Agricultural land cannot be said to be arable land within the meaning of s. 17(1) of the Land Acquisition Act, 1894.

In considering whether any land is "waste or arable" it is the nature of the land and its substantive use that one must have regard to and not what it is formally dubbed in archaic revenue records.

Navnitlal v. State of Bombay,¹⁶ *Jairam Balaji Anikar v. The State of Maharashtra*¹⁷ and *Sadashiv Lahanu v. The State of Maharashtra*,¹⁸ followed.

Palmer v. McCormick,¹⁹ *Simmons v. Norton*²⁰ and *Vithoba Rambhau Bahirat v. The Special Land Acquisition Officer, Poona*,²¹ referred to.

Where dictionaries differ as to the meaning of a word used in a statute, a judicial interpretation of the word even in a "persuasive" precedent will be of prime importance.

10 [1957] S.C.R. 233.

11 [1957] S.C.R. 335.

12 (1914) 17 Bom. L.R. 100, P.C.

13 [1961] 1 S.C.R. 128.

14 [1961] 2 S.C.R. 459.

15 [1963] A.I.R. S.C. 1890.

16 (1960) 62 Bom. L.R. 622.

17 (1962) Special Civil Application No. 25 of 1962, decided by Kotval and Paranjpe JJ.,

on September 26, 1962 (Unrep.).

18 (1962) Special Civil Application No. 93 of 1962, decided by Kotval and Paranjpe JJ., on November 9, 1962 (Unrep.).

19 (1889-90) L.R. 25 Ir. Eq. 110.

20 (1831) 7 Bing. 640.

21 (1963) Special Civil Application No. 1556 of 1962, decided by Palekar and Gokhale JJ., on December 5, 1963 (Unrep.).

THE facts are stated in the judgment.

J. C. Bhatt, with *R. L. Dalal* and *R. J. Bhatt*, instructed by *Ambubhai & Diwanji*, for the petitioner.

H. M. Seervai, Advocate General, with *Atul M. Satalvad*, instructed by *Little & Co.*, for the respondents.

KOTVAL J. In this Special Civil Application there are challenged two Notifications under the Land Acquisition Act whereby the land of the petitioner has been taken by the State of Maharashtra, respondent No. 3 before us. On January 24, 1963, a Notification under s. 4 of the Land Acquisition Act, 1894, was issued under the signature of the Commissioner of Bombay Division, respondent No. 1 before us. Since almost every paragraph of this Notification has given rise to one or more of the points argued before us it is worthwhile to reproduce the whole of this Notification. It runs as follows:—

"No. LAQ-B. 7244-B. Whereas it appears to the Commissioner, Bombay Division, that the lands specified in the Schedule hereto (hereinafter referred to as the said lands) are needed for a public purpose viz. for development and utilisation of lands as an industrial area.

It is hereby notified under the provisions of section 4 of the Land Acquisition Act, 1894 (I of 1894), that the said lands are needed for the public purpose specified above.

All persons interested in the said lands are hereby warned not to obstruct or interfere with any surveyors or other persons employed upon the said lands for the purpose of the said acquisition. Any contracts for the disposal of the said lands by sale, lease, mortgage, assignment, exchange or otherwise, or any outlay or improvements made therein, without the sanction of the Collector, after the date of this notification, will, under section 24 (seventhly) of the said Act, be disregarded by the Officer assessing compensation for such parts of the said lands as may be finally acquired.

And whereas the Commissioner, Bombay Division, is of the opinion that the said lands are waste or arable lands and that their acquisition is urgently necessary; he is further pleased to direct under sub-section (4) of section 17 of the said Act, that the provisions of section 5-A of the said Act, shall not apply in respect of the said lands.

Under clause (c) of section 3 of the Land Acquisition Act, 1894, the Commissioner, Bombay Division, is pleased to appoint the Special Land Acquisition Officer, Ulhas Valley Project, Thana, to perform the functions of a Collector under section 4(1) of the said Act, in respect of the said lands.

Schedule.

District Thana, Taluka Thana, village Pachpakhadi.

Block No.	Survey No.	Hissa No.	Approximate area of the lands required. A. G. a.
III	XXX	XX	XXX
	XXX	XX	XXX
	373	1	7 32 0"

It will be clear from this Notification that a plot of land admeasuring 7 acres and 32 gunthas belonging to the petitioner was sought to be acquired for a public purpose. The declaration in the Notification under s. 6 is "for development and utilization of lands as an industrial area". One of the several points that have been raised in this petition is that this does not constitute a public purpose and, therefore, the Notification is bad. In the Notification under s. 4 the Commissioner has stated that those lands were in his opinion waste or arable lands and their acquisition was urgently necessary. They were, therefore, taken without recourse to the provisions of s. 5A of the said Act. This dispensation of the provisions of s. 5A of the Act was by virtue of sub-s. (4) of s. 17 of the Act. The Notification under s. 4 was followed by a Notification under s. 6 on March 28, 1963. Since the Notification under s. 4 had dispensed with the intermediate procedure provided by s. 5A, Notifica-

tion under s. 6 was issued without reference to that section. In the Notification under s. 6 the "public purpose" is specified in the Schedule as "for the development and utilisation of lands as an industrial area".

On April 30, 1963, the Special Land Acquisition Officer, Ulhas Valley Project, served a Notice on the petitioner under s. 4 of the Act. That notice was actually dated April 19, 1963, but was served upon the petitioner on April 30, 1963. It was followed by a notice to hand over possession on May 6, 1963, because of the application of s. 17(4). It was the petitioner's case that this notice, though dated April 19, 1963, and calling upon him to attend at the time of taking possession i.e. at 12 noon on May 6, 1963, was actually served on him on May 7, 1963, after possession was taken. On April 30, 1963, a further notice was served upon the petitioner by the Special Land Acquisition Officer, respondent No. 2, to appear before him on May 15, 1963, and to lodge his claim for compensation. In the meanwhile, pursuant to the notice dated April 19, 1963, informing the petitioner that possession of the land would be taken on May 6, 1963, the petitioner's land was taken possession of on May 6, 1963. It is also admitted that on the same day possession was handed over by the State to respondent No. 4, the Maharashtra State Industrial Development Corporation. All this was pointed out in a letter dated May 14, 1963, written by the petitioner's attorneys complaining that the acquisition was illegal. The present petition was filed on June 12, 1963.

Now it is the petitioner's case that the Notifications under ss. 4, 6 and 9 of the Land Acquisition Act are illegal for several reasons and that, therefore, the acquisition of the petitioner's land is also illegal. The grounds, briefly stated are as follows:—That the notifications purport to have been signed by and issued under the authority of respondent No. 1 Mr. J. H. Patwardhan, Commissioner of Bombay Division. Mr. Patwardhan purported to sign these Notifications by virtue of the authority conferred on him by an Amendment made in the Land Acquisition Act by a Notification issued by the State Government under s. 3(4) of the Bombay Commissioners of Divisions Act VIII of 1958. It has been argued before us that the power thus delegated to the Commissioner is improperly delegated and that the State Legislature which conferred the power by virtue of the Bombay Commissioners of Divisions Act, upon the State Government to amend by Notification the Land Acquisition Act did not make a valid delegation of its legislative power to the State Government.

Next it has been objected by the petitioner that on the merits the Notifications are bad, because they do not comply with the requirements of the Land Acquisition Act, particularly ss. 4 and 6 thereof which prescribe as an essential condition to the exercise of the power conferred by them that there must be a "public purpose". The petitioner says that the Notifications do not disclose on the face of them any "public purpose" at all, but assuming that a purpose is there it does not amount to a public purpose as interpreted by several authorities. Even having regard to the definition in the Land Acquisition Act contained in s. 3(f)(2) as locally amended there does not appear any public purpose upon the Notifications, and so the acquisition is bad. The further challenge was that the definition of "public purpose" in s. 3(f)(2) which was amended so far as the State of Maharashtra is concerned by the Land Acquisition (Bombay Amendment) Act, 1953, is no "public purpose" as understood upon the authorities and in any case, the Bombay Amendment is illegal and void under arts. 14, 19 and 31 of the Constitution. *Ipsa facto* the Notifications issued pursuant to the powers given by the new definition would also be illegal.

An alternative objection against the three Notifications has been taken that in fact and in substance the acquisition in the present case is not at all an acquisition for a public purpose, but that having regard to the circumstances it was an acquisition for a Company viz. the Maharashtra State Industrial Development Corporation. As a result, it has been urged that two consequences follow, firstly, that the Notifications issued under ss. 4 and 6 of the Land Ac-

quisition Act declaring that the land is required for a public purpose are a mere colourable exercise of the power granted under these sections and, secondly, that the procedure followed for the acquisitions is vitiated. The correct procedure which ought to have been followed is that prescribed in Part VII of the said Act which deals with acquisitions for Companies or Chapter VI of the Maharashtra Industrial Development Act which deals with acquisition for that Corporation.

Next attack was levelled against what has been concisely dubbed the "urgency" clause in the three Notifications whereby respondent No. 1 announced his intention to take the petitioner's lands because they were "waste or arable" lands and their acquisition was "urgently necessary" under the powers vested in him under sub-s. (4) of s. 17 of the Act. By virtue of that sub-section respondent No. 1 dispensed with the provisions of s. 5A of the Land Acquisition Act and declared that it shall not apply to the said land. It is the petitioner's case that thereby he was deprived of a very valuable right viz. the right to take objection and try to persuade the authorities that there was no "public purpose" involved or that the land was not needed or likely to be needed for a contemplated public purpose. The petitioner says that the urgency clause has, therefore, been wrongly applied on the ground that the petitioner's lands were neither "waste" nor "arable" lands and unless they were lands falling within those categories, s. 17(1) would be inapplicable. In reply to this point on behalf of the State it was argued that the question whether they are waste or arable lands under s. 17(1) is a matter to be decided in the opinion of the authority concerned and that the Courts are precluded from considering on what basis such an opinion was formed.

It may be noted here that of the above pleas, which we have stated in brief, the Constitutional objections were not in the petition as originally filed but by an amendment permitted by this Court they were allowed to be incorporated as part of the petition. Similarly, the objection that the powers under s. 17(4) read with s. 5A of the Land Acquisition Act were wrongly exercised, was also incorporated by way of amendment. The petitioner originally relied upon the Notifications which are impugned in this petition and upon the document of sale in his favour dated September 17, 1960, (exh. A to the petition) to show his ownership. But later considerable developments took place, which it was said was a test case.

In reply to the original petition respondent No. 1 the Commissioner of Bombay Division, filed a return on November 4, 1963, and followed it up by a supplemental return on April 23, 1964, in order to meet the amendments in the petition. In this return respondent No. 1 affirmed that in all the Notifications issued by him and impugned in the petition, there was a public purpose involved and that in any event the question whether there was a public purpose or not, was not open to be raised by the petitioner because of the provisions of s. 6(3) which makes the declaration of the public purpose conclusive evidence that the land sought to be acquired was needed for the public purpose declared therein. In elaboration of this plea it was urged in the arguments before us that the Court is precluded from inquiring whether in fact there exists a public purpose or not. The respondent traversed the various Constitutional grounds and urged that neither the Notifications nor the provisions of s. 3(f)(2) as amended were liable to be set aside on the ground of unconstitutionality. The Commissioner also pointed out that he had issued the Notification under s. 4 after he had satisfied himself that the said lands were acquired for the purpose of "developing and utilising the same as an industrial area" and he asserted

"I say that as the said lands were waste or arable lands and as their acquisition was urgently necessary I directed that the provisions of section 5A of the Land Acquisition Act would not apply to the said acquisition."
He added that he was satisfied that the said lands were needed for the afore-

said public purpose before he issued the declaration under s. 6 and that he had similarly satisfied himself as to the requirements of s. 9(1) when he issued the Notification under that section.

In order to meet the point taken by the petitioner that the acquisition was for a Company, viz. the Maharashtra State Industrial Development Corporation, the Commissioner stated in para. 10 of his return,

"I say that the said land is to be acquired from the funds of the Maharashtra Industrial Development Corporation which is a Government of Maharashtra Undertaking financed by the State Government from public funds and are intended to be developed from the said funds and to be subsequently dealt with by lease or sale in order to develop the said area as an industrial area".

We have reproduced this part of the pleading of the Commissioner here because it was the subject of most of the affidavits subsequently filed by way of amendment or elucidation. The amendment of respondent No. 1's pleading resulted in the petitioner asking a number of particulars and being furnished with replies to those particulars and in the filing of a number of documents to prove whether the original statement was correct or otherwise. In subsequent affidavits filed by certain officers of the State, the said statement of the Commissioner has been dubbed as incorrect and further averments made which are contrary to the statement quoted above.

The Commissioner further stated that the object of acquiring lands for and developing industrial areas was to procure orderly and planned development of industries in and around Greater Bombay and elsewhere in the State and that such development was necessary not merely

"to encourage and remove the growth of industry but also in order to avoid future concentration of industry and to ameliorate (sic) the consequence of concentration of industry which has occurred in the past".

He alleged that the

"concentration led to congestion and consequently to bad conditions of housing, educational and medical facilities etc. and that by laying out areas in a deliberately planned manner for development as an industrial area and by ensuring a proper development of such areas with space reserved for social services, recreational facilities etc. all the disadvantages of haphazard and unplanned development" would be avoided for the future.

In order to meet the plea taken by the petitioner that the lands were not waste or arable lands and, therefore, s. 17(4) read with s. 5A was not attracted, the Commissioner re-asserted that the lands were waste or arable and further stated in para. 13

"With reference to ground (d) contained in the said Paragraph (para. 8) I say that the said lands are agricultural lands described as such in the Record of Rights. I say that the said lands are being assessed to land revenue as agricultural lands. I say that the said lands are waste or arable lands within the meaning of Section 17 of the Land Acquisition Act. I am not aware of and do not admit the allegations that the petitioner's land was fit for immediate use for non-agricultural industrial or building purposes or that the land had been surveyed or that plans had been prepared for construction thereon before the issue of the impugned Notifications".

He also asserted in answer to the point raised by the petitioner that he had satisfied himself after fully considering all the facts that the said lands were urgently required for development as an industrial area. On the question of delegation of authority to the Commissioner, he stated that the delegation was proper and legal and that he himself acted under the powers thus delegated to him by s. 3(4) of the Bombay Commissioners of Divisions Act, 1957, and the Government Notification No. LAQ-2558/V dated September 5, 1958. The second affidavit which the Commissioner filed merely negatived all the pleas as to the unconstitutionality of the notifications as well as s. 3(f)(2), of the Land Acquisition Act as locally amended.

Matters stood at this, when on June 24, 1964, an affidavit came to be filed by an Under-Secretary in the Industries and Labour Department of the Government of Maharashtra, Mr. Hanumant Shrinivas Nargund. That affidavit purports on the face of it to have been filed "in order to correct a mis-statement of fact occurring in the said affidavit filed in Court on 15-11-1963 sworn by the same Mr. Patwardhan". In para. 3 of his affidavit Mr. Nargund stated:

"In paragraph 10 of the said affidavit dated 4th October, 1963 (the date it is admitted is wrongly stated. It should be the affidavit filed on 15-11-1963), it has been stated 'the said land is to be acquired from the funds of the Maharashtra Industrial Development Corporation'. I say that the said statement is incorrect and was made under a misapprehension of the true facts. I say that the said lands are being acquired by the State Government for the development of the lands as an industrial area and the compensation payable for the said lands was intended to be paid and is to be paid from public revenue out of the consolidated fund of the State of Maharashtra and the necessary provision therefor has been made in the Annual Budget Estimates of the Industries and Labour Department of the State Government".

Mr. Nargund further alleged that

"the sanctioned amount will be paid by the Government to the Special Land Acquisition Officer concerned for payment of compensation according to his Award to the interested persons".

Mr. Nargund also raised a point in para. 4 of this affidavit that after the acquisition of the said lands and their vesting in the State Government they would be placed at the disposal of the Maharashtra Industrial Development Corporation as provided in s. 40 of the Maharashtra Industrial Development Act, 1961. Along with this affidavit Mr. Nargund filed copies of extracts from the detailed estimates from the Budget for the year 1964-65. This affidavit filed by the Under-Secretary set in motion a process which accounts for the bulk of the pleadings in this petition. It resulted in several affidavits being filed by the petitioner to counter the new stand taken and as we have said, in further affidavits being filed by various officers of the State and the M.I.D.C. and in the filing of a large number of documents by both the parties. It will be noticed that the stand taken in the affidavit of Mr. Nargund is in direct conflict with that taken by Mr. Patwardhan in his first affidavit. We shall deal with the remaining affidavits, when we deal with the question raised upon the documents.

Before we proceed, therefore, to discuss the several points raised, it is necessary to say a word about the local amendments that have been effected in the Land Acquisition Act. The provisions of the Land Acquisition Act have been several times amended by local legislation. We are concerned in this petition with two such amendments. The first is the amendment made by Act XXXV of 1953 in the definition of "public purpose" contained in sub-s. (f) of s. 3 of the Land Acquisition Act. The definition as it stands after amendment is as follows:—

"(f) the expression 'public purpose' includes

(1) the provision of village sites in districts in which the (appropriate) Government shall have declared by notification in the Official Gazette that it is customary for the Government to make such provision (and a housing scheme as defined in the Land Acquisition (Bombay Amendment) Act, 1948); and

(2) the acquisition of land for purposes of the development of areas from public revenues or some fund controlled or managed by a local authority and subsequent disposal thereof in whole or in part by lease, assignment, or sale, with the object of securing further development".

In this definition the word "Appropriate" before the word "Government" was added by the Adaptation of Laws Order, 1950, and the following words in sub-cl. (1) of cl. (f) were added by the Land Acquisition (Bombay Amendment) Act, 1948 (Act IV of 1948):

"and a housing scheme as defined in the Land Acquisition (Bombay Amendment) Act, 1948".

The other amendment made was to add sub-cl. (2) to cl. (f) of s. 3 containing the definition of "public purpose" as follows:—

"(2) the acquisition of land for purposes of the development of areas from public revenues or some fund controlled or managed by a local authority and subsequent disposal thereof in whole or in part by lease, assignment, or sale, with the object of securing further development".

It is this definition of "public purpose" as amended by the Bombay Act that is the subject of attack on the ground of unconstitutionality and other grounds.

The other amendment made which is material for our purpose was, as we have in passing indicated by the Bombay Commissioners of Divisions Act, 1957, s. 3(4). That sub-section—we shall presently advert to its detailed provisions—gave power to the State Government to

"confer and impose on the Commissioner powers and duties under any other enactment for the time being in force and for that purpose may, by a notification in the *Official Gazette*, add to or specify in the Schedule the necessary adaptations and modifications in the enactment to be amended"

and it was provided that upon such notification being issued every such enactment shall accordingly be amended and have effect subject to the adaptations and modifications so made and the Schedule to the Act shall be deemed to be amended by the inclusion therein of the said provision for amending the enactment. It appears that pursuant to this power the State Government issued the notification already referred to in the affidavit of Mr. Patwardhan viz. Government Notification Revenue Department No. LAQ-2558/V dated September 5, 1958.

We may also at this stage refer to the Maharashtra Industrial Development Corporation and the law under which it was established.

The Maharashtra Industrial Development Act, 1961 (Act III of 1962) was brought into force on March 1, 1962. It applies to the whole of the State of Maharashtra but sub-s. (3) of s. 1 thereof provides that Chap. VI shall take effect in such area, from such date as the State Government may, from time to time, by notification in the *Official Gazette*, appoint in that behalf. Accordingly, the State Government has from time to time actually applied Chap. VI to several areas under its jurisdiction, but it is conceded on both sides that Chap. VI has not been brought into force so far as the area in which the lands in dispute are situated. Therefore, for the purposes of this petition Chap. VI does not apply at all. The preamble of the Act recites that it is expedient to make special provision for securing the orderly establishment in industrial areas and industrial estates of industries in the State of Maharashtra, and to assist generally in the organisation thereof, and for that purpose to establish an Industrial Development Corporation, and for purposes connected with the matters aforesaid. In sub-s. (g) of s. 2 "industrial area" has been defined to mean an industrial area so declared by the State Government in the *Official Gazette*, which is to be developed and where industries are to be accommodated. Section 3 deals with the establishment and incorporation of the Maharashtra Industrial Development Corporation. Sub-section (2) says that the Corporation shall be a body corporate with perpetual succession and a common seal, and may sue and be sued in its corporate name, and shall be competent to acquire, hold and dispose of property, both moveable and immoveable, and to contract, and do all things necessary for the purposes of the Act. Section 4 provides for the constitution of the Corporation. A perusal of the several categories of its members will indicate that excepting three members to be nominated by Government on the ground of certain special experience or ability they are all officers under the State Government or connected with one or more Boards established by the State Government. The Chairman of the Corporation is to be appointed by the State Government and if it thinks

fit a Vice-Chairman. The Chief Executive Officer of the Corporation is appointed under s. 12 also by the State Government though subordinate officers and servants are to be appointed by the Corporation under s. 12(2). Sub-section (1) of s. 13 provides that the Corporation shall take over and employ such of the existing staff serving for the purposes of the Board of Industrial Development constituted by Government Resolution in the Industries and Labour Department No. IDL. 2360/140755-IND-I, dated October 1, 1960, as the State Government may direct, and every person so taken over and employed shall be subject to the provisions of this Act and the rules and regulations made thereunder. Then follow the provisions for the terms of employment of these persons. Sub-section (3) of s. 13 provides that

"All obligations incurred, all contracts entered into and all matters and things engaged to be done, before the first constitution of the Corporation, by, with or for the State Government or the Board of Industrial Development aforesaid for any of the purposes of this Act, in respect of any schemes for the development of industrial estates or industrial areas entrusted to the Corporation, shall be deemed to have been incurred, entered into or engaged to be done by, with or for the Corporation"

and the sub-section further provides for suits and other legal proceedings which may be continued or instituted only against the Corporation. Sub-section (4) of s. 13 is somewhat important, because of the stand taken that the expenditure for the acquisition in this case was really an expenditure of the Corporation. Sub-section (4) says:

"All expenditure which the Board of Industrial Development may have incurred before the date of the coming into force of this Act in connection with any of the purposes of this Act shall be deemed to be a loan advanced to the Corporation under section 21 on that date, and all assets acquired by such expenditure shall vest in the Corporation".

It is also not in dispute that the erstwhile Board of Industrial Development which was a Board set up by Government itself was replaced by the Corporation on August 1, 1962, by a Notification No. IDC-1062-IND-1 dated August 1, 1962, in the Official Gazette. Sections 14 and 15 indicate the functions of the Corporation and its powers. Section 14 mentions the functions as follows:—

"14. The functions of the Corporation shall be—

(i) generally to promote and assist in the rapid and orderly establishment, growth and development of industries in the State of Maharashtra, and

(ii) in particular, and without prejudice to the generality of clause (i), to—

(a) establish and manage industrial estates at places selected by the State Government;

(b) develop industrial areas selected by the State Government for the purpose and make them available for undertakings to establish themselves;

(c) assist financially by loans industries to move their factories into such estates or areas;

(d) undertake schemes or works, either jointly with other corporate bodies or institutions, or with Government or local authorities, or on an agency basis, in furtherance of the purposes for which the Corporation is established and all matters connected therewith".

Section 15 delineates its powers; principally the power to acquire and hold property and to dispose it of, to enter into agreement and take property on lease, to erect buildings and execute such other works as may be necessary for the purpose of carrying out its duties and functions. Clause (j) of s. 15 gives power to the Corporation "to enter into and perform all such contracts as it may consider necessary or expedient for carrying out any of its functions". Section 18 lays down that the State Government may issue to the Corporation such general or special directions as of policy as it may think necessary or expedient for the purpose of carrying out the purposes of this Act, and the Corporation shall be bound to follow and act upon such directions.

Chapter IV deals with finance, accounts and audit and in this connection one point which was made in the arguments may be noted here, that the Corporation has to maintain its accounts not like any other company but in accordance with the public account rules, and they are to be audited by an auditor appointed by the State Government (s. 27(2)) in consultation with the Comptroller and Auditor General of India. These accounts moreover are to be laid before the House of the State Legislature annually (s. 27(4)). By virtue of s. 21 all moneys received by the Corporation from the State Government by way of grants, subventions, loans, advances or otherwise become part of the fund of the Corporation among other things. Chapter VI, which we have already said was not brought into force so far as the area which is the subject-matter of this petition is concerned, provides for acquisition and disposal of land. Having regard to this Chapter it is conceded that there is a special provision for acquisition of lands for this Corporation provided the Chapter is made applicable to the area in question.

In the affidavit made on behalf of the Commissioner a reference is to be found to s. 40 of the Act which gives power to the State Government upon such conditions as may be agreed upon between it and the Corporation to place at the disposal of the Corporation any lands vested in the State Government "for the furtherance of the objects of this Act" and that after such land has been developed by, or under the control and supervision of the Corporation, it shall be dealt with by the Corporation in accordance with the regulations made and directions given by the State Government. The affidavit averred that the petitioner's land would be dealt with under s. 40, but obviously in view of the fact that Chap. VI has not been brought into force in the area in which this land is situated, that reference is irrelevant. The miscellaneous and supplemental provisions contained in Chap. VII amply indicate that the State Government has a very rigid control over the Corporation and if it so decides can even dissolve the Corporation itself (vide s. 58) subject to it being satisfied that its purposes have been substantially achieved. Despite this provision in the Corporation Act there has been no dispute raised here that the Maharashtra Industrial Corporation is a "company". It was conceded that it would be a company having regard to the definition in s. 3(e) of the Land Acquisition Act as locally amended. The powers and functions of the Maharashtra Industrial Development Corporation have a material bearing on the question whether the acquisition in the instant case was for a public purpose or for a company as stated in s. 6 of the Land Acquisition Act.

The questions, therefore, which arise for determination in this Special Civil Application are broadly speaking as follows:—

(1) Whether the delegation of the State Government's power to acquire land particularly under ss. 4, 6, 9 and 17, to the Commissioner (respondent No. 1) by the local amendments effected by the Commissioners of Divisions Act, was in excess of the powers of the State Legislature and whether that delegation, which gives the State Government the power to bring into force any amendment of any Act by a notification is a valid delegation of authority; if not, what would be the consequence upon the Notifications issued in this case under ss. 4, 6 and 9 by respondent No. 1?

(2) Whether ss. 4 and 6 or any parts of those sections read with the amendment made in s. 3(f)(2) of the Land Acquisition Act of the definition of "public purpose" by the local amendment, infringe arts. 31, 14 or 19 of the Constitution and whether, therefore, the notifications under ss. 4 and 6 of the Land Acquisition Act are bad?

(3) Whether the acquisition in the instant case is not for a "public purpose" in the context of s. 6(1) and more particularly its proviso?

(4) Whether the declaration in the notification under s. 6 of the existence of a public purpose is in the circumstances conclusive under s. 6(3) of the Land Acquisition Act?

(5) Whether the acquisition is for a company within the meaning of Part

VII of the Land Acquisition Act and if so whether the omission to follow the procedure laid down in that part would vitiate the acquisition proceedings?

(6) Whether the petitioner's lands were waste or arable lands and could be taken possession of without observance of the provisions of s. 5A? If they cannot be so taken what is the effect on the notification under s. 4.

(7) Whether the opinion of the authority under s. 17 would be merely a subjective opinion which the Court cannot scrutinise or whether it should be objectively proved that the requirements of s. 17(1) have been fulfilled?

We may first of all dispose of the objections to the notifications that the Commissioner could not promulgate them as he had no valid power. We have already indicated that the notifications under ss. 4, 6 and 9 were all signed by Mr. J.H. Patwardhan, the Commissioner of Bombay Division, who is respondent No. 1. The first of these two notifications also contains the necessary declaration under sub-s. (4) of s. 17 of the Act, dispensing with the provisions of s. 5A. In the Land Acquisition Act, as it originally stood, the power under each of the ss. 4, 6, 9 and 17 was only entrusted to the Local Government. After the Constitution by an amendment made by the Adaptation of Laws Order, 1950, instead of the word "local" the word "appropriate" was substituted. It was only the appropriate Government which could exercise all the relevant powers under the Act. A definition was added of the words "appropriate Government" in s. 3(ee) as follows:—

"The expression 'appropriate government' means, in relation to acquisition of land for the purpose of the Union, the Central Government, and, in relation to acquisition of land for any other purposes, the State Government".

Thus matters stood until by the local amendment the words "or the Commissioner" were added in s. 3(a), 4, 5A, 6, 9 and 17 after the words "appropriate Government". This amendment was made under somewhat peculiar circumstances which give rise to the argument that there has been an excess of delegation. The amendment to the Land Acquisition Act was not directly made by any Legislature. What was amended was a local Act, Act VIII of 1958, viz. the Bombay Commissioners of Divisions Act, 1957. This Act was already in force since 1958. It was brought into force in order to provide for the offices of the Commissioners of Divisions in the State of Bombay and prescribing their powers and duties and to make ancillary provisions consequent upon a policy decision to resuscitate the office of Divisional Commissioner which had been abolished soon after Independence. In this Act provision was made by the Bombay Legislature for the amendment of several Acts. Section 3, sub-ss. (1) and (4) provide as follows:—

"3. (1) For the purposes of constituting offices of Commissioners of divisions and conferring powers and imposing duties on Commissioners and for certain other purposes, the enactments specified in column 1 of the Schedule to this Act shall be amended in the manner and to the extent specified in column 2 thereof, and sub-s. (4) thereof is as follows:—

"The State Government may confer and impose on the Commissioner powers and duties under any other enactment for the time being in force and for that purpose may, by a notification in the *Official Gazette*, add to or specify in the Schedule the necessary adaptations and modifications in that enactment by way of amendment; and thereupon—

(a) every such enactment shall accordingly be amended and have effect subject to the adaptations and modifications so made, and

(b) the schedule to this Act shall be deemed to be amended by the inclusion therein of the said provision for amending the enactment".

It may be noticed at the outset that the Land Acquisition Act was not one of the Acts mentioned in the Schedule and the amendment of that Act could, therefore, be made only under sub-s. (4) of s. 3 of the Commissioners of Divisions Act which says that "the State Government may confer and impose on the Commissioner powers and duties under any other enactment for the time being in force..."

Purporting to act under these powers the State Government issued a notification on September 5, 1958, Notification No. G.N.R.D. No. LAQ-2558/V dated September 5, 1958, inserting the words "or the Commissioner" in the said sections of the Land Acquisition Act in the then State of Bombay excluding the transferred territories under the Reorganisation of States Act. By virtue of sub-s. (4) of s. 3 the Schedule to the Commissioners of Divisions Act accordingly stood amended and that in its turn incorporated those amendments in the Land Acquisition Act.

Now, it has been urged on behalf of the petitioner that this was a very devious method of amending the Land Acquisition Act. It is not disputed that the State Legislature could with the requisite assent of the President have directly legislated to amend the Land Acquisition Act to give the necessary powers to the Commissioners. It is also not in dispute that the Bombay Commissioners of Divisions Act has received the assent of the President and that would mean in the context of s. 3(4) that the President has assented to those powers being conferred upon and being entrusted to Commissioners in such enactments as are within the competence of the State Legislature to enact. What is argued, however, is that the State Legislature could not by enacting s. 3(4) delegate in this manner its legislative function to the State Government and give the State Government an omnibus power to amend any other enactment for the time being in force by a simple notification in the Official Gazette. That, it was argued, virtually amounts to entrusting to the Executive the whole function of the Legislature in the matter, and to that extent, therefore, the delegation was bad. It was also urged that it was an excessive delegation for the reason that the State Government had been armed with the power to amend any and every Act and virtually to become a Legislature in itself.

On this question reference was made to *In re the Delhi Laws Act, 1912*¹ and to the principles laid down therein by the highest Court upon which questions of delegated legislative authority must be judged. The subsequent decision of the Supreme Court in which that leading case was substantially summarised was also referred to namely *Rajnarain Singh v. The Chairman, Patna Administration Committee, Patna*.² After the analysis of the opinions in the *Delhi Laws Act* case made in *Rajnarain's* case the principles are now well settled. In dealing with the *Delhi Laws Act* case Mr. Justice Bose made the following propositions in *Rajnarain Singh's* case (p. 298):

"The Court had before it the following problems. In each case, the Central Legislature had empowered an executive authority under its legislative control to apply, at its discretion, laws to an area which was also under the legislative sway of the Centre. The variations occur in the type of laws which the executive authority was authorised to select and in the modifications which it was empowered to make in them. The variations were as follows:

(1) Where the executive authority was permitted, at its discretion, to apply without modification (save incidental changes such as name and place), the whole of any Central Act already in existence in any part of India under the legislative sway of the Centre to the new area:

This was upheld by a majority of six to one.

(2) Where the executive authority was allowed to select and apply a Provincial Act in similar circumstances:

This was also upheld, but this time by a majority of five to two.

(3) Where the executive authority was permitted to select future Central laws and apply them in a similar way;

This was upheld by five to two.

(4) Where the authorisation was to select future Provincial laws and apply them as above:

This was also upheld by five to two.

1 [1951] S.C.R. 747.

2 [1955] 1 S.C.R. 290.

(5) Where the authorisation was to repeal laws already in force in the area and either substitute nothing in their places or substitute other laws, Central or Provincial, with or without modification:

This was held to be *ultra vires* by a majority of four to three.

(6) Where the authorisation was to apply existing laws, either Central or Provincial, with alterations and modifications; and

(7) Where the authorisation was to apply future laws under the same conditions:

The views of the various members of the Bench were not as clear cut here as in the first five cases, so it will be necessary to analyse what each Judge said."

The authorisation under s. 3(4) of the Bombay Commissioners of Divisions Act is in substance an authorization to amend any other enactment with a view to confer powers and impose duties on Commissioners under those enactments. It would, in our opinion, properly fall within the sixth category in the passage quoted above, "Where the authorisation was to apply existing laws either Central or Provincial, with alterations and modifications".

As to that category at page 301 of the Report Mr. Justice Bose summed up the result of the *Delhi Laws Act* case as follows:—

"In our opinion, the majority view was that an executive authority can be authorised to modify either existing or future laws but not in any essential feature. Exactly what constitutes an essential feature cannot be enunciated in general terms, and there was some divergence of view about this in the former case, but this much is clear from the opinions set out above: it cannot include a change of policy".

In *Rajnarain Singh's* case there were impugned two notifications issued under ss. 3(1)(f) and 5 of the Patna Administration Act of 1915 (Bihar & Orissa Act I of 1915) as amended in 1928 whereby the Local Government was empowered in effect:

(1) to cancel or modify any existing municipal laws in the Patna Administration area;

(2) to extend to this area all or any of the sections of the Bihar & Orissa Municipal Act of 1922 subject to such restrictions and modifications as it considered fit;

(3) to add to the Patna Administration area other areas not already under Municipal control.

What the State Government did was to add by a notification a new area to the Patna Administration area and bring the new area under municipal control. Besides it picked s. 104 out of the Bihar and Orissa Municipal Act of 1922, modified it and extended it in its modified form to the Patna Administration and the new areas. That section was with regard to assessment of taxes and the petitioner in the case who was a resident of the new area contended that such a delegation was a delegation of an essential function of the Legislature and, therefore, the provisions of the Act which authorized such a delegation were void. It was held that the action of the Governor in subjecting a resident of the new area to municipal taxation without observing the formalities imposed by ss. 4, 5 and 6 of the Bihar and Orissa Municipal Act, 1922, cut across one of its essential features touching a matter of policy and was bad to that extent, but so far as s. 3(1)(f) of the Act which authorised the delegation of powers to the Government is concerned, it was a valid delegation. Dealing with that point the Supreme Court ruled in *Rajnarain's* case (p. 303):—

"Now the only difference between that case (the *Delhi Laws Act* case) and this is that whereas in the former case the whole of an enactment, or a part of it could be extended, here, any section can be picked out... It follows that when a section of an Act is selected for application, whether it is modified or not, it must be done so as not to effect any change of policy, or any essential change in the Act regarded as a whole. Subject to that limitation we hold that section 3(1)(f) is *intra vires*, that is to say, we hold that any section or sections of the Bihar and Orissa Municipal Act of 1922 can be picked out and applied to "Patna" provided that does not effect any essential change in the Act or alter its policy".

Judged in the light of this principle we are unable to find that any essential

change was made or any change of policy effected when after the words "appropriate government" the words "or the Commissioner" were added in the several sections of the Land Acquisition Act. The original policy of the Legislature remained untouched; the power originally conferred on the State Government remained in all its pristine plenitude; only the Commissioner was given those powers *pari passu* with the State Government. In so far as the Commissioner was a subordinate of State Government and could always be controlled by it, the State Government's power was not affected. The Commissioner in his turn was a responsible officer and in normal course would always be consulted by Government when acquiring property in his division. Thus, in fact, he would always be influencing the decisions in the matter of acquisitions. This *de facto* state of affairs was legally recognised by the amendment. It seems to us that the amendment was made only for administrative convenience and not for any change which can be termed essential much less in order to effect a change of policy.

In the case last cited reference was made to the leading case of *The Queen v. Burah*.³ On the power of the State Legislature to effect an amendment of this kind that case is instructive. In that case an Act passed by the Indian Legislature (Act XXII of 1869) which was a validly enacted piece of legislation by the then Governor-General in Council. It empowered an executive authority viz. Lieutenant-Governor of Bengal to apply "any law or any portion of any law now in force...or which may hereafter be enacted" to a certain district of the then Province of Bengal at his discretion. It was urged that the Indian Legislature could not have thus delegated its own power of legislation to the Lieutenant-Governor of Bengal and that in so far as it empowered the Lieutenant-Governor to determine whether the said laws or any part of them shall be applied in a certain district, the delegation of the legislative authority of the Governor-General-in-Council to the Lieutenant-Governor of Bengal was in excess of the legislative powers of the Governor-General-in-Council. The High Court held that the 9th Section of the Act of 1869 which purported to empower the Lieutenant-Governor to extend the Act to the Khasi and Jaintia districts was in excess of the legislative powers of the Governor-General in Council. Repelling this view, the Judicial Committee of the Privy Council observed (p. 193):

"But their Lordships are of opinion that the doctrine of the majority of the Court is erroneous, and that it rests upon a mistaken view of the powers of the Indian Legislature, and indeed of the nature and principles of legislation. The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers. But, when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large, and of the same nature, as those of Parliament itself. The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted. If what has been done is legislation, within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited (in which category would, of course, be included any Act of the Imperial Parliament at variance with it), it is not for any Court of Justice to inquire further, or to enlarge constructively those conditions and restrictions."

Here again the Judicial Committee stressed the point that where a delegation takes place what one has to see is whether looking to the terms of the Act granting legislative power both in the extent of what it gives as well as what it restricts, any essential legislative power has been conferred or surrendered.

The Judicial Committee also drew another distinction. It distinguished be-

tween essential legislative function and the conditions attached to a legislation. They pointed out that so long as the essential function is not delegated to the Executive a legislative authority can permit the Executive to fulfil any of the conditions attached to a legislation. The distinction was thus indicated by their Lordships (p. 194) :—

“Their Lordships agree that the Governor-General in Council could not, by any form of enactment, create in India, and arm with general legislative authority, a new legislative power, not created or authorized by the Councils’ Act. Nothing of that kind has, in their Lordships’ opinion, been done or attempted in the present case. What has been done is this. The Governor-General in Council has determined, in the due and ordinary course of legislation, to remove a particular district from the jurisdiction of the ordinary Courts and offices, and to place it under new Courts and offices, to be appointed by and responsible to the Lieutenant-Governor of Bengal; leaving it to the Lieutenant-Governor to say at what time that change shall take place; and also enabling him, not to make what laws he pleases for that or any other district, but to apply by public notification to that district any law, or part of a law, which either already was, or from time to time might be, in force, by proper legislative authority, ‘in the other territories subject to his government’. The Legislature determined that, so far, a certain change should take place; but that it was expedient to leave the time, and the manner, of carrying it into effect to the discretion of the Lieutenant-Governor; and also, that the laws which were or might be in force in the other territories subject to the same Government were such as it might be fit and proper to apply to this district also; but that, as it was not certain that all those laws, and every part of them, could with equal convenience be so applied, it was expedient, on that point also, to entrust a discretion to the Lieutenant-Governor...

Their Lordships think that it is a fallacy to speak of the powers thus conferred upon the Lieutenant-Governor (large as they undoubtedly are) as if, when they were exercised, the efficacy of the acts done under them would be due to any other legislative authority than that of the Governor-General in Council. Their whole operation is, directly and immediately, under and by virtue of this Act (XXII. of 1869) itself. The proper Legislature has exercised its judgment as to place, person, laws, powers; and the result of that judgment has been to legislate conditionally as to all these things. The conditions having been fulfilled, the legislation is now absolute. Where plenary powers of legislation exist as to particular subjects, whether in an imperial or in a provincial Legislature, they may (in their Lordships’ judgment) be well exercised, either absolutely or conditionally.”

Having regard to these principles and particularly the distinction adverted to between the delegation of essential legislative function and the delegation of powers to give effect to legislation on the fulfilment of certain conditions we do not think that we can hold that what has been authorised in the instant case is in excess of the powers of the State Legislature. The State Legislature had the power to create offices under it and to say which of its officers shall perform which functions. That legislative determination or judgment is expressed in the very terms of sub-s. (2) of s. 3 when it says that

“the Commissioner of a division, appointed under the law relating to land revenue as amended by the said Schedule, shall exercise the powers and discharge the duties conferred and imposed on the Commissioner by any law for the time being in force, including the enactments referred to in sub-section (1) as amended by the said Schedule”.

By sub-s. (4) the further determination was made that “the State Government may confer and impose on the Commissioner powers and duties under any other enactment for the time being in force.” In other words, the legislative determination consisted in this that the Legislature felt that powers under any other enactment could fittingly be conferred upon the Commissioner. That determination included in it a determination as to the authority on whom and the powers which were to be conferred, the purpose for which and the manner in which that authority would be conferred upon the Commissioner and the time when it was

to be conferred. Once that legislative judgment was exercised the rest was, in our opinion, merely a matter of the conditions upon which the legislative determination was to take effect. Therefore, there was, in our opinion, no parting with the essential legislative functions in the instant case.

It was next argued that the amplitude of the language used in enacting this piece of legislation is so wide that the State Government can by a conceivable notification make amendments which may affect essential legislative functions. It was urged, for instance, that the State Government could by notification amend the legislation taking away the power from Courts. Wherever power of this kind is conferred, undoubtedly it is liable to be exceeded by those entrusted with it or for that matter even to be abused. But the argument does not amount to saying, therefore, that the power conferred is bad but that in the implementation of that power the authority is liable to exceed or overstep its delegated functions. That is a different question. It seems to us that it is not seriously argued here that in adding the words "or the Commissioner" in the several sections of the Land Acquisition Act the State Government has exceeded the powers conferred upon it but that the delegate may abuse those powers. The mere capability of its abuse or mis-use cannot alter the nature of the power. In the instant case, we have already said that that power was only a power to give effect to the conditions attached to a legislation and did not amount to giving any power to make any essential legislative determination. The delegation was, therefore, proper.

It was then urged that though the Commissioners of Divisions Act has undoubtedly received the assent of the President, the subsequent amendments effected by the notifications of the State Government in the Land Acquisition Act as well as the other Acts were not assented to by the President and to that extent the subject of the legislation which admittedly fell in List III of the Constitution would be bad, because it conflicts with an existing Central law viz. the Land Acquisition Act. It was urged that the Central law merely entrusted the functions under ss. 4, 6, 9 and 17 to the State Government whereas the local legislation and that too by notifications of the State Government add the words "or the Commissioner" and to that extent is repugnant to a Central law. The clear answer to the contention is, in our opinion, to be found in the provisions of art. 254, sub-art. (2) of the Constitution which runs as follows:—

"Where a law made by the Legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State."

The Bombay Commissioners of Divisions Act was passed in 1958 and the Land Acquisition Act was passed in 1894. Therefore, for the purposes of sub-art. (2) of art. 254 would be an "existing law" on the date of the Constitution. So far as the Bombay Commissioners of Divisions Act is concerned, it is not disputed that it has received the assent of the President and, therefore, having received the assent it would prevail so far as the State of Maharashtra is concerned, even though it may be repugnant to the provisions of the earlier law made by Parliament viz. the Land Acquisition Act. The Land Acquisition Act was an existing law having regard to the definition of the term in art. 366(10) of the Constitution. We, therefore, hold that the amendments effected in the Land Acquisition Act by the Bombay Commissioners of Divisions Act were valid amendments so far at least as this State is concerned. We have already held that there was no excess of delegation of legislative authority by s. 3 of the Bombay Commissioners of Divisions Act. Similar instances of enactments held valid, though not identical with the present case are to be found in the *State v. Heman Alreja*,⁴ *Edward Mills Co. Ltd. v. The State of Ajmer*,⁵ *Gulam Mohammad v. State of Bombay*,⁶ and *Patna Improvement Trust v. Lakshmi Devi*.⁷

4 (1951) 53 Bom. L.R. 837, at p. 850.

5 [1955] 1 S.C.R. 735.

6 [1962] 2 S.C.R. 659.

7 [1963] A.I.R. S.C. 1077.

Next we turn to the challenge to the provisions of the Land Acquisition Act and particularly to s. 6 thereof upon constitutional grounds. The provisions of s. 6, it has been said, are *ultra vires* of art. 19(1)(f) and (g), of art. 31 and of art. 14. So far as arts. 19(1)(f) and (g) are concerned, we may at once point out that the challenge to the Act on the ground of infringement of art. 19 has been answered by the highest Court in *Somawanti v. State of Punjab*.⁸ At page 160 in the same passage which we quote below the Supreme Court also repelled the argument that it infringed art. 31 of the Constitution. In para. 21 of the judgment, Mr. Justice Mudholkar observed with reference to the Land Acquisition Act (p. 160) :

"...The Act has been in operation since 1894. The validity of the law was challenged before this Court in *Babu Barkya Thakur v. The State of Bombay*,⁹ on the ground that it infringes the provisions of Arts. 31(2) and 19(1)(f) of the Constitution. But this Court held that the law being a pre-Constitution law is protected from the operation of Art. 31(2) by the provisions of Art. 31(5)(a). It also held, following the decision in *The State of Bombay v. Bhanji Munji*¹⁰ and that in *Lilavati Bai v. The State of Bombay*,¹¹ that the attack under Art. 19(1)(f) of the Constitution is futile".

In Civil Appeal No. 322 of 1961¹² before the Supreme Court this view was reaffirmed and a further point taken on the strength of the decision of the Supreme Court in *Kavalappara Kottarathil Kochuni v. State of Madras*,¹³ that the decision in *Bhanji Munji's* case must be deemed to have lost its authority, was repelled. Mr. Justice Sarkar observed:

"The observation in *Kavalappara Kochuni's* case that *Bhanji Munji's* case 'no longer holds the field' has, therefore, to be understood as meaning that it no longer governs a case of deprivation of property by means other than requisition and acquisition by the State. *Kavalappara Kochuni's* case was not concerned with a law of requisition or acquisition of property governed by art. 31(2), as it now stands, and did not decide that question".

We may also say that art. 19(1)(f) or (g) is no longer available to the petitioner having regard to the provisions of art. 358 of the Constitution and the proclamation of emergency recently made by the President in October 1962. The article in terms says that

"While a Proclamation of Emergency is in operation, nothing in article 19 shall restrict the power of the State as defined in Part III to make any law or to take any executive action which the State would but for the provisions contained in that Part be competent to make or to take..."

We hold that neither s. 4 nor s. 6 of the Land Acquisition Act can be held to infringe art. 19 of the Constitution.

So far as art. 31 is concerned, we have already referred to the decision in *Somawanti's* case. In the passage from that decision, which we have quoted above, no doubt Mr. Justice Mudholkar made it clear that the Supreme Court in that case were not concerned with a post-Constitution law, but a pre-Constitution law. Relying on these observations a distinction is sought to be drawn between that decision and the present case. It has been urged that so far as the definition of "public purpose" in s. 3(f)(2) of the Land Acquisition Act is concerned, it was added by the local amendment made by Act XXXV of 1953 and, therefore, would be a post-Constitution law and not a pre-Constitution law as the rest of the Act would be. The conditions necessary to be fulfilled under art. 31 of the Constitution are that no property can be acquired compulsorily except for a public purpose and under authority of law. The law has been enacted and in our opinion is valid. The question then is whether in sub-s. (2) of s. 3(f) of the Land Acquisition Act, (as amended), the purposes mentioned can be held to be public purposes within the meaning of art. 31. We

8 [1963] A.I.R. S.C. 151.

9 [1961] 1 S.O.R. 128.

10 [1955] 1 S.O.R. 777.

11 [1957] S.O.R. 721.

12 Decided on December 1, 1962 (Supreme Court).

13 [1960] 3 S.C.R. 887.

shall presently discuss this question as it arises also in connection with sub-s. (1) of s. 6. We may say here, however, that in our opinion, sub-cl. (2) of s. 3(f) added by the local amendment which includes certain purposes within the definition of a public purpose are within the accepted connotation of that expression.

Turning to the challenge under art. 14 of the Constitution, it is the petitioner's case that he himself is the owner of a small factory manufacturing explosives in close proximity to the residential part of Bombay, that therefore the Government of India had ordered him to shift the factory to other premises outside the limits of Greater Bombay and so he had purchased the plot which is the subject of the present acquisition "specifically for re-establishing the said factory". He also averred that detailed plans of the buildings to be constructed were submitted to the Explosives Department of the Government of India and have been finally approved by the Department on January 24, 1963. The land which he had thus purchased was a "levelled land" and fit for erection of a factory and did not require anything to convert it into land suitable for establishing a factory. It was also land within the industrial area.

The facts stated in this part of the petition were not controverted in the affidavit of the Commissioner dated November 15, 1963, except to deny that the land was levelled or that it was in a fit condition for the erection of a factory or the construction of buildings. It was also denied that it did not require any development to be made for converting it into land suitable for a factory. The facts that the Government of India had asked him to shift this factory and, therefore, that he purchased this plot and the Department of Explosives had approved the petitioner's plans for the new factory building were not controverted. In fact, the petitioner has filed a number of documents from which these facts are abundantly established. The said correspondence appears at pages 78 to 90 of the paper book. It was on January 24, 1963, that the Inspector of Explosives of the Central Government at Bombay approved the plans showing the site and details of construction of the proposed gun-powder factory of the petitioner and informed the petitioner accordingly by his letter No. MR/BY.52/E dated January 24, 1963. That was curiously enough the very day on which the notification under s. 4 and which is impugned in the present petition, came to be promulgated.

Now taking his stand upon these facts Mr. Bhatt has urged on behalf of the petitioner that the petitioner was himself a person engaged in industry, had himself bought the land in dispute for the manufacture of explosives which is an industry and there was no point in the Government starting acquisition proceedings for the same land for an identical purpose stated in the notification under s. 4 as "for development and utilization of lands as an industrial area". The same purpose, though in different words, is also mentioned at the foot of the notification under s. 6 "for the development and utilization of lands as an industrial area". Mr. Bhatt points to the several provisions of the Maharashtra Industrial Development Act, 1961, and the Maharashtra Industrial Development Corporation for which he says that the acquisition has in fact been made and to the definition in s. 3(f) (2) where the words "and subsequent disposal thereof in whole or in part by lease, assignment, or sale, with the object of securing further development" occur. He says that the whole object, therefore, of the present acquisition is really to take the lands of the petitioner who is himself engaged in industry and dispose them of to another person for profit though ostensibly for a public purpose. This law thus permits the State to take the lands of one citizen held by him upon certain terms and conditions and hand them over to another citizen upon similar terms and conditions and, therefore, it discriminates against the petitioner. He has also urged that the power given by virtue of s. 6 read along with the amendment in s. 3(f) (2) is an arbitrary power conferred upon the State to acquire the lands of the petitioner. There are no safeguards against the exercise of this arbitrary power and, therefore, discrimination is writ large upon the face of the law itself. For these reasons the law

infringes art. 14 of the Constitution. In this connection, he also makes an ancillary point that the amendment made by virtue of the power delegated to the State Government under the Commissioners of Divisions Act heightens the discrimination. He urges that whereas the State Government was entrusted with deciding all matters under the Act as it originally stood now even the Commissioner of Division can do so. Therefore, the discrimination is the worse because of the powers being entrusted to a lesser official and a subordinate of the State Government, rather than the State Government itself.

Article 14 refers to "equality before the law or the equal protection of the laws within the territory of India". There is no question here undoubtedly of inequality before the law and the argument of the petitioner is based upon the second part of art. 14 "equal protection of the laws". Now it is difficult to see how merely because the law gives power to the State or the Commissioner upon certain conditions to take or acquire the property of the petitioner, the petitioner ceases to receive the same protection of the laws as any other citizen. The power or authority conferred, whether upon the State Government or the Commissioner, is the same, be it the petitioner or any other citizen. What it seems to us, is really complained against in the arguments, is that the power given to the State or the Commissioner is a very wide and arbitrary power and the very amplitude of the discretion makes for discrimination.

We are, however, unable to accept this argument for a discretion given under a law, however wide it may be, cannot necessarily be equated with discrimination, and in so far as there is a possibility of the misuse of a discretion the normal presumption of law is that the authority invested with a discretionary power will act fairly and honestly and not abuse it. If it does however abuse it in a given case, that is an indication of human frailty rather than of the power being discriminatory. The distinction has been drawn in a number of cases, but the most authoritative of these statements is to be found in the decision of the Supreme Court in *Pannalal Binraj v. Union of India*.¹⁴ In that case power was given by s. 5(7A) of the Indian Income-tax Act to the Commissioner to transfer the case of any assessee from one officer to another officer. It was urged that the assessee had a right under s. 64(1) and (2) of the Act to have his tax assessed at the place where he carried on his business or resided and that, therefore, the very wide power given to the Commissioner amounted to an arbitrary power which tended to discriminate between one assessee and another. The Supreme Court put the point before them thus (p. 252):

"The position, therefore, is that the determination of the question whether a particular Income-tax Officer should assess the case of the assessee depends on (1) the convenience of the assessee as posited in section 64(1) and (2) of the Act, and (2) the exigencies of tax collection and it would be open to the Commissioner of Income-tax and the Central Board of Revenue who are the highest amongst the Income-tax Authorities under the Act to transfer the case of a particular assessee from the Income-tax Officer of the area within which he resides or carries on business to any other Income-tax Officer if the exigencies of tax collection warrant the same", and the Court answered the point as follows (p. 257):

"...Such discretion would necessarily have to be vested in the authority concerned and merely because the case of a particular assessee is transferred from the Income-tax Officer of an area within which he resides or carries on business to another Income-tax Officer whether within or without the State will not by itself be sufficient to characterize the exercise of the discretion as discriminatory. Even if there is a possibility of discriminatory treatment of persons falling within the same group or category, such possibility cannot necessarily invalidate the piece of legislation..."

This power is discretionary and not necessarily discriminatory and abuse of power cannot be easily assumed where the discretion is vested in such high officials (*Vide Matajog Dobey v. H. C. Bharti*).¹⁵ There is moreover a presumption that public officials

14 [1957] S.C.R. 233.

15 [1955] 2 S.C.R. 925, 932.

will discharge their duties honestly and in accordance with the rules of law. (Vide *New York ex rel. Lieberman v. Van De Carr*.)¹⁶

Their Lordships also quoted with approval their remarks in *A. Thangal Kunju Musaliar v. M. Venkitachalam Potti*¹⁷ as follows:

"...It is to be presumed, unless the contrary were shown, that the administration of a particular law would be done 'not with an evil eye and unequal hand' and the selection made by the Government of the cases of persons to be referred for investigation by the Commission would not be discriminatory".

We may add that the same presumption would prevail here and it cannot be assumed that in the selection of land for acquisition the Government or the Commissioner (and he is as high an officer as in *Pannabai Binjraj's* case the Income-tax Commissioner was) would act with any particular animus or show discrimination between the petitioner and other citizens.

In another case, where the provisions of the Industrial Disputes Act, 1947, were challenged as *ultra vires* of art. 14, their Lordships reiterated the same view. The Industrial Disputes Act, 1947, gives authority to the State Government in different circumstances and conditions to take different actions to resolve industrial disputes. It has been given one of several alternative powers e.g. of arbitration, of reference, of conciliation. It was urged that these were powers which could be exercised at the whim of the Government. They could exercise them in a given case and not exercise in another case or use one power in one case and another in a similar case and, therefore, those powers tended to work a possible discrimination against certain persons. The argument was negatived in *Niemla Textile Finishing Mills Ltd. v. The 2nd Punjab Industrial Tribunal*,¹⁸ as follows (p. 349):—

"We are unable to accept these contentions. Having regard to the provisions of the Act hereinbefore set out it is clear that s. 10 is not discriminatory in its ambit and the appropriate Government is at liberty as and when the occasion arises to refer the industrial disputes arising or threatening to arise between the employers and the workmen to one or the other of the authorities according to the exigencies of the situation. No two cases are alike in nature and the industrial disputes which arise or are apprehended to arise in particular establishments or undertakings require to be treated having regard to the situation prevailing in the same. There cannot be any classification and the reference to one or the other of the authorities has necessarily got to be determined in the exercise of its best discretion by the appropriate Government. Such discretion is not an unfettered or an uncontrolled discretion nor an unguided one because the criteria for the exercise of such discretion are to be found within the terms of the Act itself".

Then their Lordships indicated the nature of the safeguards and the criteria indicated in the Act. Now, it seems to us that even in the present Act there are sufficient criteria or safeguards indicated and that the discretion vested in the State Government or the Commissioner is not an arbitrary discretion. The Act itself provides the following among other safeguards: The preamble itself indicates that the purpose is a very limited purpose and can only be a public purpose as defined in the Act. A perusal of the definition shows that though it is wide in connotation still it has definite circumscribed limits. Sections 4 and 6 also indicate that specific conditions have to be fulfilled before the notices of acquisition can issue. The over-riding limitation is of course the public purpose as defined. In s. 6 another alternative is also contemplated by the words "for a company". Now "a company" is defined and so far as acquisitions for a company are concerned, Part VII lays down further limitations, particularly the requirements of s. 40 that the appropriate Government shall not give consent unless it is satisfied as to the conditions mentioned in cls. (a) and (b) of sub-s. (1) of s. 40 and unless an agreement with Government is entered into as mentioned in s. 41. So far as s. 17 is also concerned, drastic as its provisions are,

¹⁶ (1905) 199 U.S. 552, 50 L. ed. 305.

¹⁸ [1957] S.C.R. 335.

¹⁷ [1955] 2 S.C.R. 1196.

there are strict limitations to the taking of land under that section. We shall show when we come to discuss the point raised upon the provisions of s. 17(4) that those safeguards are stringent and partly, in any case, have not been fulfilled. That itself would show that arbitrary powers have not been vested in the authorities nor do they lead to discrimination.

In the next place, upon the facts the land which is being acquired from the petitioner is not an isolated piece of land but part of a very much larger area which the Government have declared an area suitable as an industrial area for development. The whole area is being acquired for a public purpose and the petitioner's land is a small part of it. This is not only clear from the affidavit of the Commissioner dated November 15, 1963, a portion from which we have already quoted, but it is further made clear in the affidavit of Mr. P. C. Nayak (Para. 6) the Chief Executive Officer of the Maharashtra Industrial Development Corporation dated July 15, 1964. The Chief Executive Officer has there indicated that a large block of lands known as the "Wagle Estate" comprising about 310 acres which originally belonged to Government before the Board of Industrial Development was constituted and other large tracts of lands were handed over to the Board and ultimately to the Maharashtra Industrial Development Corporation for development as industrial areas. Therefore, even assuming that the law permits any discrimination, it seems to us, that in the present case there is no scope for discrimination against the petitioner. His land is part of a very large area of land which is all being acquired. We hold, therefore, that the challenge to the notifications and the provisions of the Act under art. 14 and art. 19 fails.

Then we turn to a more substantial contention urged on behalf of the petitioner that in the notifications as well as in the amendment to s. 3(f) contained in sub-cl. (2) incorporated as a local amendment, there is no public purpose apparent. Therefore, it was argued, the amendment as well as the notifications infringed the requirements both of s. 6 and of art. 31 so far as the amendment is concerned. The definition in s. 3(f) is only an inclusive definition. It does not attempt to delineate what is a "public purpose" but merely includes by an artificial extension of meaning certain matters within it. But the words "public purpose" occurring throughout the Act and particularly in s. 6 have several times received interpretation in this Court. The expression first came up for consideration not in connection with the provisions of the Land Acquisition Act, but in connection with the use of the expression in a lease deed granted by the then East India Company in favour of the defendant in a suit. The decision is to be found reported in *Hamabai v. Secretary of State*.¹⁹ An appeal from that decision ultimately went to the Privy Council and the decision of the Privy Council is reported in *Hamabai Framji Petit v. Secretary of State*.²⁰ Their Lordships accepted the definition of "public purpose" given by the trial Judge Mr. Justice Batchelor and they adopted it as their own. That definition, which is now the classic definition of "public purpose" appears in the following passage (p. 102):—

"The argument of the appellants is really rested upon the view that there cannot be a 'public purpose' in taking land if that land when taken is not in some way or other made available to the public at large. Their Lordships do not agree with this view. They think the true view is well expressed by Batchelor J. in the first case, when he says (p. 1119):—

'General definitions are, I think, rather to be avoided where the avoidance is possible, and I make no attempt to define precisely the extent of the phrase "public purposes" in the lease; it is enough to say that, in my opinion, the phrase, whatever else it may mean, must include a purpose, that is, an object or aim, in which the general interest of the community, as opposed to the particular interest of individuals, is directly and vitally concerned.'

That being so, all that remains is to determine whether the purpose here is a pur-

19 (1911) 13 Bom. L. R. 1097.

20 (1914) 17 Bom. L.R. 100, P.C.

pose in which the general interest of the community is concerned. *Prima facie* the Government are good Judges of that. They are not absolute Judges. They cannot say: 'Sic volo sic jubeo', but at least a Court would not easily hold them to be wrong. But here, so far from holding them to be wrong, the whole of the learned Judges who are thoroughly conversant with the conditions of Indian life, say that they are satisfied that the scheme is one which will redound to public benefit by helping the Government to maintain the efficiency of its servants."

Thus, this decision which is the basis of all subsequent decisions, lays down two important criteria, firstly that it is not necessary in order that there should be a public purpose that the land which is taken must always be made available to the public at large. It may be that it may benefit only a small section of the community. Secondly, it must be for an object or aim in which the general interest of the community as opposed to the particular interest of individuals is directly and vitally concerned.

The definition of "public purpose" with particular reference to the Land Acquisition Act was also adverted to in a case which we have already referred to, *Babu Barkya Thakur v. State of Bombay*, and at page 134 Chief Justice Sinha defined it thus:

"...It will thus be noticed that the expression 'public purpose' has been used in its generic sense of including any purpose in which even a fraction of the community may be interested or by which it may be benefited."

In *Somawanti's* case (sup. cit) the definition given by the learned Chief Justice was verbatim adopted (vide para. 34 at page 164 of the A.I.R. Report).

In *Babu Barkya's* case a point was raised before the Supreme Court that "public purpose" was not disclosed on the face of the notification impugned in the case—a notification under s. 4 of the Land Acquisition Act—and their Lordships held (p. 139):

"It is argued that in terms the notification does not state that the land sought to be acquired was needed for a public purpose. In our opinion, it is not absolutely necessary to the validity of the land acquisition proceedings that that statement should find a place in the notification actually issued. The requirements of the law will be satisfied if, in substance, it is found on investigation, and the appropriate Government is satisfied as a result of the investigation that the land was needed for the purposes of the Company, which would amount to a public purpose under Part VII, as already indicated".

Therefore, it seems to us that the question whether there is a public purpose or not does not fall to be considered merely upon the recitals of the particular notification impugned, but must be gathered from the facts and circumstances before the Court.

In this petition in both the notifications under ss. 4 and 6 the public purpose has been stated as "for the development and utilization of the land as an industrial area." This is further elaborated in the affidavits filed by the Commissioner and the other respondents. The Commissioner has explained that the idea behind and object of acquiring the land in the instant case and developing industrial areas was to ensure orderly and planned development of industries in and around Greater Bombay and elsewhere in the State. It is explained that such development is necessary, because there has been a great growth of industry and concentration thereof in and around Greater Bombay. Therefore, it has become necessary to relieve the congestion and the consequent "bad condition of housing, educational and medical facilities etc." The affidavit further points out that the object of Government is that these areas which are being acquired would be properly laid out and planned with some deliberation so that their development as an industrial area would be a proper development and space would be reserved for social services, recreational facilities and thereby all the disadvantages of "haphazard and unplanned development would be avoided for the future." All this has not been controverted

on behalf of the petitioner, and it seems to us that if that be the object, as we have no doubt it is, then the lands sought to be acquired are clearly being acquired for a public purpose. We have no hesitation, therefore, in holding that the purpose mentioned in the notifications is a public purpose as shown therein.

Turning next to the amended definition of "public purpose" in cl. (2) of s. 3(f), the words used there are "for purposes of the development of areas ...and subsequent disposal thereof in whole or in part by lease, assignment, or sale, with the object of securing further development." It was urged that the expression "development of areas" is a very vague expression and what is involved in "development" is not indicated. It was even suggested that if the State were to take the areas, merely remove the weeds and cut the grass growing thereon that could also be said to be "development". Here again the contention only amounts to this that taking advantage of the use of the expression "development of areas" the authorities may be enabled to take advantage and making a pretence of "development" dispose of the lands acquired. The argument, however, does not show that the development of areas from public revenues *per se* cannot be a public purpose. In fact, without development of areas on a large scale and proper laying out and without proper provision of amenities for sanitation and health, it would not be possible to develop industrial areas at all. Now that is the sole purpose of the definition.

The meaning of the word "development" as given in the Oxford Illustrated Dictionary 1962 is "gradual unfolding; evolution; realisation of potentialities of site or territory by building or mining". It would thus appear that in so far as these activities are undertaken by the State by the very use of the word "development" a public purpose is implicit, for it means "the realisation of the potentialities of land or territory by building or mining". The subsequent words of the clause, which does not find place in any other definition of "public purpose" have been relied on viz. "and subsequent disposal thereof in whole or in part etc." Those words are also qualified by the words "with the object of securing further development". That again, in our opinion, would justify the disposal of these lands only for a public purpose and not otherwise. Therefore, even though by the addition of sub-cl. (2) of s. 3(f) the connotation of the expression "public purpose" has been considerably enlarged by the local amendment, still the new definition has implicit in it the idea of a public purpose. To that extent, therefore, the definition does not conflict with either s. 6 or art. 31 which lays it down as a condition to the acquisition of a citizen's property that there should be a public purpose. In that view, we must hold that the amended definition of "public purpose" is *intra vires* of art. 31 as well as s. 6 of the Land Acquisition Act.

We next turn to the argument advanced on the basis of the proviso to s. 6. Section 6, sub-s. (1) runs as follows:—

"Subject to the provisions of Part VII of this Act when the appropriate Government is satisfied, after considering the report, if any, made under section 5-A, sub-section (2), that any particular land is needed for a public purpose, or for a Company a declaration shall be made to that effect under the signature of a Secretary to such Government or of some officer duly authorised to certify its orders:

Provided that no such declaration shall be made unless the compensation to be awarded for such property is to be paid by a Company, or wholly or partly out of public revenues or some fund controlled or managed by a local authority."

So far as sub-s. (1) is concerned, the acquisition could be for one of two purposes, viz. (a) that any particular land is needed for a public purpose or (b) for a company. These are initially two limitations upon the power to acquire and these limitations have to be decided upon before the issue of notification by the Appropriate Government and/or now the Commissioner. We have already held that there was involved in the notifications impugned a pub-

lic purpose. The satisfaction of the Commissioner that there exists a public purpose is also endorsed upon the face of these notifications and, though it has been held that that is not essential, so far as sub-s. (1) of s. 6 is concerned, the notifications could be said to be in order. But there is then the proviso to s. 6. The relationship of the proviso to the parent section and its effect has also been indicated in one of the recent cases which came before the Supreme Court *Valjibhai v. State of Bombay*.²¹ After considering the proviso to sub-s. (1) Mr. Justice Mudholkar who delivered the judgment on behalf of the Court observed in para. 7 as follows:

"We must, however, point out that before effect can be given to a notification under sub-sec. (1) of s. 6 of the Land Acquisition Act the terms of the proviso to that section should be satisfied."

Then the learned Judge quoted the section and the proviso which we have already reproduced above and in para. 8 observed:

"The proviso clearly precludes the Government from making a notification under sub-section (1) of section 6 unless (a) the compensation to be awarded for such property is to be paid by a company or is to come (b) wholly or partly out of (i) public revenues or (ii) some fund controlled or managed by a local authority."

Thus, it has been clearly laid down and that is the plain effect on the language of the proviso itself, that unless the conditions in the proviso are fulfilled, the declaration under sub-s. (1) of s. 6 cannot be made. If such a declaration is made and it is found that the terms of the proviso have not been fulfilled, the declaration will not be a declaration under sub-s. (1) of s. 6 with the result that the subsequent provisions of s. 6 would be inapplicable to it. Thus, though we have held that a public purpose is involved within the meaning of the parent sub-s. (1) of s. 6, we must turn to consider whether the terms of the proviso have been fulfilled in the instant case.

Now, the proviso contemplates two alternative conditions for the making of the declaration under sub-s. (1) of s. 6; firstly, that the compensation to be awarded for such property is to be paid by a company or, alternatively, wholly or partly out of public revenues or some fund controlled or managed by a local authority. Of these two conditions, the first cannot upon the terms of the notifications and the pleadings on behalf of the State at all apply here, for it is not the case of the State that the acquisition in the instant case was for a Company or that the compensation to be awarded for such property was to be paid by a Company. On the other hand, the stand has been expressly taken at least in the arguments, that the compensation was to come wholly or partly out of public revenues. Of course, we may say at this stage that the learned Advocate General urged that in this case the entire funds for the acquisition were to come out of public revenue, but it is not necessary for him to go as far as that for even if they were to come partly out of public funds, the proviso would be fulfilled. It is the case of neither party that any amount was to come out of funds controlled or managed by a local authority. We, therefore, turn to scrutinise the facts as they appear upon the affidavits and the numerous documents which the parties have placed before us. But before we do so, we may here observe that the self-same facts and documents are also germane to a consideration of the question, which we will next discuss, whether the acquisition was really for a Company or for a public purpose and, therefore, we would deal with the facts here under both these heads and indicate what our conclusions are upon those facts.

[His Lordship after considering the facts, held, that the amount of the compensation which was to be awarded for the acquisition in this case along with other lands did not come out of public revenues at all whether in whole or in part but came only from the Maharashtra Industrial Development Corporation to whom it was given as a loan by the State Government.]

The learned Advocate General next argued that even assuming that the amount was given by the State Government to the Corporation as a loan to begin with and then the Corporation paid it to the Special Land Acquisition Officer, as we have found, still it must be held that the compensation which was awarded for such property was paid wholly or partly out of public revenues within the meaning of the proviso to s. 6. The argument, as we understand it, runs somewhat as follows:—That it is the ultimate hand that pays which has to be looked at and it is immaterial in what manner the money is paid for the acquisition so long as the ultimate burden falls upon the public revenues. This contention is based upon certain observations of the Supreme Court in the case which we have already referred to of *Pandit Jhandu Lal v. The State of Punjab*.²² Chief Justice Sinha in stating the decision of the High Court in that case indicated at page 466,

“...It has been pointed out by the learned single Judge that it was clear from the Government Housing Scheme that a substantial amount to be expended on this Scheme comes out of the Revenues, in the form of subsidies and loans” (italics are ours) and then the learned Chief Justice in giving the decision of the Supreme Court in the penultimate paragraph of the judgment at page 469 observed,

“...As in the present instance, it appears that part at any rate of the compensation to be awarded for the acquisition is to come *eventually* from out of public revenues, it must be held that the acquisition is not for a Company simpliciter”. (italics are ours). The learned Advocate General emphasised the word “*Eventually*” and urged that what the learned Chief Justice was clearly laying down was that if the amount in the final reckoning comes from out of public revenues that would be sufficient compliance with s. 6(1) and its proviso. No doubt in the judgment referred to there is a reference to “loans” in the passage which we have quoted, which passage is, so to say, in the preambulatory part of the judgment and the word “*eventually*” finds place in the concluding part of it, but we must indicate that in the whole body of that judgment—and we say so with the greatest respect and not with any intention to suggest that anything has been left out in that judgment—there is not the slightest reference or discussion regarding the question of loan or to the question whether—if amounts are paid by way of loans and the debtor then supplies funds for acquisition out of that loan, s. 6 would be fulfilled or not. We cannot read into the judgment, therefore, such a decision simply because of one word used by the learned Chief Justice viz. “*eventually*”. We may also point out that the word “*eventually*” could as well apply to “*subsidies*” which in that case had also been given. There were both subsidies and loans and when the learned Chief Justice used the word “*eventually*” we do not know whether he intended to refer to “*subsidies*” and “*loans*” or only to “*subsidies*”. We do not think that that was the decision of the Supreme Court much less that it was the law declared. We do not think, therefore, that *Pandit Jhandu Lal's* case is an authority for the proposition that even if the State Government grants a loan to the Corporation and an amount is paid by the Corporation out of that loan, the acquisition will be wholly or partly from out of public revenues.

On the other hand, we may point out that the view taken in a recent decision of the Supreme Court directly negatives the contention raised. In *Valjibhai's* case (sup. cit) precisely the same question as is before us had arisen before the Supreme Court. A plot of land was sought to be acquired, because it was required by the State Transport Corporation for constructing offices and other buildings by that Corporation. The notification there no doubt stated that it was to be acquired for the purposes of and at the expense of the State Transport Corporation and upon the facts it was found that the State Transport Corporation was to pay for it as we have done here but then

the argument similar to the one here advanced of "the ultimate burden" was advanced and it was thus answered at page 1894 of the A.I.R. Report:

"...Since, however, the compensation to be awarded for the acquisition is to be paid only by the Corporation and no portion of it was paid by the Government, could it be said that the terms of the proviso to sub-section (1) of Section 6 have been satisfied? It is contended by the learned Attorney General on behalf of the respondent that the funds of the Corporation have themselves come out of public revenue inasmuch as they consist of moneys provided by the State of Bombay. Even assuming that the funds of the Corporation consist only of the moneys which have been provided by the State of Bombay it is difficult to appreciate how they could be regarded as part of the public revenue. *No doubt, the source of the funds would be public revenue but the funds themselves belong to the Corporation and are held by it as its own property. They cannot, therefore, be regarded as 'public revenue' in any sense.*" (the italics are ours).

It seems to us clear upon an interpretation of the proviso to s. 6 and upon the authorities that when moneys are advanced by the State to a Corporation for the payment of compensation for lands acquired for the Corporation, the compensation to be awarded cannot be said to be paid "wholly or partly out of public revenues".

The finding which we have given, moreover, is no way in conflict with the provisions of the law by which the Maharashtra Industrial Development Corporation is governed. We have pointed out that under s. 21 of the Maharashtra Industrial Development Corporation Act the Corporation have the power to borrow loans and that the pre-requisite condition for the grant of loan by Government has been fulfilled. No doubt, the latter part of s. 21 has still to be satisfied viz. the terms of the advance have yet to be settled, as admitted on behalf of the respondents, but since the Budget appropriation has been made the loans granted would still not be illegal. It is also consonant with and conducive to the functions of the Corporation and its general powers as indicated in ss. 14 and 15 of that Act.

[His Lordship after dealing with points not material to this report, proceeded.]

The proviso to s. 6 has been analysed and pronounced upon in a number of decisions of the highest Court. We have already referred to some of them. *Pandit Jhandu Lal's* case, at pages 465, 468 and 469; *Somawanti's* case at pp. 163, 166 and 167 (paras. 36, 42 and 44) and *Valjibhai's* case at page 1892 (paras. 7 and 8). We may also refer to the recent decision in February of this year in *Shyam Behari v. The State of Madhya Pradesh*,²³ which reiterates the same position. In the case last mentioned Mr. Justice Wanchoo observed as follows:—

"Section 6(1) of the Act requires that whenever any land is needed for a public purpose or for a company, a declaration shall be made to that effect. Further the proviso to s. 6(1) provides that no such declaration shall be made unless the compensation to be awarded for such property is to be paid by a company, or wholly or partly out of public revenues or some fund controlled or managed by a local authority. This clearly contemplates two kinds of declarations. In the first place, a declaration may be made that land is required for a public purpose, in which case in view of the proviso, the compensation to be awarded for the property to be acquired must come wholly or partly out of public revenues or some fund controlled or managed by a local authority. No declaration under section 6 for acquisition of land for a public purpose can be made unless either the whole or part of the compensation for the property to be acquired is to come out of public revenues or some fund controlled or managed by a local authority; (See *Pandit Jhandu Lal v. State of Punjab*). In the second place, the declaration under sec. 6 may be made that land is needed for a company in which case the entire compensation has to be paid by the company. It is clear therefore that

where the entire compensation is to be paid by a company the notification under s. 6 must contain a declaration that the land is needed for a company. No notification under s. 6 can be made where the entire compensation is to be paid by a company declaring that the acquisition is for a public purpose, for such a declaration requires that either wholly or in part, compensation must come out of public revenues or some fund controlled or managed by a local authority". (italics are ours).

Upon the findings which we have given, therefore, it is clear that no notification under s. 6 that the land is required for a public purpose could have been made in the instant case, for the entire compensation was to be paid by a Company, the Maharashtra Industrial Development Corporation. The declaration that the acquisition is for a public purpose would be bad, for such a declaration requires that the compensation must come out of public revenues, either wholly or in part which has not been proved. For these reasons, we think that the impugned notifications both under s. 4 and under s. 6 are bad and must be quashed.

Since we have held the notification under s. 6 bad it can hardly be contended that s. 6(3) would come into operation or that such a declaration would be conclusive evidence that the land is needed for a public purpose as stated in the notification. The conclusiveness can only be imparted to a notification which is valid in law. Apart from this we have also held that in declaring that the land was required for a public purpose the Commissioner did not apply his mind to the question at all. If as the Commissioner has stated the proper material was not before him and he was obviously misguided thereby then that error must necessarily be reflected in the making up of his mind as to the existence of a public purpose. If, on the other hand, as the affidavits of other officers and the statement of particulars wish to make out, the Commissioner's statement that the petitioner's land was to be acquired from the funds of the Maharashtra Industrial Development Corporation was incorrect, then the Commissioner's declaration that there was a public purpose was made upon incorrect premises and without a consideration of the proper material. We must, therefore, hold the action taken by the Commissioner to be a colourable exercise of the power.

In *Valjibhai's* case the Supreme Court was faced with a similar acquisition and considering the provisions of s. 6(2) the Supreme Court observed in para. 5 of the judgment (p. 1892):

"...The notification under S. 6 reiterates this fact and in addition says that the land was needed to be acquired for the purposes of and at the expense of the State Transport Corporation. There is thus a clear declaration of the Government that the purpose of acquisition was a public purpose and as has been consistently held by this Court in a number of cases, including the most recent one, *Smt. Somawanti v. State of Punjab*, the declaration as to public purpose by the Government is final except where it is a colourable exercise of power."

Since we have held that in the instant case the declaration as to public purpose did amount to a colourable exercise of power, the conclusiveness imparted to the declaration will not be attracted to the present notification under s. 6.

[His Lordship after dealing with some points not material to this report proceeded.]

Now, it has been contended on behalf of the petitioner that these lands of the petitioner were not lands falling within the description of "waste or arable land" contained in s. 17(I), but that they were lands which were under cultivation or that they were lands for building sites or industrial purposes. So far as the allegation which has been made in para. 8(d) of the petition that the land is a building site within the Thana Borough Municipal limits is concerned, it appears that there has been no specific denial of that fact in the return filed by the Commissioner. Even the allegation in para. 8(d) of the petition that the land is fit for non-agricultural and building purposes immediately is

not specifically denied. All that the Commissioner says amounts to this "I am not aware of and do not admit these allegations". The denial also does not meet the substance of the allegation in the petition and the substance is that the petitioner's land was fit for non-agricultural, industrial or building purposes and included within the area of the Thana Borough Municipality. What is really denied is that it is so fit for immediate use. The petitioner has placed on record voluminous correspondence with the Inspector of Explosives of the Government of India and a letter to the Director of Industries, Bombay, from which it is clear that the petitioner was proposing to shift his existing explosives factory to the site in dispute and after protracted negotiations, the Government of India through its Inspector of Explosives had on January 24, 1963, approved of the plans to shift the factory to this very site. The land is also included within the confines of the Thana Borough Municipality. From all this material it does appear to us that though no doubt the land is still classed as agricultural land in the revenue records of the State Government it is in fact and in substance land usable for building and industrial purposes and earmarked for that purpose. Otherwise it could not have been included within the borough limits of Thana. It cannot, therefore be called "waste or arable land" by any stretch of the meaning of those words. In considering whether any land is "waste or arable" it is the nature of the land and its substantive use that one must have regard to and not what it is formally dubbed in archaic revenue records.

In *Navnitlal v. State of Bombay*,²⁴ a Division Bench of this Court has already held that land which is a building site within municipal limits and situated in the developed part of the city cannot be regarded as arable land much less as waste land and that a building site which is quite suitable to be built upon cannot be regarded as waste land simply because it is not put to any present use. It is its unfitness for use and not the mere fact that it is not put to any present use that must determine whether the land is waste or not. On this short ground in the first place the declaration of this land as waste or arable land is liable to be set aside. But we do not propose to rest our decision on this question on this point only.

A further and the larger question has been canvassed very acutely before us. It is whether, assuming that these are agricultural lands as the Commissioner has admitted, they can be said to be "arable lands". The learned Advocate General conceded that they cannot be called waste lands and so the only question which survives is whether the lands of the petitioner can be said to be "arable lands".

But before we do so, we may point out one other thing upon which we think that the notification in this respect suffers from an initial defect. It will be noticed that the learned Commissioner has in forming his opinion merely repeated *ipsissima verba* the language of s. 17(I) and said that "the said lands are waste or arable lands". Now, a particular piece of land cannot both be waste and arable land. It is either waste land or arable land and since the section permits lands of either category being taken upon the decision as to urgency it seems to us that the authority must indicate which class of land the authority thinks it is going to take under the 'urgency' provisions. To say that the Commissioner is of the opinion that the said lands are waste or arable lands is, in our opinion, not indicative of any decision whatever. It is, on the other hand, an indication that the Commissioner has not applied his mind to the question. The mechanical reproduction of the words of the section that the said lands are waste or arable itself shows, that the Commissioner never applied his mind to the question. We do not say that it necessarily vitiates the notification altogether but that he left the question open to doubt is itself an important indication of the non-application of mind. In *Navnitlal's* case to which we have referred above, the Commissioner was wiser.

He omitted all reference to waste or arable lands and the Division Bench held that the notification was bad for the reason that the authority had not applied its mind before forming the opinion. At page 628 the Division Bench observed:

"...The affidavit does not state that the Government had formed the opinion that the provisions of s. 17(1) were applicable to the land in the present case nor does it state facts from which we can conclude that such an opinion was formed by the Government. The affidavit has stated that before issuing the Notification the land was inspected and was found to be waste and arable and having no structure on it.... Whether the land is waste or arable is an objective fact. Under s. 17(4) Government is required to form an opinion with regard to this objective fact as a preliminary step to the exercise of its power to issue a direction dropping the inquiry under s. 5A. The Government must form the necessary opinion with regard to this objective fact on considerations of reasons which are relevant to its determination. If the Government forms such opinion, the correctness of the opinion cannot be challenged and the sufficiency of the reasons on which the opinion is based cannot be questioned and the direction issued in pursuance of the opinion cannot be assailed. If, however, the Government has formed no opinion at all or the opinion formed is based on reasons which are not relevant to the determination of the objective fact regarding which the opinion is formed, in either of these two cases the direction issued can be successfully challenged as not being in accordance with law."

In our opinion, for the reasons which we have stated, it is clear to us that initially the Commissioner formed no opinion at all.

The passage which we have just quoted from *Navnitlal's* case also assists in disposing of another contention on behalf of the State. It has been the argument that the question whether certain lands are waste or arable lands is a matter to be decided in the opinion of the authority concerned and that the Courts are precluded from considering on what basis such an opinion was formed. In the first place we may point out that the sub-section itself does not use any expressions such as "in the opinion of the authority" or "to the satisfaction of the authority", so that by its terms the section gives no indication. But sub-s. (1) does say

"In cases of urgency, whenever the appropriate Government or the Commissioner so directs, the Collector... may... take possession of any waste or arable land needed for public purposes or for a Company".

The sub-section thus deals with five concepts as follows: (1) the existence of urgency, (2) a direction from the appropriate Government or the Commissioner, (3) waste or arable land, (4) need for a public purpose and (5) need for a Company. All these concepts are treated equally by the section and there is no indication that anyone is discretionary or subjective. It seems to us on a plain reading of the section that they are all conditions prescribed for the exercise of the power or jurisdiction of the Collector to take the citizens' property under those provisions. Upon the non-fulfilment or non-existence of any one of those conditions the exercise of the power must necessarily be interdicted. The conditions going to the root of the jurisdiction must be strictly fulfilled and are not left to the subjective satisfaction or opinion of the authority concerned. Secondly, the passage from *Navnitlal's* case which we have quoted is decisive of this question. We may only make one thing clear here. The word 'opinion' is used in sub-s. (4) in the clause

"In the case of any land to which, in the opinion of the Appropriate Government or the Commissioner the provisions of sub-section (1)... are applicable..." and it was urged on the strength of that word "opinion" thus used that all that is necessary is that the authority must be subjectively of that opinion and that Courts cannot look at the matter objectively and determine whether the conditions exist. The word "opinion" may import only a subjective satisfaction, but it must be pointed out that in sub-s. (4) the word "opinion" is used in the context of the duty to see whether sub-s. (1) is applicable to any

land and not in the context of whether the conditions of sub-s. (1) are fulfilled or not. Those conditions as held in *Navnitlal's* case must be objectively proved. We then turn to examine whether the petitioners' land was "arable" land. We have already adverted to the return of the Commissioner. In para. 13 he has stated that the said lands are "agricultural lands" described as such in the Record of Rights. Nevertheless, the Commissioner has reiterated in para. 13 of his affidavit that the said lands are waste or arable lands within the meaning of s. 17 of the Land Acquisition Act. Here again, we may see the complete non-application of mind. On the one hand, the Commissioner himself asserts that the lands are agricultural lands and recorded as such and in the same breath he also adds that the lands are waste or arable. How agricultural lands could be waste lands it is difficult to see. No doubt, it has been pointed out to us in the arguments that in the sale deed filed by the petitioner of the purchase of the land by him it is mentioned that the 7 acres and 32 gunthas as agricultural lands and out of it 2 gunthas as Pot-Kharaba, that is to say, waste land, and that, therefore, the opinion of the Commissioner is justified. In the first place, the notification does not disclose this fact that the words "waste or arable lands" were used because of the two gunthas as Pot-Kharaba nor is that the explanation given even in the affidavit filed by the Commissioner. It seems that he was completely unaware of this fact until the petitioner filed the sale deed in this Court and the fact was noticed by counsel on behalf of the respondents. Apart from this the Commissioner's return obviously seems to equate agricultural lands with arable lands leaving out the question of waste land, which may apply to the two gunthas of land which is also in doubt. The principal point which arises, therefore, upon the provisions of s. 17(1) is whether agricultural land can be said to be arable land within the meaning of sub-s. (1) of s. 17.

Upon this question, it has been pointed out that there are two decisions of this Court, one reported in *Jairam Balaji Anikar v. The State of Maharashtra*²⁵ and the other in *Sadashiv Lahanu v. The State of Maharashtra*.²⁶ In the first of these cases, the Division Bench referred to the earlier decision in *Navnitlal's* case and with reference to the question whether agricultural land can be arable land, they observed as follows:—

"The Commissioner has issued this Notification stating in the notification that in his opinion the land is arable land. We cannot accept the contention that the words 'arable land' would include land which is under cultivation either of agricultural crops or fruit-bearing trees from which income is derived by the land owner. It seems more consonant with the scheme of section 17 that it is only that land which is actually waste or which is arable, that is, which is culturable but which is not under crops or not being put to use for raising income to which the provisions of the urgency clause can be made applicable, so that nobody who is in possession and enjoyment of the land and raises crops or fruits by way of income is put to loss. It is unlikely that the Legislature could have intended that the urgency clause should be made applicable to lands which are under crops or on which fruit-bearing trees are standing".

This decision was followed in the subsequent case to which one of us (Kotval J.) was a party. In that decision also it was held that

"arable land as the expression is used in s. 17, sub-s. (1), cannot include land which is under cultivation either of agricultural crops or fruit-bearing trees from which income is derived by the land owner".

Reference was also made to the meaning of the word "arable" as given in the Oxford English Dictionary, Vol. I, page 423 as "capable of being ploughed, fit for tillage". It was also pointed out that the provisions of s. 17(1) were, it appears, deliberately made applicable by the Legislature only to waste or arable lands and not to cultivated lands for obvious reasons. These decisions

²⁵ (1962) Special Civil Application No. 25 of 1962, decided by Kotval and Paranjpe JJ., on September 26, 1962 (Unrep.).

²⁶ (1962) Special Civil Application No. 93 of 1962, decided by Kotval and Paranjpe JJ., on November 9, 1962 (Unrep.).

are binding upon us unless we take the view that they were wrongly decided in which case we would be bound to refer the point to a larger Bench.

In the face of these judgments, the learned Advocate General could only contend that these decisions are incorrect. It was urged that the decisions in these two Special Civil Applications Nos. 25 and 93 of 1962 were given without a consideration of the definition of "arable land" contained in s. 3(aa) and without looking at the provisions of sub-s. (3) of s. 17. The new definition in s. 3(aa) was introduced into the Land Acquisition Act by a local amendment by s. 2 of the Land Acquisition (Bombay Amendment) Act XXVII of 1950. It is contended that that definition did not apply to the Vidarbha area from which the two cases cited above arose and that, therefore, the Division Benches had no occasion to consider the effect of that amendment and if the new amendment thus added is taken into account the decision would be different. It was also pointed out that some of the dictionaries give a wider meaning to the word "arable". Thus substantially three reasons have been advanced why the decisions in those two Special Civil Applications should not govern the present case. The first is that sub-s. (1) of s. 17 has not been correctly construed for the reason that sub-s. (3) of s. 17 was not noticed in any of those decisions; secondly, that in the Special Civil Application No. 93 of 1962 the meaning of the word "arable" as given in the Oxford Dictionary was followed, but that there are other Dictionaries which give an extension of the meaning as including land which is cultivated; thirdly, that the definition of "arable land" in s. 3(aa) of the Land Acquisition Act makes a crucial difference. We would deal with each one of these submissions separately.

Section 17 runs as follows:—

"Special powers in cases of urgency:—

(1) In cases of urgency, whenever the (appropriate) Government or the Commissioner so directs, the Collector, though no such award has been made, may, on the expiration of fifteen days from the publication of the notice mentioned in section 9, sub-section (1), take possession of any waste or arable land needed for public purposes or for a Company. Such land shall thereupon vest absolutely in the (Government) free from all encumbrances.

(2) Whenever, owing to any sudden change in the channel of any navigable river or other unforeseen emergency, it becomes necessary for any Railway Administration to acquire the immediate possession of any land for the maintenance of their traffic or for the purpose of making thereon a river-side or ghat station, or of providing convenient connection with or access to any such station, (or whenever owing to a like emergency or owing to breaches or other unforeseen events, causing damage to roads, rivers, channels or tanks, it becomes necessary for the State Government to acquire the immediate possession of any land for the purpose of maintaining road communication or irrigation or water supply service, as the case may be) the Collector may, immediately after the publication of the notice mentioned in sub-section (1) and with the previous sanction of the (appropriate) Government or the Commissioner enter upon and take possession of such land, which shall thereupon vest absolutely in the (Government) free from all encumbrances:

Provided that the Collector shall not take possession of any building or part of a building under this sub-section without giving to the occupier thereof at least forty-eight hours notice of his intention so to do, or such longer notice as may be reasonably sufficient to enable such occupier to remove his movable property from such building without unnecessary inconvenience.

(3) In every case under either of the preceding sub-sections the Collector shall at the time of taking possession offer to the persons interested compensation for the standing crops and trees (if any) on such land and for any other damage sustained by them caused by such sudden dispossession and not excepted in section 24; and, in case such offer is not accepted, the value of such crops and trees and the amount of such other damage shall be allowed for in awarding compensation for the land under the provisions herein contained.

(4) In the case of any land to which, in the opinion of the (appropriate) Government, or the Commissioner, the provisions of sub-section (1) or sub-section (2) are applicable, the (appropriate) Government may direct that the provisions of section 5-A shall not apply, and, if it does so direct, a declaration may be made under section 6 in respect of the land at any time after the publication of the notification under section 4, sub-section (1)".

Sub-section (1) of s. 17 deals with the question of taking possession of any waste or arable land needed for public purposes or for a Company and we have already indicated the conditions for the exercise of the power to take those lands. Sub-section (2) refers to any sudden change in the channel of any navigable river and/or other unforeseen emergency and is a power reserved to the authorities only where possession of any land becomes necessary for a railway administration. Sub-section (2), however, uses the words "any land" in contra-distinction with sub-section (1) where the words are "any waste or arable land". Sub-section (2) is thus not confined merely to waste or arable land as sub-s. (1) is. We are not concerned with the other requirements of sub-s. (2). It is upon the words of sub-s. (3) that emphasis is laid by the learned Advocate General. He says that the key word in this section is the word "either" preceding the words "of the preceding sub-sections" that is to say, it means "either of the sub-sections (1) or (2)". The argument is that the word "either" is used to imply both sub-ss. (1) and (2) and so reading it, it is impossible to apply sub-s. (3) unless we read into the word "arable" in sub-s. (1) the meaning that it includes cultivated lands also. It is urged that otherwise the subsequent words of sub-s. (3) "offer to the persons interested compensation for the standing crops and trees (if any) on such land..." would be rendered nugatory. The argument is that between sub-ss. (1) and (2) there are contemplated three categories of lands, waste land, arable land and any land and then sub-s. (3) says that in every case under either of the preceding sub-sections the Collector shall at the time of taking possession offer to the persons interested compensation for the standing crops and trees if any. Obviously, then, if arable land does not include cultivated land, then the words "crops and trees" could not apply, certainly not the word "crop" and, therefore, sub-s. (3) indicates that implicit in the meaning of the word "arable" is included cultivated land.

We are unable to accept this contention, because in the first place the word "either" in the opening clause of sub-s. (3) does not necessarily carry the meaning "both" as the Advocate General contends. The word "either" is used to mean "both" or "any one of two". In this case it is clear that it qualifies the words "preceding sub-sections." The expression is "in every case under either of the preceding sub-sections". So used it is clear that it is used as an adjective and according to the Oxford Dictionary its meaning is "each of the two". In Middle English its sense is indicated as "one or other of the two". It may also be used in the plural when it may imply both, but the Oxford Dictionary indicates that that sense is very rarely used. These senses are explained by a number of illustrations and one of the illustrations given is from Chesterton's letters as follows: "When the sun shines on either side of us (as it does mornings and evenings) the shadows are very long". Another example given is "The artificial thunder, in the hands of either nation, must have turned the fortune of the day". The word "either" in the expression "either of the preceding sub-sections" thus means "each of the two preceding sub-sections". So used it cannot possibly imply "both the sub-sections". What is more, the words are preceded by the words "In every case" which again emphasises that the sub-section deals with each individual case separately arising under each of the two sub-sections. We do not think that in the context in which it is used the word "either" implies "both" the preceding sub-sections, but what it means is "In every case under either sub-section (1) or sub-section (2)", or in other words "each of the two sub-sections". Moreover, we shall presently show that nothing turns upon the

meaning of the word "either" and that the key words of the sub-section are the words, "if any" in the brackets and if one carefully considers why those words were at all put in, in the section the construction sought to be put upon the word "either" by the learned Advocate General must fail.

An analysis of the possible cases which may arise under sub-ss. (1) and (2), s. 17, will make the matter farther clear. In sub-s. (1) the words used are "waste or arable land" and in sub-s. (2) "any land". In sub-s. (3) compensation is to be given for the standing crops and trees (if any). Now it is clear that crops and trees cannot possibly exist in both cases of waste land and of arable land. In arable land there may be crops and trees and those trees may be of two kinds, growing spontaneously or cultivated by the hand of man but in waste land there can only be at the most wild trees of spontaneous growth, but there never can be crops in waste land. The draftsman of the section realized that the word "crops" in sub-s. (3) must be meaningless so far as sub-s. (1) is concerned viz. in its application to waste or arable land. It would have meaning so far as "any land" in sub-s. (2) is concerned. It is quite clear that sub-s. (3) is not limited to sub-s. (1). Sub-section (2), as we have pointed out, is concerned with any land which may include even cultivated land or a garden or a pasture or a building land and in such a case it may be that that land may contain crops or trees both wild and cultivated. Therefore, the words "crops and trees" can always apply to sub-s. (2), but the word "crops", it appears, cannot apply to sub-s. (1) but the word "trees" would apply in a certain measure to sub-s. (1) for trees of spontaneous growth may be found in both waste and arable land. The draftsman of sub-s. (3) envisaged all these various possible cases arising under sub-ss. (1) and (2) and since he was making a composite provision for both the sub-sections he first used the words "for the standing crops and trees" and realising that some part of that expression may not be applicable to the case arising under either sub-section he added the words in brackets "(if any)". It seems that these are the key words to the section, and furnish the real clue to the interpretation of the section.

The very fact that the draftsman of this piece of legislation used the words "(if any)" in brackets indicates that he thought that there would arise a conceivable case under sub-s. (1) or sub-s. (2) where the words "standing crop or trees" would not apply or neither of them would apply as in the case of a completely barren piece of waste land. Therefore, since he was required to make a compendious provision covering all the possible cases in sub-s. (1) and (2), he used a composite expression "standing crops and trees" and added the words into brackets "(if any)". He thereby intended to convey "You must in every case pay compensation for standing crops or trees. If in any of the cases arising under sub-sections (1) and (2) there are or can be no crops then pay compensation only for the trees. If on the other hand in any of the cases arising under sub-sections (1) and (2) there are no trees but only standing crops then pay compensation for the crops. If in any of the cases arising under sub-sections (1) and (2) there are no standing crops and no trees then compensation need not be paid". That, in our opinion, is the only sense we can make out of the provisions of sub-s. (3). The draftsman had to put these separate ideas into one compact sentence. He realized that under sub-ss. (1) and (2) there were bound to arise a variety of cases. There would be trees only and no crops: or crops only and no trees: or neither trees nor crops: He wanted to include every variety into one sentence and therefore he said "standing crops or trees (if any)".

Were we to hold that the words "standing crops and trees" would apply to both sub-ss. (1) and (2) in their entirety, then in the first place, we would be rendering the words "(if any)" meaningless and of no effect and in the second place, we would be so construing the words as to give rise to an impossibility. For instance, in waste land there never can be standing crops, yet we would be so construing the sub-section that the words "standing crops"

would apply even to waste lands. It is in precisely such a case that the words "(if any)" would come into operation. On the other hand, in waste land there may be wild trees of spontaneous growth standing, in which case the words "(if any)" would come into operation so far as the standing crops and cultivated trees are concerned. Similarly, in the case of arable lands, there can be no standing crops and may be no trees whatsoever and therefore, the words "(if any)" would come into operation. It is not necessary, therefore, to import by virtue of sub-s. (3) that meaning into "arable land" in sub-s. (1) which would include standing crops in arable land. We do not, therefore, think that sub-s. (3) in any way compels us to give to the meaning of the word "arable" any special connotation other than its normal connotation and that takes us to a consideration of what is the normal connotation of the word "arable" in the English language.

In the second of the two judgments, which we have cited above in *Sadashiv Lahanu v. The State of Maharashtra*, the Division Bench had occasion to refer to the meaning of the word as given in the Oxford Dictionary which is to be found in Vol. I at page 423. The meaning given is "capable of being ploughed; fit for tillage; opposed to pasture or woodland" and the illustrations there given are from Coke On Littleton, "If the tenant convert arable land into wood"; or from Rogers Agriculture & Prices "half the arable estate, as a rule, lay in fallow". Thus the word is used to indicate land which is capable of being ploughed or fit for tillage and in opposition to pasture land, that is to say grazing land, as it is called in this country—or woodland or forests and fallow land. Indeed, if one considers the origin of the words as given in the Oxford Dictionary, it comes from the "Littre arabilis, French arare to plough" and the word "arable" is the present pronunciation of what was in the early English the correct word "arable" or in the 16th century "errable, earable, aerable".

What is more significant, however, is what the Oxford Dictionary omits to mention. It does not mention any other sense in which the word "arable" could possibly be understood. Webster in his Dictionary shows a somewhat extended meaning and it is that meaning upon which strong reliance was placed on behalf of the respondents. Webster also mentions the same meaning as in the Oxford Dictionary to begin with

"capable of being plowed; fit for tillage and crop production (with reference to land)" but then he gives the extended meaning as follows: "Brit: engaged in or involving the production of cultivated crops (farming); Brit, of crops: requiring cultivation; esp. seeded and grown annually rather than from the regrowth of an established sod; 2. Brit. of livestock; fed on cultivated crops (as roots) (the arable ewe going back on to the rough grazing—S.J. Watson)". As a noun the meaning given is "land that is tilled or tillable".

Thus even Webster makes a distinction between the adjectival use of the word "arable" and the noun "arable". It seems that the adjective has now begun to be used in Britain as a noun and so used, it is used indiscriminately for both "tilled and tillable" lands. The meaning, however, it is clear is of comparatively recent growth and it is not of universal use. In Britain it is used in a peculiar connotation, but its basic meaning still remains the same "fit for tillage and crop production or capable of being ploughed." It may be pointed out that this meaning is the same as occurs in 1902 edition of Webster's Dictionary and also in the Imperial Dictionary of 1882 where also the meaning is given "fit for ploughing or tillage; arable land, land which is cheaply cultivated by means of plough" as distinct from pasture land.

There is a clear conflict as to the extended meaning in the several dictionaries. One thing is at least clear that the original and basic meaning of the word "arable" was "fit for ploughing or tillage or capable of being ploughed". As to the extended meaning we would prefer to rely upon the Oxford Dictionary which is a work of great renown and a standard work on the meanings

of words in the English language, and in that great work the extended meaning does not find place.

But though with the aid of counsel we have gone into this research as to the meaning of the word "arable" we think that the matter before us can be decided upon the judicial construction of the word and the meaning given to it in early English decisions. Where dictionaries differ, a judicial interpretation of the word even in a "persuasive" precedent would be of prime importance. In *Palmer v. M'Cormick*²⁷ Mr. Justice Chatterton expressed the meaning thus at page 119:

"... 'Arable' does not mean land actually ploughed up or in tillage, but land capable or fit to be so; and for aught I know this land, though properly designated arable in 1821, may even then have been in process of acquiring the character of ancient pasture, which process may have commenced, and been going on for some time".

The learned Vice Chancellor, therefore, clearly and definitely says that "arable" land does not mean land actually ploughed up or in tillage. In our opinion, that interpretation by a Judge whose understanding of the word we would prefer more than any dictionary should settle the issue. There is also a passage in the judgment of Tindal C. J. in *Simmons v. Norton*,²⁸ where the meaning of the word was not directly adverted to but discussion serves to illuminate that meaning (p. 647):—

"...Ploughing meadow land is also esteemed waste on another account; namely, that in ancient meadow, years, perhaps ages, must elapse before the sod can be restored to the state in which it was before ploughing. The law, therefore, considers the conversion of pasture into arable as *prima facie* injurious to the landlord, on those two grounds at least".

Here again, the learned Judge uses the word "arable" as ploughable land. In the same case Mr. Justice Fitz Gibbon at page 126 has used the words:

"...because it was not in grass for twenty years before the lease, and therefore by its omission from the suit and injunction, may be taken as arable land cultivable by the defendant at his discretion, but subject always to the husbandry covenants which secure all the lands against real 'waste'".

This decision was given in 1890 and nowhere was it suggested that "arable" meant land which is already cultivated or on which crops were grown. On the other hand, we have shown that Vice-Chancellor Chatterton has definitely said that the word "arable" does not imply cultivated land. We can see no reason why the decisions in the two cases should not be followed. There appears to be no doubt as to the meaning of the word "arable", nor is there any indication in sub-s. (3) or any other provision of s. 17 to indicate that the word "arable" has a special connotation and includes cultivated lands as well. Upon the citation of Webster's and other dictionaries wherein the extension of meaning has been shown, we suggested to the learned Advocate General at an early stage of the arguments on this point that if there was any doubt, we were prepared to refer this case to a larger Bench, but the learned Advocate General felt that that ought not to be done as it would delay the decision of this case. On fuller arguments we see no reason to doubt the earlier view taken in this Court.

Then we turn to the third contention as to whether the new definition added by local amendment makes any difference to the interpretation of the word "arable" in sub-s. (1) of s. 17. By the Amendment Act XXVII of 1950 a local amendment has been incorporated in s. 3 and in the definition clause the following clause has been added:—

"The expression 'arable land' includes garden land".

This definition, of course, did not come up for consideration before the two Division Benches which decided the earlier cases because that definition was not operative in the area in which those cases arose. The definition is only

an inclusive definition and something which is included by an express statute may or may not be implicit in the original meaning. In our opinion, the inclusion of "garden land" in arable land is an artificial extension of the meaning of the expression "arable land" which the Legislature was always entitled to give. The inclusive definition would further emphasise the connotation which we have preferred, because the definition includes "garden land" in "arable" land which otherwise would not have been normally included. The expression "garden land" moreover is a peculiar expression and is not to be found in normal English. We have not been able to trace the word "garden" being used in conjunction with land in any dictionary and it seems to us that really the expression is, so to say, a technical expression borrowed from local legislation. For instance, a reference to "garden land" is to be found in s. 117C(6) of the Bombay Land Revenue Code where "Class of land" is defined as meaning "any of the following classes of land, namely, dry crop, rice or garden land". It seems to us that it was an expression conveniently coined as an English equivalent to the well recognised classification in the Hindi language of "Bagayat land". Reference to this shade of meaning may be found in Gupte's Land Revenue Code, 5th Ed. at page 683. We do not think, therefore, that the extension of the meaning of the words "arable land" given in the definition now incorporated in s. 3 of the Land Acquisition Act by the local amendment assists in the determination of or alters, the true meaning of the expression "arable land" as used in s. 17(I), except that by artificial extension it now includes Bagayat land.

Reference was then made to a passage in the decision we have already referred to in *Navnitlal's* case. At page 624 Mr. Justice Desai in discussing the affidavit put in by the Commissioner in that case observed as follows:—

"...From the affidavit in reply filed by the Commissioner, it does appear that the only ground on which the Commissioner has regarded the land as waste and arable is that it was not put to any present use and had no structure standing on it. An arable land is a land which is fit for tillage *and the expression is usually used to mean lands which are ploughed for raising ordinary annual crops such as rice, jowar, etc.*" (italics are ours).

The learned Advocate General relied upon the words italicised in this quotation to urge that the words "arable land" have been judicially interpreted by that Division Bench to include cultivated land. From a perusal of the judgment it is quite clear that the learned Judge was not attempting to define the expression at all. He was referring to what the Commissioner in that case had regarded as waste and arable land and in that context he referred to the meaning of "arable land" as land which is fit for tillage and further observed that the expression is usually used to mean lands which are ploughed for raising ordinary annual crops such as rice, jowar, etc. With respect, we may point out that there is no authority referred to and no reasoning and it is clear that the remark was wholly obiter and that was also conceded by the learned Advocate General.

Having regard to the correct meaning of the word "arable" we do not think that the petitioner's lands in the present case were arable lands. That they were not waste lands is not disputed. On the interpretation which we have given to the word "arable" and upon the statement of the Commissioner himself that these are agricultural lands, therefore, it must be held that the petitioner's lands could not be taken under s. 17(I). It seems to us that the law in its wisdom deliberately excluded cultivated land from being thus taken under the urgency provisions. The intention of the law is clear as indicated in the judgment in *Sadashiv Lahani v. The State of Maharashtra* that where a person has expended time, money and labour in tilling the soil and in cultivating crops, the land should not be taken except under the normal procedure of the Land Acquisition Act. That interpretation which is consonant with the

normal meaning of the words used is an interpretation which, in our opinion, is also just.

Some reference was made in the arguments before us to a decision of another Division Bench of this Court in *Vithoba Rambhau Bahirat v. The Special Land Acquisition Officer, Poona*.²⁹ to which decision my learned brother was a party. A perusal of the penultimate paragraph of that judgment unmistakably shows that so far as this point was concerned it was decided on a concession. It is categorically stated in the judgment itself that the learned counsel "does not seriously dispute that although they (the lands in that case) are in the City of Poona and have been included in the Town Planning Scheme, they are in fact put to use for agricultural purposes". Of course, the point was never argued before the Division Bench, whether the lands were arable lands and were being put to agricultural purposes and the attention of the Division Bench was not invited to the point which has been so seriously agitated before us. We cannot regard that decision as a decision contrary to the view which has already been taken by this Court and with which we are in agreement.

In connection with the point, which we have just decided, another ancillary question was raised by the learned Advocate General. He urged that even assuming that we take the view that the lands of the petitioner were not arable lands and could not be taken under s. 17(1), all the notifications issued in this case ought not to be held bad, but only those notifications which were issued from the point where the authorities went wrong. The effect of holding that s. 17(1) did not apply to the petitioner's lands would be that s. 5A would not be excluded and therefore the petitioner would be entitled to urge and be heard upon any objections to the acquisition which he may choose to take. It was urged that, therefore, the notification under s. 6 and the subsequent notification under s. 9 should alone be held bad, but not the notification under s. 4. On behalf of the petitioner, however, Mr. Bhatt contended that s. 4 is so inextricably intermingled with the other provisions of the Act that we cannot set aside only the notifications under ss. 6 and 9. He pointed out that under s. 5A he was entitled to show by taking objections, that the land was really not needed for a public purpose at all or that other land was available, or that only a part of the land ought to be taken, in which case even the notification under s. 4 would have to be held bad and unnecessary. He also relied upon the decision in *Nawnittal's* case where the Division Bench set aside all the notifications although they held that the notification under s. 17(1) was bad. In the view we have taken upon other points, we do not feel called upon to decide this question regarding the severability of the proceedings. Moreover, we have in this case also held that the notification under s. 4 is bad for other reasons. In that view, it is unnecessary to decide whether the principle of severability applies here.

In the result, we allow the petition and quash the notifications issued by respondent No. 1 under ss. 4 and 6 of the Land Acquisition Act. We also quash the notifications so far as s. 17 has been applied in this case and hold that the possession of the petitioner's land taken under those notifications under s. 17 was illegal and must be restored to the petitioner. The respondents will pay the costs of the petitioner. The order restoring possession is at the request of Mr. Setalvad for the State stayed upto October 1, 1964.

Petition allowed.

²⁹ (1963) Special Civil Application No. JJ., on December 5, 1963 (Unrep.).
1556 of 1962, decided by Palekar and Gokhale.

[NAGPUR BENCH]

Before Mr. Justice V. S. Desai and Mr. Justice Wagle.

THE COMMERCIAL CREDIT CORPORATION (1943) PRIVATE LIMITED
v.

THE STATE OF MAHARASHTRA.*

C. P. & Berar Sales Tax Act (XXI of 1947), Secs. 10, 11—Constitution of India. Seventh Schedule. List II entry 54—Government of India Act, 1935, [25 & 26 Geo. 5, Ch. 42] Seventh Schedule, Provincial Legislative List, entry 48—Whether notice under s. 10(1) of Act XXI of 1947 necessary before proceedings under s. 11(5) can be started against unregistered dealer—Provisions of s. 11(5) whether can be invoked for entire period for which tax liability incurred—Hire-purchase agreement, nature of, how to be determined—Terms of option to purchase to buyer and of liberty reserved to him to return goods whether conclusive of nature of transaction—Transactions in substance sales or containing predominant element of sale whether "sale of goods".

A notice under s. 10(1) in Form VI of the C. P. and Berar Sales Tax Act, 1947, is not obligatory in the case of an unregistered dealer before a proceeding for a best judgment assessment can be started against him under s. 11(5) of the Act.

*Nimar Cotton Press v. Sales Tax Officer*¹ and *Ghanshyamdas v. Regional Asst. Commr. of Sales Tax*,² explained.

Central Potteries Ltd. v. State of Maharashtra,³ referred to.

The provisions of s. 11(5) of the C. P. and Berar Sales Tax Act, 1947, can be invoked only for the period or periods of a quarter or quarters which are within three years from the date of the notice issued under this section.

Firm Sheonarayan Matadin v. Sales Tax Officer,⁴ followed.

Battulal v. Commr. of Sales Tax,⁵ *L. J. Patel & Co. v. Commr. of Sales Tax*⁶ and *Ghanshyamdas v. Sales Tax Officer*,⁷ dissented from.

State of Orissa v. Chakobhai Ghelabhai & Co.,⁸ explained.

Ghanshyamdas v. Regional Asst. Commr. of Sales Tax,⁹ *Central Potteries Ltd. v. State of Maharashtra*¹⁰ and *Ramkrishna Ramnath v. Sales Tax Officer*,¹¹ referred to.

The proper test to determine what the true nature of a hire-purchase agreement is, is to look at the substance of the transaction, the intention of the parties in entering into that transaction, and what it is really intended by them to be. An option to purchase given to the buyer may be indicative that no sale may have been intended by the parties. The mere circumstance that an option to the buyer has been given may not necessarily involve the conclusion that it is not a sale, nor intended to be a sale. What has got to be considered is to consider the terms of the contract including the option which may have been given to the buyer under the terms of the contract and consider what is the real nature of the transaction.

In determining the true nature of a transaction of hire-purchase the term of option given to the hirer and the term of liberty reserved to him to return the goods during the continuance of the contract are terms which have an important bearing in determining the nature of the transaction; but they are not in every case conclusive of the nature of the transaction. They are of great help in determining the true nature of the transaction, but it is on a consideration of the entire terms of the contract read in the light of the surrounding circumstances that the true nature of the transaction has to be determined, and it is possible that even in cases where the option to purchase and the liberty to return the goods are reserved in the contract, the contract in its true nature may still be a contract of sale and not merely a contract of hiring with an option to purchase. It is necessary to see what is the purpose of introducing the terms

* Decided, August 28/September 2/4, 1964
Special Civil Application No. 486 of 1962.

1 (1954) 5 S.T.C. 428.

2 (1963) 14 S.T.C. 976.

3 (1962) 13 S.T.C. 472.

4 (1950) 7 S.T.C. 623.

5 (1962) 13 S.T.C. 803.

6 (1963) 15 S.T.C. 18.

7 (1963) 15 S.T.C. 128.

8 (1960) 11 S.T.C. 716.

9 (1963) 14 S.T.C. 976.

10 (1962) 13 S.T.C. 472.

11 (1959) 11 S.T.C. 811.

as to the option to purchase and liberty to return the goods during the subsistence of the contract. If on a consideration of all the terms of the agreement, it is found that these terms have been intended for the benefit of a buyer who has not made up his mind to buy at the time when he entered into the contract, to leave him free to make up his mind at any later stage and have an option of buying or not buying the article and return it to the owner at any time he liked, then the contract will not be an agreement of sale. If, on the other hand, it is clear that the parties to the contract have intended it to be a sale although they have introduced these terms in the working out of the contract for their mutual benefit and convenience, the mere presence of the terms will not destroy the character of the contract between the parties as an agreement to buy and to sell. What is necessary to consider is whether the transaction in substance is a transaction of sale although an element of bailment is added to it, or whether it is a contract of hiring with an added offer to the hirer to buy the hired article at his option.

Transactions which are in substance sales or which contain to a predominant extent an element of sale in them can come within the expression "sale of goods" in entry 48 in the Provincial Legislative List in the Government of India Act, 1935, or entry 54 in the State List in the Constitution of India.

Commercial Credit Corporation v. Dy. Comm. Tax Officer,¹² agreed with.

Instalment Supply Limited v. State of Delhi,¹³ and *Indian Finances Private Ltd. v. Sales Tax Officer*,¹⁴ dissented from.

Helby v. Matthews,¹⁵ explained.

Sales Tax Officer v. Budh Prakash Jai Prakash,¹⁶ *State of Madras v. Gannon Dunkerley & Co.*,¹⁷ *Damodar Valley Corporation v. State of Bihar*,¹⁸ and *Instalment Supply (Private) Ltd. v. Union of India*,¹⁹ referred to.

THE facts are stated in the judgment.

P. P. Deo, V. J. Huddar and R. N. Jain, for the petitioner.

S. M. Hajarnavis, Assistant Government Pleader, for respondents Nos. 1 to 4.

V. S. DESAI J. This is a petition under arts. 226 and 227 of the Constitution of India challenging the notices issued by the Sales Tax Officers of Nagpur and Wardha to the petitioner and praying that a writ may be issued against the said Sales Tax Officers requiring them to withdraw the said notices and prohibiting them from assessing the petitioner to sales tax for the periods covered by the said notices.

The petitioner is a financing corporation, and according to it, it carries on the business of financing the purchase of motor vehicles. The petitioner has been carrying on its business at Bombay and it has a representative in Nagpur. On November 12, 1962, the Sales Tax Officer III, Circle II, Nagpur, served a notice on the petitioner directing the petitioner to show cause why it should not be assessed/reassessed and why a penalty should not be imposed on it on the ground that being a dealer liable to pay tax under the C.P. and Berar Sales Tax Act, 1947 (XXI of 1947), in respect of the period between January 1, 1959, and December 31, 1959, it had wilfully failed to apply for registration. Another similar notice was issued by the Sales Tax Officer, Wardha, on November 26, 1962, relating to the same period. On December 10, 1962, one more notice was issued by the Sales Tax Officer III, Circle II, Nagpur, by which the petitioner was required to show cause why it should not be assessed for the entire period from June 1, 1950, to December 31, 1959, during which time it had been a dealer liable to pay sales tax under the Sales Tax Act and had wilfully failed to apply for registration.

The petitioner's case is that the petitioner is not a dealer. The transactions which it is carrying on are not sales; that it has not been carrying on the busi-

12 (1958) 9 S.T.C. 599.

13 (1956) 7 S.T.C. 586.

14 (1964) 15 S.T.C. 254.

15 [1895] A.C. 471.

16 (1954) 5 S.T.C. 193.

17 (1958) 9 S.T.C. 353.

18 (1961) 12 S.T.C. 102.

19 (1961) 12 S.T.C. 489.

ness within the territorial jurisdiction of the Sales Tax Officers at Nagpur and Wardha; that its activities, if any, within the jurisdiction of these Sales Tax Officers are not the activities of a dealer; that the Sales Tax Officers have no jurisdiction to issue the notices for the periods for which they have purported to issue the said notices; and that the present notices which have been issued by the Sales Tax Officers are invalid on the ground that the notices in Form VI under s. 10(1) of the Act had never been given to the petitioner prior to the issue of the present notices.

In support of its case that the business transactions of the petitioner are not sales which could come within the definition of the expression in the Sales Tax Act, the petitioner gave the description of the nature of its transactions. According to the petitioner, a person desirous of purchasing a motor vehicle who had applied to the authorised dealer of the manufacturer and had selected a vehicle which he wanted to buy, had fixed up its price and also made the initial deposit with the dealer, approached the petitioner in case he needed financial help for making payment for the vehicle which he wished to purchase. For that purpose, he and his guarantor made a proposal to the petitioner in a particular form giving certain details as were required by it. This form, it would appear, is the form of a proposal of a hire-purchase agreement to be entered into by the customer with the petitioner. After the acceptance of this proposal by the petitioner, an agreement called a hire-purchase agreement was executed between the customer and his guarantor on the one hand and the petitioner on the other. This agreement of hire-purchase related to the vehicle which the customer had decided to buy from the dealer of the manufacturer. In this agreement, the petitioner was described as the owner and the purchaser as the hirer. After this agreement was executed between the parties, the petitioner informed the dealer of the manufacturer that it had agreed to finance the purchase and requested the dealer to send a debit note for the amount of the bill less the amount received by the dealer from the purchaser. The dealer thereafter delivered the vehicle to the customer and sent the bill to the petitioner. The customer also passed a receipt to the petitioner for having received the vehicle in good order and condition, complete with all tools and accessories in accordance with the terms and conditions of the agreement between him and the petitioner. After the receipt of the vehicle by the customer, he applied to the Regional Transport Authority and got the vehicle registered in his name. In the application, however, which the customer would make to the Regional Transport Authority, he had to state that the vehicle was held by him under a hire-purchase agreement with the petitioner. According to the petitioner, all transactions of this nature which were entered into by the petitioner with its customers were entered into in Bombay and were also executed there. All the instalments which were due to be received by the petitioner from its customers in respect of these transactions were also payable at Bombay. According to the petitioner, therefore, it did not carry on any business of selling or supplying motor vehicles but acted merely as a financier. It had no show room, no warehouse and no workshop either at Bombay or at Nagpur.

The petitioner's case is that having regard to the nature of the transactions which the petitioner had with its customers, it was merely a transaction of financing the customer. There was involved no sale of any vehicle from the petitioner to the customer. The customer bought the vehicle from the dealer of the manufacturer by applying to the dealer in a prescribed form accompanied by a written guarantee by a bank undertaking to pay to the dealer. The agreement of hire-purchase entered into by the customer with the petitioner was only for the purpose of enabling the petitioner to finance the customer for the purpose of his purchase of the vehicle from the dealer. The petitioner, therefore, contends that it was not a dealer under the Sales Tax Act and was under no obligation to get itself registered as a dealer under the said Act.

The petitioner's case further is that even assuming that in view of the agreements of hire-purchase entered into by the customers with the petitioner the

transactions were in fact hire-purchase agreements, such hire-purchase agreements would not amount to sales of goods, so as to be capable of being made subject to tax under the Sales Tax Act. The petitioner's contention is that the term "hire-purchase" in Explanation (I) to the definition of "sale" in the Sales Tax Act will not apply to transactions of the nature which have taken place between the petitioner and its customers and alternatively, if that Explanation was intended to apply to these transactions, it was beyond the competence of the State Legislature to tax such transactions. It was contended by the petitioner that even assuming that the transactions between the petitioner and its customers were liable to payment of sales tax, the present notices which have been issued by the Sales Tax Officers to the petitioner were invalid and incompetent as notices under s. 10(1) in Form VI had not been issued to the petitioner prior to the issuance of the said notices. The present notices which are purported to be issued under s. 11(5) or s. 11-A of the Sales Tax Act could not be issued for periods of more than three years prior to the date of the notice, and inasmuch as the periods mentioned in the present notices go beyond the said period of three years, they are invalid and incompetent. The petitioner has, therefore, prayed for appropriate writs quashing the said notices requiring the Sales Tax Officers to withdraw the said notices and prohibiting them from taking any further action on the said notices.

In the affidavit which has been filed in reply to the petition by the respondents, some of the facts mentioned in the petition are controverted. It is contended on behalf of the respondents that the nature of the transactions between the petitioner and its customers is such that the petitioner purchases vehicles from the dealer of the manufacturer and sells the same on hire-purchase basis to the customers. The petitioner thus carries on the business of selling motor vehicles on hire-purchase basis and is, therefore, a "dealer" as defined in the Sales Tax Act. The respondents contend that the petitioner has its sub-office at Nagpur wherefrom it carries on the business of purchasing motor vehicles at Nagpur and other places in the Vidarbha area. It is contended by the respondents that the notices which have been issued by the Sales Tax Officers to the petitioner are under s. 11(5) of the Sales Tax Act and they are perfectly good and competent. According to the respondents, the transactions between the petitioner and its customers are transactions which come within Explanation (I) to the definition of "sale" in the Sales Tax Act and the said Explanation is perfectly *intra vires* and not outside the competence of the State Legislature.

At the hearing of this petition, Mr. Hajarnavis, learned Assistant Government Pleader appearing for the respondents, raised a preliminary contention. According to him, the petition involves several disputed questions of fact on the allegations contained in the petition and the reply given to the said allegations by the respondents. Secondly, he said that all that has happened at present is that notices have been issued by the Sales Tax Officers to the petitioner requiring it to show cause why it should not be assessed to sales tax for a certain period. It is possible for the petitioner to appear before the Sales Tax Officers and show cause and satisfy them that it is not liable to pay tax in respect of its transactions. The mere circumstance that notices have been issued by the Sales Tax Officers to the petitioner does not give any cause to the petitioner to come to this Court on a writ petition.

Now, it is no doubt true that on a writ petition this Court will not go into any disputed questions of fact. It is also true that unless the petitioner has a grievance which it can legitimately make on a writ petition, this Court will not entertain a writ petition only in order to decide questions which can well be agitated and decided in a proper forum before which the proceedings between the parties are pending. Mr. Deo, learned advocate for the petitioner, however, has submitted that he does not wish to urge in this petition any questions of disputed fact but will only confine himself to such contentions as are

permissible to be made on a writ petition at the present stage. He has stated that he wishes to urge only three contentions before us, namely—

(i) that the notices issued in Form XII by the Sales Tax Officers to the petitioner under s. 11(5) of the Sales Tax Act are invalid and incompetent by reason of the notices in Form VI under s. 10(1) not having been issued to it earlier;

(ii) that at any rate, in so far as the notices issued by the Sales Tax Officers seek to assess the petitioner for a period which is more than three years prior to the date of the issue of the notices, the said notices are beyond the authority of the Sales Tax Officers and, therefore, incompetent; and

(iii) that on the nature of the transactions between the petitioner and its customers of the type described by the respondents themselves in their affidavit, he would contend that such transactions do not amount to sales under the Sales Tax Act, and that if the extended definition of "sale" given in Explanation (I) to that definition seeks to include the transactions of this nature within its ambit, the said Explanation is beyond the legislative competence of the State Legislature in a legislation enacted under entry 48 of the Provincial Legislative List in the Government of India Act, 1935, or under entry 54 of the State List under the Constitution of India.

According to Mr. Deo, his first two contentions are to the effect that the proceedings sought to be instituted against the petitioner by the Sales Tax Officer by the notices issued by them are illegal and without jurisdiction, and the third contention which he seeks to raise relates to the *vires* of a legislative provision. Mr. Deo contends that all these contentions can legitimately be urged on an application under arts. 226 and 227 of the Constitution, and the present stage at which they are sought to be urged cannot be said to be in any way inappropriate or premature. In our opinion, if the present writ petition is confined only to the three points which Mr. Deo wants to agitate it would be perfectly competent and not open to objection in the nature of a preliminary contention that it is not maintainable: (see for instance *Carl Still G.m.b.H. v. State of Bihar*¹; *The State of Bombay v. The United Motors (India) Ltd.*²; *Calcutta Discount Co. v. I.T. Officer*³ and *The Sales Tax Officer, Pilibhit v. Messrs Budh Prakash Jai Prakash*.⁴) We will, therefore, proceed to deal with and dispose of this petition only on the three points which are stated above.

Before proceeding to deal with the three contentions which have been urged by Mr. Deo, it will be desirable to refer to some of the provisions of the C.P. and Berar Sales Tax Act, 1947 (hereafter referred to as the Act). Under the said Act, a "dealer" is a person carrying on the business of selling or supplying or buying goods. "Sale" has been defined as any transfer of property in goods for cash or deferred payment or other valuable consideration including a transfer of property in goods made in course of the execution of a contract but not including a mortgage, hypothecation, charge or pledge. Explanation (I) to the said definition states that a transfer of goods on hire-purchase or other instalment system of payment shall, notwithstanding that the seller retains a title to any goods as security for payment of the price, be deemed to be a sale. There is a second Explanation to the said definition but it is not material to be stated. "Turnover" under the Act means the aggregate of the amounts of sale prices and parts of sale prices received or receivable by a dealer in respect of the sale or supply of goods or in respect of the sale or supply of goods in the carrying out of any contract, effected or made during the prescribed period. "Year" under the Act is a financial year from April 1, to March 31, of the subsequent year or at the option of the assessee, the account year followed by him. Section 4 of the Act is the charging section, and it provides that every dealer whose turnover during the year exceeds certain specified limits will be liable to pay tax. All dealers whose turnover during the year preceding

1 [1961] A.I.R. S.C. 1615.

2 [1953] S.C.R. 1069.

3 [1901] A.I.R. S.C. 372.

4 [1955] 1 S.C.R. 243.

the commencement of the Act exceeded the specified limits became liable to pay tax under the Act from the commencement of the Act. In respect of other dealers, they became liable to pay tax from the date of the expiry of two months after the month up to the end of which their turnover calculated from the commencement of the year or from the commencement of the date of their business, if they were in business for less than twelve months, exceeded the specified limits. A dealer who is liable to pay tax continues to be so liable until the expiry of a period of three consecutive years during each of which his turnover has not exceeded the specified limits and such further period as may be prescribed by the rules. It will thus be seen that the liability of a dealer to pay tax is dependent upon his turnover exceeding certain specified limits. The liability comes in when the turnover exceeds the said specified limits and continues to be in existence for a period of three years after the turnover has fallen below the specified limits for three consecutive years. Under s. 8 of the Act it is provided that every dealer who is liable to pay tax has got to get himself registered and possess a registration certificate during the interval during which he is liable to pay tax. The procedure for registration of dealers has been provided in Part IV of the Rules made under the Act. Under s. 9 a list of the registered dealers is required to be published by the State Government. Section 10 provides that every registered dealer shall furnish such returns by such dates and to such authorities as may be prescribed and the rules prescribed in that connection are rules 19 to 21 contained in Part V of the Rules. The said section also provides that every dealer may be required by the Commissioner by a notice served in the prescribed manner to submit a return. The prescribed manner is provided by rule 22 which occurs in Part V of the Rules.

Under sub-s. (3) of s. 10, failure on the part of an unregistered dealer to comply with the requirements of a notice issued to him under sub-s. (1) and failure on the part of a registered dealer to furnish his return for any period within the prescribed period have been made liable to the imposition of a penalty by the Commissioner after giving the defaulter an opportunity of being heard. Section 11 deals with the assessment of dealers to tax. The first three sub-sections of this section apply to all dealers, i.e. registered as well as unregistered. Under sub-s. (1) the Commissioner may accept the returns furnished by dealer and assess him on the said returns without any further inquiry if he finds that the returns are satisfactory. In the event of the Commissioner not being satisfied with the returns submitted, under sub-s. (2) he is enabled to serve a notice on the dealer furnishing the return to appear before him either by himself or by a representative for the purpose of being examined on oath and furnishing information with regard to the return submitted, or for the production of other evidence and accounts for the purpose of assessment and assess him to tax under sub-s. (3) after hearing him and after having examined the other evidence. Sub-section (4) of s. 11 applies only to registered dealers and authorises the Commissioner to assess a registered dealer to a best judgment assessment in the event of the defaults specified in the said sub-section having been committed by the dealer. The manner in which the best judgment assessment will be made by the Commissioner is prescribed in rule 32 contained in Part VII of the Rules. Sub-section (5) of s. 11 is a provision which relates to the best judgment assessment of an unregistered dealer. The conditions on the satisfaction of which the best judgment assessment of an unregistered dealer can be made are specified in the said sub-section, and the manner in which the assessment will be made is prescribed in rule 32 which is an omnibus rule providing for other matters as well. Section 11-A of the Act is a provision which provides for the assessment of a turnover which has escaped assessment.

The provisions so far referred to are mainly the provisions which we may have to consider in deciding the questions which have been raised before us on the present petition. The other provisions to which a passing reference may have to be made are the provisions of s. 15 which authorises the Commissioner to require any dealer to produce before him any accounts, registers or docu-

ments relevant to the financial transactions of the dealer or to furnish information relating to the stocks of goods, or purchases, sales and deliveries of goods made by him, and s. 16 under which the Commissioner is authorised to delegate his powers under the Act to persons appointed under s. 3 to assist him.

With regard to the first point raised by Mr. Deo, his contention is that in the case of an unregistered dealer, a notice under s. 10(1) of the Act is obligatory before a proceeding for a best judgment assessment can be started against him under sub-s. (5) of s. 11 of the Act. It is urged in that connection that the scheme of the Act shows that the dealers who are liable to pay tax under s. 4 are under an obligation to get themselves registered under s. 8 and also under an obligation to submit returns of their taxable turnover in the prescribed manner and at prescribed intervals under s. 10. The assessment of registered dealers proceeds after the stage of the submission of returns by them as provided under the Act is passed. In the case of unregistered dealers there is no obligation to submit any return unless they are called upon by a notice served on them under sub-s. (1) of s. 10 to do so by the Commissioner. Section 11 which provides for the assessment of registered dealers also provides for the assessment of unregistered dealers, and the scheme of the said section will show that just as in the case of registered dealers so also is the case of unregistered dealers, its application comes in after the stage of the submission of the returns by him is over, and their assessment is only consequent on their having been called upon to furnish returns under s. 10(1) of the Act. The first three sub-s. of s. 11 apply both to registered dealers as well as to unregistered dealers. The first sub-section provides in the case of either of them that if the returns which are submitted by them are satisfactory, they can be assessed on the basis of the said returns without further inquiry. If the returns which they have submitted are not satisfactory, then under sub-s. (2) the Commissioner may call upon them or their representatives to appear before him, so that he can examine them on oath or he may call upon them to produce evidence or accounts etc. to satisfy himself with regard to the returns. The notice under sub-s. (2) of s. 11 calling upon registered as well as unregistered dealers is governed by the same rule, namely, rule 31 of the Rules. Under sub-s. (3), assessment is authorised to be made on the examination of the returns and on the examination of the further evidence if any called for by the Commissioner. Sub-section (4) of s. 11 relates to the best judgment assessment of a registered dealer who has committed faults which are specified in the sub-section. These faults are that he has either not furnished returns, or that after having furnished returns, he has not complied with the notice issued to him under sub-s. (2), or that he has not employed a regular method of accounting which would enable the Commissioner to make a proper assessment. It would be clear from the provisions of sub-s. (4) of s. 11, says the learned advocate, that the stage of making a best judgment assessment against a registered dealer can only be reached after the stage of submission of returns which the registered dealer is under a statutory obligation to furnish under s. 10 is over and the registered dealer has disentitled himself to a regular assessment by reason of the defaults committed by him. The provisions of sub-s. (5) of s. 11 is a provision relating to the best judgment assessment of unregistered dealers. The argument of the learned advocate is that as in the case of a registered dealer so in the case of an unregistered dealer this provision is not intended to apply unless the unregistered dealer has disentitled himself to a regular assessment which in his case can only be by calling upon him to furnish a return under s. 10(1) of the Act. Mr. Deo contends that in the case of a registered dealer, the statute has made no provision requiring the Commissioner to give him a notice to submit his returns. On the other hand, it has put the obligation on the registered dealer himself to submit returns in the prescribed manner and at the prescribed intervals. The jurisdiction of the Sales Tax Officer, therefore, to proceed to assess in the case of the registered dealer cannot be said to depend upon the issuance of a notice to him to submit returns. There is however no such jurisdiction in the Sales

Tax Officer to assess an unregistered dealer in the absence of a notice under sub-s. (1) of s. 10. The first step to bring the unregistered dealer to assessment is to issue a notice to him under sub-s. (1) of s. 10 and it is the issuance of this notice that gives jurisdiction to the Sales Tax Officer to proceed to assessment against him under s. 11. It is, therefore, contended by the learned advocate that a notice under sub-s. (1) of s. 10 is obligatory in the case of the unregistered dealer before he can be assessed under the provisions of s. 11 including the provision of best judgment assessment under sub-s. (5) of that section.

The second argument of the learned advocate in this connection is that even on the language employed in sub-s. (5) of s. 11 it will be apparent that that sub-section is intended to come into operation only after the returns as required by sub-s. (1) of s. 10 have been furnished by the unregistered dealer and assessment proceedings on the basis of the said returns have commenced or taken place before the Sales Tax Officer. Sub-section (5) of s. 11 specifies the conditions subject to which the provision can be applied. These conditions are that information must have come into the possession of the Commissioner which is sufficient to satisfy him that the dealer was liable to pay tax under the Act in respect of any period and that he had wilfully failed to apply for registration. According to the learned advocate, the information which is spoken of in this sub-section is the information which comes into the possession of the Commissioner during the assessment proceedings commenced on the returns submitted by the unregistered dealer in compliance with the notice issued to him under sub-s. (1) of s. 10. It is the information which the Commissioner obtains subsequent to the returns submitted under sub-s. (1) of s. 10, or at any rate, subsequent to the notice issued by him under sub-s. (1) of s. 10. The stage of operation of the provisions of sub-s. (5) of s. 11, therefore, can only be reached after a notice under sub-s. (1) of s. 10 has been issued. The learned advocate has sought to derive support for his submissions from a decision of the former Nagpur High Court in *Nimar Cotton Press v. Sales Tax Officer*⁵ and certain observations of the Supreme Court in the case of *Ghanshyamdas v. Regional Asst. Commr. of Sales Tax*.⁶

Now, under the Act, liability to pay tax arises under s. 4 in case of the dealer whose turnover exceeds the specified limits and comes into existence from the point of time as specified in the section and also continues in accordance with the provisions of the said section. The liability to pay tax is neither dependent on the dealer registering himself under s. 8, nor is it dependent on the issuance of a notice to the dealer under sub-s. (1) of s. 10 of the Act. The jurisdiction of the Sales Tax Officer to assess a dealer is derived under s. 11 and that jurisdiction to assess is again not dependent upon whether a notice under sub-s. (1) of s. 10 has been issued or not issued to the unregistered dealer. In *Central Potteries Ltd. v. State of Maharashtra*⁷ a contention was raised before the Supreme Court that the jurisdiction of the Sales Tax Officer to take proceedings for assessment with respect to the unregistered dealer depends on the issuance of a notice under sub-s. (1) of s. 10 and rule 22. The contention was negatived and it was observed (p. 476):

"...It is contended that the jurisdiction of the Sales Tax Officer to take proceedings for assessment with respect to non-registered dealers depends, on the issue of a notice such as is prescribed by section 10 and rule 22 and that as no such notice had been issued in the case of the appellant, the assessment proceedings must be held to be incompetent, if the registration certificate is invalid. We see no force in this contention. The taxing authorities derive their jurisdiction to make assessments under sections 4 and 11 of the Act, and not under section 10, which is purely procedural."

The argument of the learned advocate, therefore, that the Sales Tax Officer would have no jurisdiction to assess an unregistered dealer unless he has in the first place issued a notice under sub-s. (1) of s. 10 to him cannot be sustain-

⁵ (1954) 5 S.T.C. 428.

⁶ (1963) 14 S.T.C. 976.

⁷ (1962) 13 S.T.C. 472.

ed. It is, however, argued that even though the proceedings of assessment held in the absence of a notice under sub-s. (1) of s. 10 cannot be said to be incompetent on the ground of want of inherent jurisdiction in the Sales Tax Officer in view of the observations of the Supreme Court in the case referred to above, the said observations do not go to the extent of saying that no notice under sub-s. (1) of s. 10 even as a procedural matter is required to be given or that the provision can be ignored by the Sales Tax Officer. The argument of the learned advocate is that even if it is regarded that the provision of sub-s. (1) of s. 10 is a procedural provision, it is nevertheless a provision which the Sales Tax Officer is required to follow under the law and the proceedings which he purports to hold without following the proper procedure could be complained of by the petitioner, so that the fault in the procedure can be corrected and the Sales Tax Officer could be compelled to adhere to the proper provisions of law. The question to be considered, therefore, is whether the provision of sub-s. (1) of s. 10 is required to be followed by the Sales Tax Officer in every case of assessment of an unregistered dealer, or whether there may exist cases under the Act in which the assessment of an unregistered dealer can take place even without the issuance of a notice under sub-s. (1) of s. 10.

Now, it seems to us that the provisions of sub-s. (1) of s. 10 is an enabling provision which the Commissioner may resort to when he is proceeding to consider the assessment of an unregistered dealer. Where such a notice is issued to the unregistered dealer and he complies with the said notice and furnishes returns, those returns will be dealt with in accordance with the provisions of the first three sub-sections of s. 11. If in the proceedings of assessment or in the inquiry made in the said proceedings, information comes into the possession of the Sales Tax Officer which provides the necessary satisfaction under sub-s. (5) of s. 11, the provision of the said sub-section can also be resorted to against the unregistered dealer. It must, however, be noted that the provisions of sub-s. (5) of s. 11 do not appear to be confined to what transpires in the assessment proceedings instituted on the basis of the returns submitted by the unregistered dealer in pursuance of the notice issued under sub-s. (1) of s. 10. We have already referred to the provisions of sub-s. (4) of s. 11 which relate to the best judgment assessment in the case of a registered dealer. A perusal of the said provisions makes it clear that the best judgment assessment as against a registered dealer is resorted to for defaults connected with the returns submitted by him. It is either for failure to submit the returns altogether or for submitting faulty returns or maintaining a faulty system of account which does not enable the Commissioner to make a proper assessment on the returns submitted by him, that the best judgment assessment provision is applied against the registered dealer. The provisions of sub-s. (5) of s. 11 however do not confine it to any faults of not submitting returns which the unregistered dealer is called upon to furnish under sub-s. (1) of s. 10, or any faults contained in the returns submitted. The conditions which are required to be satisfied for the operation of sub-s. (5) of s. 11 as against the unregistered dealer are entirely different and relate to the evasion of tax by him. The conditions which are required to be satisfied are that the dealer was liable to tax during a certain period and that he had evaded the liability to pay tax for that period by not getting himself registered wilfully. It may be that this information may be discovered on the proceeding instituted against the unregistered dealer on the notice under sub-s. (1) of s. 10 issued against him; but it does not appear that the application of the provision is only confined to such cases. It is possible that the Commissioner may have the necessary information which might give him the satisfaction such as is required under the said sub-section even without any notice having been issued to the unregistered dealer in the first place and without his having submitted any return in pursuance of the said notice. Under s. 15 of the Act, the Commissioner has power to require any dealer to produce before him accounts, registers and documents relevant to the financial transactions of the dealer, as also information relating to the stock of goods, purchases, sales and deliveries of the goods effected

by him. This information the Sales Tax Department is entitled to call from any dealer irrespective of whether a notice under sub-s. (1) of s. 10 has been issued to him or not. If on the information received in this manner, the Commissioner is satisfied with regard to the conditions mentioned in sub-s. (5) of s. 11, he would be entitled to invoke his jurisdiction under that sub-section irrespective of whether he had issued any prior notice to the unregistered dealer under sub-s. (1) of s. 10, or not. It does not, therefore, appear that the procedural requirement of sub-s. (1) of s. 10 is necessary to be followed in every case where the provisions of sub-s. (5) of s. 11 are intended to be resorted to by the Commissioner. As we have already pointed out, the application of the said provisions is not necessarily confined to assessment proceedings commenced on returns filed in compliance with a notice under sub-s. (1) of s. 10. The provisions aim at cases of evasion of tax and not for punishing defaults in the matter of submission of returns. It seems to us, therefore, that the argument of the learned advocate that a notice under sub-s. (1) of s. 10 is obligatory before the proceedings under sub-s. (5) of s. 11 can be taken against an unregistered dealer cannot be sustained.

We may also point out in this connection that rule 32 of the rules framed under the Act, which specifies amongst other things, the manner in which the assessment under sub-s. (5) of s. 11 can be made, provides that for the proceedings to be taken under the said sub-section, a notice in Form XII specifying the default committed by the unregistered dealer—which in this case would be that he being liable to tax, had wilfully failed to apply for registration—and calling upon him to show cause why he should not be assessed in the manner provided in the said sub-section will have to be served on him and thereafter the assessment made in the manner provided in the said rule. Form XII in which the said notice is to be given shows that the dealer is directed to attend in person or by his representative and to produce his account books and documents specified in the notice or any other evidence on which he may rely. From the provisions of sub-s. (5), therefore, it would appear that its operation is brought in on the satisfaction of the conditions mentioned therein and its application is made in the manner provided by rule 32. There is nothing in the provision itself which would indicate that its application will necessarily come in only after the submission of returns by an unregistered dealer.

Coming now to the cases which have been referred to by the learned advocate in this connection, the first of them is *Nimar Cotton Press v. Sales Tax Officer*. The question as to whether a notice under sub-s. (1) of s. 10 in Form VI was obligatory for assessing an unregistered dealer was considered in that case. It would seem however that the case does not lay down a proposition as wide as the learned advocate has put before us, namely, that in every case of assessment of an unregistered dealer under sub-s. (5) of s. 11, a prior notice under sub-s. (1) of s. 10 is obligatory. The learned Judges in that case proceeded to consider the unregistered dealers in two categories, namely—

(i) those who had not got themselves registered and submitted returns under a bona fide belief that they were not dealers within the Act or their taxable turnover did not exceed the taxable quantum provided under s. 4: and

(ii) those who, though they believed were dealers and liable to registration, had wilfully failed to apply for registration;

and the view they took was that in the case of unregistered dealers falling in the first category, since they could not be regarded as having wilfully failed to apply for registration, the provisions of sub-s. (5) of s. 11 can have no operation against them and in their case, therefore, if at all they were to be assessed, the provisions of sub-s. (1) of s. 10 will have to be followed. The learned Judges observed (p. 439):

“...Unless, therefore, the Sales Tax Officer is satisfied that an unregistered dealer has wilfully failed to apply for registration, he cannot commence proceedings under Section 11, sub-section (5). The proper procedure for him is to issue a notice under Section 10, sub-section (1), and after hearing such evidence as may be tendered in support of the

return, or if the dealer contends that he is not liable to pay any tax. after hearing such evidence as he may adduce, the Sales Tax Officer has to decide his liability as a dealer and to assess him to tax if he is held liable.... In our opinion, therefore, a notice in Form No. VI is obligatory in case of unregistered dealers unless the Sales Tax Officer is satisfied that the unregistered dealer has wilfully failed to apply for registration."

Now, in the present case, the notice under sub-s. (5) of s. 11 has been issued to the petitioner by the Sales Tax Officer on the basis that he is satisfied that the conditions as to the application of the said provision exist in the case of the petitioner. Whether his satisfaction is justified or not would be decided by him on the cause being shown by the petitioner, and if on the cause being shown the Sales Tax Officer is satisfied that the dealer is not liable to tax or that he has not wilfully failed to apply for registration, the proceedings which are sought to be instituted against him will come to an end. We are, however, not concerned with the result of the proceedings. What we are concerned with is whether the notice which is at present issued by the Sales Tax Officer to the petitioner is competent or not. Even on the authority referred to by the learned advocate such a notice would be competent if the dealer was liable to registration and knowing that he was a dealer and liable to registration, had wilfully failed to apply for registration. The case which the learned advocate has cited does not support his contention that a notice under sub-s. (1) of s. 10 is obligatory in every case where action under sub-s. (5) of s. 11 is intended to be taken against an unregistered dealer.

Mr. Deo has then invited our attention to the case in *Ghanshyamdas v. Regional Asst. Commr. of Sales Tax*. That was a case of a registered dealer who had not submitted his returns for certain periods and notices under sub-s. (4) of s. 11 were issued by the Sales Tax Department against him for periods which were beyond three years from the date of the notice. It was contended on behalf of the assessee that under s. 11-A of the Act it was not competent for the Sales Tax Authorities to assess him in respect of the escaped assessment for a period beyond three years of the notice issued to him. It was argued on behalf of the Department that s. 11-A had no application to an assessment which was proposed to be made under sub-s. (4) of s. 11. Their Lordships of the Supreme Court were mainly concerned in that case with the true construction of the provisions of s. 11-A. In view of the contentions raised before them, they examined the scheme of the Act and the provisions of ss. 10 and 11, with reference to registered and unregistered dealers. With reference to an unregistered dealer, they pointed out that there was no statutory obligation cast on him to submit any return and his case was really a case of evasion from his obligation to get himself registered under the Act. Section 10(1) enabled the Commissioner to issue a notice to him to furnish a return in the prescribed manner, and where that was done, the first three sub-sections of s. 11 had also to be followed in the matter of his assessment. Their Lordships then observed (p. 986):

"But sub-section (5) of section 11 introduces a stringent provision to prevent evasion of tax. Under that sub-section if upon information the Commissioner is satisfied that any such dealer, who is liable to pay tax under the Act in respect of any period, has wilfully failed to apply for registration, he shall at any time within three calendar years from the expiry of such period, after giving the dealer a reasonable opportunity of being heard, proceed in the manner as may be prescribed to assess to the best of his judgment the amount of tax due from the dealer in respect of such period and of subsequent periods. He may also direct the dealer to pay, by way of penalty, in addition to the amount of tax so assessed a sum not exceeding $1\frac{1}{2}$ times that amount. So in the case of a dealer liable to pay tax, but who has failed to register himself under the Act, the Commissioner may issue a notice to him under rule 22 and assess him under section 11; and in the case of evasion, on subsequent information, the Commissioner can assess him within three calendar years from the expiry of the period in respect of which he was liable to pay tax and for subsequent years and also impose a penalty on him. It is

clear from this provision that in the case of such a dealer the assessment can be made only within three calendar years from the expiry of the period in respect whereof he has been liable to pay tax under the Act. If the contention of learned counsel for the respondent should prevail, in the case of a registered dealer there would be no limitation in the matter of assessment, whereas in the case of a dealer who evaded law, he would have the benefit of the three years' limitation." (*Italics are ours*).

Mr. Deo has relied on the observations quoted above for his submission that these observations support his argument that a notice under sub-s. (1) of s. 10 is obligatory in the case of an unregistered dealer before the provisions of sub-s. (5) of s. 11 are resorted to against him. The portion of the observations particularly relied upon in this connection by the learned advocate is the portion italicized by us. The notice under rule 22 in the above observations is the notice under sub-s. (1) of s. 10, and the submission of the learned advocate is that in view of these observations the Commissioner has to issue such notice, then proceed to assess him under s. 11, and only on subsequent information the Commissioner can assess him under sub-s. (5) for the period for which he was liable to pay tax and during which he had wilfully failed to apply for registration. In our opinion, these observations do not mean what the learned advocate wants to say that in every case a notice under sub-s. (1) of s. 10 is necessary, and it is only on the information gathered in the proceedings of assessment held in pursuance of the return submitted in compliance with the said notice that the provision of sub-s. (5) of s. 11 can be resorted to.

We may refer to the observations of Raghubar Dayal J. in the same decision dealing with the provisions of ss. 10 and 11 of the Act. It may be pointed out that although the judgment of Raghubar Dayal J. is a dissenting judgment, the dissent is not with reference to the interpretation of the scope of s. 11(5) with which we are concerned in the present case. His Lordship points out that the procedure for assessment of tax is the same, both for the registered dealer and the ordinary dealer, in case both of them furnish the returns of the turnover as required by the provisions of sub-s. (1) of s. 10 and also comply, if required, with the provisions of sub-s. (2) of s. 11. Different procedure is required to be followed if the two types of dealers do not file returns or, after filing returns, do not respond to the notice issued under sub-s. (2) of s. 11. The Act does not provide for the Sales Tax Officer's taking steps for the assessment of the tax on the ground of the unregistered dealer's not complying with either notice, i.e. when the unregistered dealer does not submit a return, or after submitting a return which is not accepted, does not respond to the notice under sub-s. (2) of s. 11. His Lordship then observed (p. 992):

"The Sales Tax Officer can, however, proceed against such a dealer under sub-section (5) of section 11 and will probably do so as the conduct of the unregistered dealer would tend to confirm the information which led him to issue notice under section 10(1); but his action will be not on the ground that the dealer had made default in furnishing the return or had failed to comply with the notice issued under sub-section (2) of section 11 but will be on the ground that according to his information the dealer had been liable to pay tax under the Act in respect of that period and had, nevertheless, wilfully failed to apply for registration."

Mr. Deo has relied on the part of the observations quoted above where it is said that the procedure under sub-s. (5) of s. 11 will be adopted by the Sales Tax Officer because the conduct of the unregistered dealer in not submitting the return in compliance with the notice issued to him under sub-s. (1) of s. 10 would confirm the information of the Commissioner which led him to issue such notice, and has contended that that would indicate that a notice under sub-s. (1) of s. 10 is obligatory before the provision of sub-s. (5) of s. 11 is invoked against the unregistered dealer. We are, however, afraid that the said observation does not give any such indication because later on his Lordship has observed: (p. 992):

"...If such a dealer had been one to whom a notice under sub-section (1) of section

10 had been issued and had failed, without any sufficient cause, to comply with the requirements of that notice, he could also be ordered to pay, by way of penalty, a sum not exceeding one-fourth the amount of the tax which is assessed on him under section 11, in view of the provisions of sub-section (3) of section 10."

It does not appear from this observation that his Lordship considers that in every case where the provision of sub-s. (5) of s. 11 is applied, a prior notice under sub-s. (1) of s. 10 is obligatory. It may be that even when the provision of sub-s. (5) of s. 11 is intended to be applied, the Commissioner may as a first step give a notice under sub-s. (1) of s. 10, and if that notice is not complied with, apart from the consequences to which the dealer may be subjected under the provisions of sub-s. (5) of s. 11, he will be liable to a further penalty under sub-s. (3) of s. 10 for failure to comply with that notice. That does not however mean that it is obligatory to give a notice under sub-s. (1) of s. 10 as a first step in every case. In our view, therefore, the observations in the Supreme Court case on which reliance is sought to be placed by Mr. Deo do not help him in support of his submission. On the other hand, some of the observations in this case appear to indicate the contrary. Thus, for instance, in the majority judgment in this case it has been observed that a case of an unregistered dealer is a case of evasion from his obligation to get himself registered under the Act. In the judgment of Raghubar Dayal J., his Lordship points out that the action under sub-s. (5) of s. 11 is not on the ground that the dealer had made default in furnishing the return or had failed to comply with the notice issued under sub-s. (2) of s. 11 but will be on the ground that the dealer was liable to pay tax under the Act but had nevertheless wilfully failed to apply for registration. It would, therefore, appear to us that the invoking of the powers under sub-s. (5) of s. 11 is not dependent on a prior notice for submission of the return issued to an unregistered dealer under sub-s. (1) of s. 10; its dependence is entirely on the fulfilment of the conditions which are specified in the section itself, namely, that there must be satisfaction of the Commissioner on the information which is in his possession that the dealer was liable to pay tax for a certain period and that during that period he had wilfully failed to apply for registration. If these conditions are satisfied, the power under sub-s. (5) of s. 11 would be invoked against the unregistered dealer and exercised in the manner stated in the said sub-section, namely, in the manner prescribed by rule 32 of the Rules made under the Act. There is nothing in the rule which would indicate that a notice for submitting the returns is required either prior or subsequent to the application of the procedure prescribed. What rule 32 requires to be done is that a notice in Form XII specifying the default and calling upon the unregistered dealer to show cause within such time as is prescribed in the notice why he should not be assessed and a penalty should not be imposed upon him, should be served on the dealer. A reference to Form XII in which the notice is required to be issued would show that the notice will give intimation to the dealer that he being a dealer liable to pay tax under the Act in respect of the periods mentioned had wilfully failed to apply for registration and will call upon him to show cause on or before a certain date why he should not be assessed and a penalty should not be imposed on him. The notice will further direct him to attend in person or by a proper representative before the Sales Tax Officer and produce or cause to be produced the books of accounts and the documents specified in the notice and such other evidence on which he may choose to rely in support of the cause required to be shown by the dealer. It would thus appear that the conditions subject to which the jurisdiction under sub-s. (5) of s. 11 can be invoked against an unregistered dealer have no reference to a notice under sub-s. (1) of s. 10 being required to be issued to him as a condition precedent to the invoking of the said jurisdiction. The procedure prescribed for the exercise of the said jurisdiction also gives no indication that the said jurisdiction has to be invoked only after the stage of the issuance of a notice under sub-s. (1) of s. 10 has passed. In our opinion, therefore, the first contention urged by Mr. Deo in the present petition cannot be sustained and must, therefore, fail.

The next point urged by the learned advocate relates to the period for which the notice under sub-s. (5) of s. 11 can be issued by the Sales Tax Officer. The rival contentions in this connection are that according to the petitioner, the period for which such notice can be issued cannot be for such period or periods of assessment as are prior to three calendar years from the date of the issue of such notice. On the other hand, the contention of the Department is that the entire period for which the unregistered dealer was liable to pay tax and for which he had wilfully failed to apply for registration can be covered by the notice within three calendar years from the end of such period. In the present case, the notices which are respectively dated November 12, 1962 and November 26, 1962 are in respect of the period from January 1, 1959 to December 31, 1959 and the third notice which is dated December 10, 1962 is for the entire period from June 1, 1950 to December 31, 1959. According to Mr. Deo, the period of assessment which comes within three calendar years from any one of the three notices is the last quarter of the year 1959. All other periods which are prior to the said last quarter of 1959 are beyond the period of three years from the dates of the notice and the Sales Tax Officer had no authority to issue any notice for the said periods. According to the learned Assistant Government Pleader who appears for the Department, the entire period from June 1, 1950 to December 31, 1959 was the period during which the petitioner was liable to pay tax and had wilfully failed to apply for registration and the notices which have been issued by the Sales Tax Officer which are within three calendar years from December 31, 1959 are good, valid and proper for the entire period from June 1, 1950 to December 31, 1959. Which of these rival contentions is right will depend upon the proper construction of the expression "the period during which the unregistered dealer was liable to pay tax and had nevertheless wilfully failed to apply for registration" which occurs in sub-s. (5) of s. 11.

Liability to pay tax under a taxing statute is entirely governed by the statute which is a complete code in itself. A taxing statute provides for the incidence of tax or the attraction of tax liability; it makes provision for the assessment of the tax liability or the ascertainment or quantification of the tax liability which is attracted; and it also makes provision for the recovery and payment of the said tax liability. Every one of these matters is governed by the provisions of the Act itself and the liability of a person to pay tax has got to be determined with reference to the provisions which are to be found in the taxing statute. In the statute before us, the incidence or the attraction of tax liability is provided by s. 4; the assessment or the ascertainment and the quantification is dealt with by ss. 11 and 11-A; the payment and recovery of the tax is provided by s. 12; and the refunds are dealt with in s. 13 of the Act. Section 4 which deals with the incidence of tax states in the first place who are the persons who are subject to tax; in the second place, the point of time when the tax liability is attracted; and in the third place, the duration to which the liability continues. Under that section it is provided that all dealers whose turnover exceeds the limits specified in the section will be liable to pay tax in accordance with the provisions of the Act. Attraction of the tax, therefore, is dependant on the turnover exceeding the specified limits and the liability to pay tax which has been attracted is to be governed in accordance with the provisions of the Act which will necessarily include the provisions as to assessment and payment. Under the said section all dealers whose turnover exceeded the specified limits during the year preceding the commencement of the Act became liable to pay tax from the commencement of the Act. In the case of others, the tax liability is attracted from a date expiring two months after the month up to the end of which their turnover calculated from the commencement of the year or from the commencement of the business in case the dealer was in business for less than 12 months exceeds the specified limits. The year for the purpose of this calculation of the turnover is the financial year beginning on April 1, or at the option of the dealer, his accounting year. The liability to pay tax which is attracted in the manner provided continues until the expiry of a period of three conse-

cutive years during which the turnover of the dealer has not exceeded the specified limits and ceases at the expiry of such three years unless a further period for its continuation has been prescribed by the Rules under the Act. The provisions of this section relate to the attraction of the tax liability. The liability to pay tax so attracted is however in accordance with the provisions of the Act. These provisions, as we have already stated, have reference to the provisions relating to assessment. Under s. 8 of the Act, a dealer who is liable to pay tax under the Act has to put in an application to get himself registered and possess a registration certificate. Failure to perform this obligation is made penal under s. 24. Section 9 provides for the publication of the list of the registered dealers. As observed by the Supreme Court in *Ghanshyamdas v. Regional Assistant Commissioner of Sales Tax* the provisions of ss. 8 and 9 are conceived in the interest of revenue, to facilitate collection of taxes and to prevent the evasion thereof. Under sub-s. (1) of s. 10, a registered dealer is required to furnish such returns by such dates and to such authority as may be prescribed. "Prescribed" means prescribed under the rules made under the Act, and the relevant rules in this connection are rules 19 and 20 in Part V of the Rules made under the Act. Rule 19 provides that a registered dealer will furnish to the appropriate Sales Tax Officer quarterly returns in Form IV within one calendar month from the expiry of the quarter to which the return relates. That is the normal period for which assessment returns are required to be filed by the registered dealer in Form IV. Under rule 20 the Commissioner is authorised to fix a monthly return for any registered dealer for reasons to be recorded by him. For such dealer the return period for the returns to be submitted by him in form IV will be a period of one month. Under sub-s. (1) of s. 10 the Commissioner is also entitled to serve a notice on an unregistered dealer requiring him to furnish a return or returns. The rule which prescribes the manner in which returns can be requisitioned from an unregistered dealer is rule 22 and it provides that the Commissioner may by a notice given in Form VI require an unregistered dealer to furnish to the appropriate Sales Tax Officer, within two calendar months from the date of the service of the notice a return or returns in Form IV in respect of the said period or periods as may be specified in the notice and thereupon such dealer shall comply with the notice. Section 10 again, as observed by the Supreme Court in *Central Patteries Ltd. v. State of Maharashtra*, is a procedural section and the liability of an assessee or a dealer to pay tax or the jurisdiction of the Sales Tax Officer to assess the dealer to tax is not dependent upon the said section.

We then come to s. 11 which is the assessment section under the Act. Under sub-s. (1) of that section assessment is made on the returns which are filed by the registered dealers under the statutory obligation imposed upon them by sub-s. (1) of s. 10, and by the unregistered dealers under sub-s. (1) of s. 10 on their being called upon to furnish such returns by the Commissioner, if the said returns are found to be satisfactory. Under sub-s. (2) of s. 11, if the Commissioner is not satisfied by the returns submitted by the registered or unregistered dealers he is empowered to call upon them by a notice to appear before him in person or by a proper representative or to produce evidence or to produce accounts etc. The notice which is required to be given under sub-s. (2) of s. 11 is provided in rule 31 of the Rules and is required to be in Form XI. Sub-section (3) of s. 11 authorises the appropriate Sales Tax Authority to make assessment on the basis of the returns furnished and on the basis of the further evidence produced in compliance with the notice given under sub-s. (2) of s. 11. Sub-section (4) provides for the best judgment assessment in the case of a registered dealer. The manner prescribed for making this best judgment assessment is dealt with in rule 32 which requires a notice in Form XII to be issued by the Sales Tax Officer to the registered dealer, who has failed to submit returns in respect of any period by the prescribed date. That notice intimates the registered dealer that having failed to furnish returns for certain specified periods he has rendered himself

liable to best judgment assessment and requires him to show cause why he should not be assessed and a penalty should not be imposed upon him. Sub-section (5) of s. 11 contains a provision for best judgment assessment of an unregistered dealer and the manner in which this best judgment assessment is to be made is again dealt with by rule 32 which provides for a notice in Form XII to be issued to the unregistered dealer. This notice intimates him of the default, namely, that having been a dealer liable to pay tax in respect of certain periods he had wilfully failed to apply for registration and calls upon him to show cause why he should not be assessed and why a penalty should not be imposed upon him.

Section 11-A of the Act provides for the assessment of turnover which has escaped assessment. That section provides that if the appropriate Sales Tax Authority is satisfied in consequence of any information which has come into its possession that any turnover of a dealer during any period has been under-assessed or has escaped assessment or has been assessed at a lower rate etc., it may within three calendar years from the expiry of such period, after giving the dealer a reasonable opportunity of being heard and after making such inquiry as it considers necessary, proceed in such manner as may be prescribed to re-assess or assess as the case may be, the tax payable on such turnover. The prescribed manner is again provided by rule 32 which requires a notice in Form XII to be issued to the dealer, calling upon him to show cause why he should not be assessed or re-assessed as the case may be. The notice in Form XII will show that the intimation which is conveyed to the dealer is that his turnover for a certain period or periods has been under-assessed or has escaped assessment etc. and requires him to show cause why he should not be assessed or re-assessed as the case may be. The provisions of ss. 10 and 11 of the Act and the rules made under the Act will show that the assessment of the tax liability under the Act is made normally in terms of quarters of a year. In other words, the normal unit of the period of assessment under the Act is a period of a quarter and the liability of a dealer or a registered dealer to pay tax is ascertained and quantified in terms of periods of quarters. The provision for the payment and recovery of the tax, as we have already mentioned, is made in s. 12 and the provision for refund is contained in s. 13, but for the purposes of the question before us it is not necessary to consider those provisions.

Now, what we have got to consider in the present case is what upon a proper construction is the meaning of the expression "period for which a dealer has been liable to pay tax" as contained in sub-s. (5) of s. 11. That sub-section reads as follows:

"If upon information which has come into his possession, the Commissioner is satisfied that any dealer has been liable to pay tax under this Act in respect of any period and has nevertheless wilfully failed to apply for registration, the Commissioner shall, at any time within three calendar years from the expiry of such period, after giving the dealer a reasonable opportunity of being heard, proceed in such manner as may be prescribed to assess to the best of his judgment the amount of tax due from the dealer in respect of such period and all subsequent periods; and the Commissioner may direct that the dealer shall pay by way of penalty in addition to the amount of tax so assessed a sum not exceeding one and a half times that amount."

The three calendar years within which the Commissioner must proceed under this sub-section are the three calendar years from the expiry of the period in respect of which the dealer had been liable to pay tax and had nevertheless wilfully failed to apply for registration, and the controversy is as to what is this period for which the dealer had been liable to pay tax and had nevertheless wilfully failed to apply for registration. Mr. Deo's contention is that the period in respect of which the dealer has been liable to pay tax under the Act is not necessarily the period during which the tax liability was attracted by his turnover; it is the period in respect of which he was liable to pay tax

in accordance with the provisions of the Act. The liability to pay tax is not dependent merely on the attraction of the tax liability. The liability comes in when the liability is ascertained and quantified in the manner provided in the Act. The period in respect of which the dealer was liable to pay tax will, therefore, depend upon the period in respect of which the dealer was liable to be assessed to tax, because if there is no assessment, there is no liability to pay. In order, therefore, to understand the proper meaning of the expression "the period in respect of which the dealer was liable to pay tax under the provisions of the Act", reference must necessarily be made to the period of assessment for which a dealer is liable to be assessed. Units of periods of assessment are units of one or more quarters. The periods for which the dealer is liable to pay tax, therefore, will be periods of a quarter or quarters in respect of which the turnover of the dealer is liable to be assessed. The three calendar years' period mentioned in sub-s. (5) within which action can be taken are three years from the expiry of the quarter or quarters which are sought to be assessed. According to the learned advocate, therefore, the Sales Tax Authorities, under sub-s. (5), can only proceed to make assessment under that sub-section in respect of such quarter or quarters as are within three calendar years of the notice issued under the said section. Mr. Hajarnavis, the learned Assistant Government Pleader, has on the other hand contended that the liability to pay tax under the Act arises under s. 4 and is not dependent upon the provisions as to assessment. The process of assessment is merely the process of collection of the liability which has been already incurred and which is all the while there. Section 4, according to him, does not merely attract the tax or brings in the incidence of tax; it also brings in the liability to pay tax. The expression, therefore, in sub-s. (5) of s. 11 must be given the meaning that it covers the entire period for which the tax liability has been incurred and during which the dealer has wilfully failed to apply for registration.

In our opinion, the argument advanced by Mr. Hajarnavis does not appear to be sound. It is no doubt true that a tax liability is brought into existence under s. 4 but that section in terms provides that the liability to pay tax will be in accordance with the provisions of the Act, which, according to us, has a necessary reference to the parts of the Act dealing with the assessment, payment and recovery. The mere attraction of the tax liability, therefore, is not sufficient to make the dealer liable to pay the tax, unless certain other provisions of the Act are also followed. As we have already pointed out earlier, under a taxing statute there are three stages; the incidence of the tax, the assessment of the tax, and the payment or recovery of the tax. The incidence of the tax brings into existence the tax liability. The liability to pay tax so incurred is on the assessment of the tax. If there is no assessment, there is no liability to pay tax. The period, therefore, for which the dealer is liable to pay tax will depend upon the period for which he is liable to be assessed in respect of the tax liability incurred. If for some reason or the other, the tax liability cannot be assessed under the provisions prescribed for the assessment of the tax under the Act, that liability ceases to exist. It seems to us, therefore, that in considering the expression "the period for which the dealer has been liable to pay tax" in sub-s. (5) of s. 11, recourse must necessarily be had to the periods of assessment in respect of the tax. There is no doubt whatsoever that under the Act the unit of assessment is a quarter: see, for instance, *Ghanshyamdas v. Regional Asst. Commr. of Sales Tax*. The expiry of the three years' period, therefore, must have reference to the periods of assessment in respect of which the dealer was liable to be assessed in respect of his tax liability. That the period or periods for which the dealer under the Act is liable to be assessed are a quarter or quarters during which the turnover of the dealer has attracted the tax under s. 4 is clear from the provisions made in the rules relating to the assessment under the Act. In our opinion, therefore, the period for which a dealer has been liable to pay tax

under the Act as mentioned in sub-s. (5) of s. 11 is the period of a quarter or quarters in respect of which he was liable to be assessed in respect of his turnover and since a period of three calendar years is mentioned in sub-s. (5) of s. 11 as the period of limitation within which action under the sub-section must be taken from the expiry of such period or periods, it is only for the period or periods of a quarter or quarters which are within three years from the date of the notice issued under this sub-section that the provisions of this sub-section can be invoked.

The view that we are taking has the support of the decision of the former Nagpur High Court in *Firm Sheonarayan Matadin v. Sales Tax Officer*.² It has been held in that case that unless the period for which the assessment has to be made ends within three years from the date when the Commissioner issues the notice, it cannot be made the subject of assessment under sub-s. (5) of s. 11. The observations of the Supreme Court in *Ghanshyamdas v. Regional Asst. Commr. of Sales Tax* also give support to the said view. In that case, their Lordships of the Supreme Court were principally concerned with s. 11-A of the Act. A dealer who was registered under s. 8 of the Act and who was obliged to furnish quarterly returns of his turnover had, for his accounting year 1949-50 which was from October 22, 1949 to November 9, 1950 submitted a return of his turnover for only one quarter of the said year on October 5, 1950 and made a default in respect of the other quarters. On August 13, 1954 the Assistant Commissioner of Sales Tax, Nagpur, issued a notice to him in Form XI under sub-ss. (1) and (2) of s. 11 of the Act in respect of the turnover of the dealer for the said period. The dealer thereafter filed his returns for the three quarters in respect of which he had made a default but in the assessment proceedings contended that since the notice which was given to him on August 13, 1954 was beyond three years of the quarters for which he had failed to submit returns, the Assistant Commissioner could not assess his escaped turnover for the said quarters. For the year 1950-51 the dealer had not submitted returns for any of the quarters. On October 15, 1954 a notice was served on him under sub-s. (4) of s. 11. The dealer contended that since the notice was issued beyond the period of three years from the periods for which his turnover had escaped assessment, the proceedings were barred under s. 11-A of the Act. The contentions of the dealer did not prevail before the Sales Tax Authorities. The dealer however applied to the High Court under art. 226 of the Constitution for quashing the proceedings on the ground that they were illegal and without jurisdiction. The contention on behalf of the dealer was that his was a case of escaped assessment which came under s. 11-A, and since there was a period of three years' limitation under the said section within which action in respect of the escaped assessment could be taken, the proceedings against him instituted by the Sales Tax Authorities were incompetent. The question before the Supreme Court was with regard to the proper scope of s. 11-A and what their Lordships had to consider was whether that section could apply only to a case where there was a final assessment, or it could also apply to cases where there was no assessment at all. Another question which their Lordships had to consider was as to when the assessment proceedings could be said to have commenced in respect of a registered dealer and when do they terminate. Their Lordships held that the expression "escaped assessment" in s. 11-A of the Act included that of a turnover which had not been assessed at all, because for one reason or other no assessment proceedings were initiated and, therefore, no assessment was made in respect thereof. They also held that so far as the registered dealer was concerned, the assessment proceedings against him could be said to have commenced when a return is made or when a notice is issued to him either under s. 10(3) or s. 11(2). The statutory obligation of the registered dealer to make a return within the prescribed time does not *proprio vigore*

initiate the assessment proceedings before the Commissioner, but the proceedings will commence after the return is submitted and will continue till a final order of assessment is made in regard to the said return. In dealing with these questions which were raised before them, their Lordships had to consider the scheme of the Act and the provisions with regard to assessment relating to dealers, both registered and unregistered. In dealing with the case of an unregistered dealer with reference to the provisions of s. 11(5), their Lordships observed:

"It is clear from this provision that in the case of such a dealer the assessment can be made only within three calendar years from the expiry of the period in respect whereof he has been liable to pay tax under the Act."

Having regard to the view which they took of the provisions of s. 11(5), they observed:

"If the contention of learned counsel for the respondent should prevail, in the case of a registered dealer there would be no limitation in the matter of assessment, whereas in the case of a dealer who evaded law, he would have the benefit of the three years' limitation."

These observations occur in the context of the contention which was raised before their Lordships with regard to the action contemplated against the dealer under sub-s. (4) of s. 11. In that case, the argument advanced on behalf of the Department was that there was no limitation for the action under sub-s. (4) of s. 11 for the best judgment assessment against a registered dealer who had failed to submit a return. Their Lordships pointed out that even when the stringent provision of sub-s. (5) of s. 11 provides a period of three years' limitation for action to be taken against an unregistered dealer, it could not have been intended that in the case of a registered dealer, there should be no period of limitation at all. These observations clearly show that the period in respect of which the unregistered dealer was liable to pay tax was the period of three years in respect of which he was liable to be assessed. The observations in the judgment of Raghubar Dayal J. in the said case also are to the same effect. His Lordship observed:

"Under the provisions of sub-section (5) of section 11, he (i.e. the Commissioner), after giving the dealer reasonable opportunity of being heard, can proceed to assess the tax to the best of his judgment within three calendar years from the expiry of the period in respect of the turnover of which he was liable to be assessed to tax."

There could be no doubt whatsoever that the period in respect of which the dealer was liable to be assessed to tax was the period of a quarter or quarters for which assessment could be made under the Act. The said decision also points out that for the purposes of assessment, the unit of assessment is a quarter. In our opinion, therefore, the view that we are taking is in accordance with the view taken by the former Nagpur High Court and also in accordance with the observations of the Supreme Court in *Ghanshyamdas v. Regional Asst. Commr. of Sales Tax*.

Mr. Hajarnavis has invited our attention to a contrary view taken by the Madhya Pradesh High Court in the following cases: (1) *Battulal v. Commr. of Sales Tax*⁹; (2) *L. J. Patel & Co. v. Commr. of Sales Tax*¹⁰; and (3) *Ghanshyamdas v. Sales Tax Officer*¹¹. The view taken by that Court is that the word "period" in sub-s. (5) of s. 11 of the C. P. and Berar Sales Tax Act, 1947, means the whole period during which a dealer has been liable to pay tax under the Act but has nevertheless wilfully failed to apply for registration, and that it is not to be construed as meaning a quarter for which under rule 19 every registered dealer is required to furnish a return. With great respect to the learned Judges, we are unable to agree with the view taken by them in the said cases. With respect, we may point out that the said decision overlooks the fact that under s. 4 the dealer's liability is to pay the tax in accordance with the provisions of the Act which necessarily include the

⁹ (1962) 13 S.T.C. 893.

¹⁰ (1963) 15 S.T.O. 18.

¹¹ (1963) 15 S.T.C. 128.

provisions relating to assessment. The expression "the period for which the dealer has been liable to pay tax under the Act" cannot, therefore, be always coincident with the period for which the tax has been attracted by his turnover. We may also point out with great respect that we do not agree with them that no fixed periods for the purpose of assessment are fixed under the Act. As has been observed by the Supreme Court in *Ghanshyamdas's* case, the unit of assessment under the Act is a quarter and that is the normal period fixed for the purposes of assessment though in exceptional cases a period of one month can also be fixed under rule 20 as the return period for assessment.

In *Battulal v. Commr. of Sales Tax* the learned Judges who decided that case observed that the view that they were taking was fortified by a decision of the Supreme Court in *State of Orissa v. Chakobhai Ghelabhai & Co.*¹² With respect again, we are unable to agree with the learned Judges. In the case before the Supreme Court, a notice under sub-s. (5) of s. 12 of the Orissa Act was issued in Form VI which corresponds to the notice in Form XII under the Act with which we are concerned. That form like Form XII of the notice under our Act was a compendious form meant for notices for several purposes. There was a foot-note appended to the form requiring the authority issuing the notice to score out the unnecessary words. One of the complaints urged against the notice was that the unnecessary words not having been scored, the notice was bad in law. That contention was negatived on the ground that since the respondent had no difficulty in understanding what that notice was, the mere circumstance that unnecessary words were not scored did not make the notice bad in law. The next complaint raised against the notice was that the notice was issued for several quarters and an assessment was made for each quarter separately. Thus, in respect of four quarters which were included in the notice, the assessment was made on July 4, 1951, and for the other eight quarters on August 29, 1951. Their Lordships held that the said objection against the validity of the notice was also not maintainable, because the notice which s. 12(5) of that Act required to be given talked of a period and this period might consist of more than one quarter. One notice, therefore, for several quarters would be quite in order though the returns in response to the said notice had to be furnished separately and had also to be assessed separately for each quarter. We are unable to see how the observations of the Supreme Court in that case, namely, that "section 12(5) talks of a period, and the period may consist of more than one quarter", would help in arriving at the proper interpretation of the expression with which we are concerned. The period for which the dealer has been liable to pay tax under the Act may undoubtedly consist of one or more quarters. But the authority of the Sales Tax Officer to make a best judgment assessment against him under s. 11(5) is only in respect of that period consisting of one or more quarters which is within three years of the notice which he can issue under the said provision. We would, therefore, prefer to follow the view taken by the Nagpur High Court in *Firm Sheonarayan Matadin v. Sales Tax Officer* which, it may be pointed out, has been subsequently followed by this Court also in *Ramkrishna Ramnath v. Sales Tax Officer*¹³. In the view that we are taking, therefore, the notices issued by the Sales Tax Officers in the present case will be incompetent except for the last quarter of the year 1959.

We now come to the third and the last contention which has been urged by Mr. Deo in this petition, namely, that having regard to the nature of the transactions between the petitioner and its customers of the type described by the respondents themselves in their affidavit, such transactions do not amount to sales under the Act and if the extended definition of "sale" given in Explanation (I) to that definition seeks to include transactions of this nature, the said Explanation is beyond the legislative competence of the Legislature in

a legislation enacted under entry 48 of the Provincial Legislative List in the Government of India Act, 1935, or under entry 54 of the State List under the Constitution of India. Now, before proceeding to deal with this question, it may be stated that in the petition the petitioner had alleged that the dealings of the petitioner were only financial dealings and there was no sale whatever involved in the said dealings of any articles or goods between the petitioner and the persons with whom it dealt. It was also alleged in the petition that in the transactions with which the petitioner was concerned relating to financing of the purchase of the motor vehicles, there was no sale of any vehicle by the petitioner to the customers. There was in fact a sale direct from the manufacturers of the vehicles to the customers and the arrangement which the customers had with the petitioner was only in the nature of a financing arrangement. This position was controverted in the reply submitted by the respondents and they averred that there was in fact a sale from the dealer of the manufacturer to the petitioner and the subsequent transaction between the petitioner and its customer was in respect of the vehicles which had been sold to the petitioner by the dealer on hire-purchase agreement. In the reply, the respondents gave the nature of the transactions and the mode in which the transactions were brought about and contended that these were transactions of hire-purchase between the petitioner and its customers.

At the hearing of the petition, Mr. Deo stated when a preliminary objection was raised on behalf of the respondents that the petition involved disputed questions of fact, that he would accept that there were amongst the transactions which the petitioner carried on with its customers transactions of the type mentioned by the respondents in their affidavit and that he would confine his submissions with respect to the transactions of that type only. His argument was that the transactions of the type which were described by the respondents and which undoubtedly form a large part of the transactions which the petitioner carried on with its customers were not sales which could be taxed under the Act. Now, the type of transactions described by the respondents which the petitioner accepts as the correct description of some of the transactions entered into by it with its customers is as follows: A person intending to purchase a motor vehicle approaches the dealer of the manufacturer and selects a vehicle and fixes up its price. Then he approaches the petitioner Company with a guarantor and gives a proposal for the hire-purchase of the motor vehicle from the petitioner Company. The Company on accepting this proposal of hire-purchase enters into an agreement for hire-purchase of this vehicle. Then the Company informs the dealer about the agreement to accept a certain sum of money on their behalf and send the bill to it and deliver the vehicle to the customer. The customer, after taking delivery, passes a receipt to the Company of his having received the vehicle in good condition, complete with all tools and accessories. The customer then applies to the Regional Transport Authority under s. 24 of the Motor Vehicles Act. The dealer of the manufacturer prepares the bill in the name of the Company and the delivery of the vehicle to the ultimate customer is then effected on the instructions of the Company. The Company accepts the proposal from the customer for selling the vehicle to him on hire-purchase basis and even after the payment of the agreed amount, the property in the goods passes only on the option exercised by the intending customer. In the hire-purchase agreement the Company describes itself as the owner of the vehicle during the period commencing from the purchase of the vehicle till the property in the vehicle is finally passed by this Company to the ultimate customer as a result of the fulfilment of all the conditions in the agreement. A form of the agreement of hire-purchase typical of this type of transaction has been annexed to the petition at Annexure B. A proposal form regarding the hire-purchase of the motor vehicle from the petitioner Company is also produced along with the petition as Annexure C. A form of the receipt to be passed by the customer for his having received the vehicle from the dealer is given at Annexure E.

Actual documents relating to a transaction of this type have been subsequently filed by Mr. Deo and were handed over to us at the time of hearing. It will be desirable to give some of the relevant clauses of the agreement entered into by the petitioner with its customers, because it is necessary to consider what is the exact nature of this transaction. In this agreement the petitioner Company is described as the owners of the vehicle and the customer as the hirer. The first clause states that the owners being the owners of the vehicle agree to let and the hirer agrees to hire the vehicle from the date of the agreement subject to the terms and conditions contained in the agreement. Under clause II, on the execution of the agreement, the hirer is required to pay to the owners a sum of Re. 1 in consideration of the option to purchase given to the hirer by clause IV of the agreement, and it is provided that the said sum shall become the absolute property of the owners. Under clause III, the hirer has to pay on the execution of the agreement a certain sum of money as an initial payment by way of hire which, though it varies with every transaction, is at least about 25 per cent of the price of the vehicle and he also agrees to pay punctually by monthly instalments further sums of money as specified in the agreement. Under clause IV it is provided that if the hirer duly performs and observes all the terms and conditions of the agreement to be performed and observed by him and pays in the manner provided to the owners monthly sums by way of rent amounting together with the initial payment made by him to a total sum which is the price of the vehicle and also pays to the owners all arrears of money which may become payable by the hirer under the agreement, the hiring would come to an end and the vehicle will, at the option of the hirer, become his property and the owners will assign and make over all their right, title and interest in the same to the hirer, but until such payments as aforesaid have been made the vehicle shall remain the property of the owners. Clause V of the agreement provides that in the event of the hiring under the contract being for any reason whatsoever terminated by either party during the specified number of months, the hirer will pay to the owners a certain sum in addition to certain other sums payable by him under the contract or in law. It is however stated by Mr. Deo that in the actual contracts entered into by the Company with its customers, this clause has been deleted. Clause VI deals with the guarantee of the guarantor.

Amongst the conditions which are stated in this agreement, the first condition states that the hirer would be at liberty at any time during the continuance of the agreement to terminate the hiring by returning the vehicle to the owners, free of all expenses to the owners, but that would be without prejudice to any claims which the owners may have against the hirer under the agreement. What is necessary to consider is what is the exact nature of the transaction. Mr. Deo has contended that the transaction is a contract of hiring and is not a sale. His contention is that under the terms of the agreement there is no contract to sell and there is no passing of the property from the petitioner to the customer in pursuance of the agreement. The essential feature of the agreement which makes it a contract of hiring and not a sale is the option which has been given to the customer to return the goods. Under condition No. 4 of the contract it is provided that even after the payments in terms of the agreement are made by the hirer to the petitioner, the vehicle will become the property of the hirer at his option. Condition No. 1 of the contract provides that during the continuance of the agreement it will be open to the customer to terminate the hiring by returning the vehicle to the owners, and condition No. 5 states that if the hiring is determined by the owners or by the hirer in the manner provided in condition No. 1, all hire up to the date of such determination shall be paid by the hirer to the owners which would mean that there is no liability in respect of the subsequent period. Mr. Deo has, therefore, contended that these features of the agreement take it out of the category of sales. It has been well settled, he argues, that a hire-purchase agreement giving an option to buy or not to buy to the hirer is not

a sale. According to the learned advocate, therefore, the transactions of the type described by the respondents between the petitioner and its customers cannot be sales, so as to come within the definition of sale under the Act even under Explanation (I) to that definition, because, according to him, the term "hire-purchase" in that Explanation must exclude out of its ambit transactions which are not sales and can only cover instances of instalment-buying though designated by the name "hire-purchase". His alternative argument is that if the term "hire-purchase" contained in the Explanation to the definition of "sale" is intended to cover pure contracts of hire-purchase of the type with which we are concerned, the Explanation will be beyond the competence of the State Legislature, because under the relevant entries in the Provincial Legislative List at the material time when the legislation was passed, or even at the present stage, the State Legislature has no power to levy tax on transactions which are other than sales. In support of his submission that the State Legislature cannot, by extending the definition of "sale", include within its ambit transactions which are not sales within the meaning of the Act, Mr. Deo has relied upon the decisions of the Supreme Court in *Sales Tax Officer v. Budh Prakash Jai Prakash*¹⁴ and *State of Madras v. Gannon Dunkerley & Co.*¹⁵

In *Sales Tax Officer v. Budh Prakash Jai Prakash*, the question before the Supreme Court was whether forward contracts which were treated as sales could be taxed under the Sales Tax Act. It was held that it would be proper to interpret the expression "sale of goods" in Entry 48 in List II of the Seventh Schedule to the Government of India Act, 1935, in the sense in which it was used in legislation both in England and India and to hold that it authorises the imposition of a tax only when there is a completed sale involving transfer of title. It was observed that a liability to be assessed to sales tax can arise only if there is a completed sale under which price is paid or is payable and not when there is only an agreement to sell, which can only result in a claim for damages. The power conferred under Entry 48 to impose a tax on the sale of goods can, therefore, be exercised only when there is a sale under which there is a transfer of property in the goods, and not when there is a mere agreement to sell. It was further observed that the State Legislature cannot by enlarging the definition of "sale" as including forward contracts, arrogate to itself a power which is not conferred upon it by the Constitution Act, and the definition of "sale" in s. 2(h) of the U.P. Sales Tax Act was, to that extent, *ultra vires* the Legislature.

In *State of Madras v. Gannon Dunkerley & Co.*, the question before the Supreme Court was whether the definition of sale in the Madras General Sales Tax Act, in so far as it sought to impose a tax on the supply of materials in execution of works contract treating it as a sale of goods by the contractor, was constitutional, and it was held that the expression "sale of goods" in Entry 48 in List II of Schedule VII of the Government of India Act, 1935, cannot be construed in its popular sense but must be interpreted in its legal sense and should be given the same meaning which it has in the Sale of Goods Act. It is a *nomen juris*, its essential ingredients being an agreement to sell movables for a price and property passing therein pursuant to that agreement.

In view of these decisions Mr. Deo has contended that in the transactions of the type with which we are concerned, there is no agreement to sell a vehicle and there is no passing of property pursuant to that agreement and, therefore, there is no sale. The position on the analysis of the terms of the agreement, he says, is this that the petitioner has hired the vehicle to the customer with an offer to him that if at the end of the hiring contract he wishes to buy it, he may buy it or he may not. There is no agreement on the part of the customer to buy the vehicle and consequently there is no agreement to sell between the parties in the present case and there is no passing of property in pursuance of that agreement. The property under the agreement in ques-

tion passes to the buyer only when he exercises the option and not before that. Until then, Mr. Deo says, the contract is a contract of hiring, pure and simple, and such a contract cannot be assessed.

Another case to which he has made a reference for the proposition urged by him is *Damodar Valley Corporation v. State of Bihar*.¹⁶ In that case, the appellant who was the Damodar Valley Corporation had entered into an agreement with two engineering contractors for the construction of a dam. Under the agreement, the Corporation agreed to make available to the contractors such equipment as was necessary and suitable for that construction, but the contractors were to be charged the actual price paid by the appellant for the equipment and machinery thus made available, inclusive of freight and customs duty, if any, as also the cost of transport, but excluding sales tax. The machineries were to remain the property of the appellant until the full price thereof had been realised from the contractors. The appellant agreed to take over from the contractors some of the machineries after completion of the work at their "residual value" which was to be calculated in a certain manner; but that was not an unconditional term. The Corporation was bound to take them over only if it was satisfied that their "residual life" was not less than the standard life fixed by the parties. Under the agreement, the contractors were made responsible for maintaining the equipments in good running condition and could not remove the equipments from site until the full cost thereof had been recovered from them and their removal was not likely to impede the satisfactory prosecution of the work. The contractors had to replenish their stock of spare parts of machineries made available to them by the appellant and when spare parts were supplied to the contractors by the appellant, the contractors were liable for the actual price of those parts inclusive of freight, insurance and customs duty. The question before the Court was whether the transaction between the parties was a mere contract of hiring or a sale within the meaning of s. 2(g) of the Bihar Sales Tax Act. On the terms of the contract, it was held by the Supreme Court that it was a contract of sale and not a contract of hiring. But in deciding that question the Court considered the essential features of a hire-purchase agreement and observed (p. 113):

"...It is well-settled that a mere contract of hiring, without more, is a species of the contract of bailment, which does not create a title in the bailee, but the law of hire-purchase has undergone considerable development during the last half a century or more and has introduced a number of variations, thus leading to categories, and it becomes a question of some nicety as to which category a particular contract between the parties comes under. Ordinarily, a contract of hire-purchase confers no title on the hirer, but a mere option to purchase on fulfilment of certain conditions. But a contract of hire-purchase may also provide for the agreement to purchase the thing hired by deferred payments subject to the condition that the title to the thing shall not pass until all the instalments have been paid. There may be other variations of a contract of hire-purchase depending upon the terms agreed between the parties. When rights in third parties have been created by acts of parties or by operation of law, the question, which does not arise here, may arise as to what exactly were the rights and obligations of the parties to the original contract. It is equally well-settled that for the purpose of determining as to which category a particular contract comes under, the court will look at the substance of the agreement and not at the mere words describing the category. One of the tests to determine the question whether a particular agreement is a contract of mere hiring or whether it is a contract of purchase on a system of deferred payments of the purchase price is whether there is any binding obligation on the hirer to purchase the goods. Another useful test to determine such a controversy is whether there is a right reserved to the hirer to return the goods at any time during the subsistence of the contract. If there is such a right reserved, then clearly there is no contract of sale." Mr. Deo says relying upon this case that the Supreme Court has held that

if there is a right reserved to the hirer to return the goods at any time during the subsistence of the contract, then clearly it is not a contract of sale. In the present case, he says that there is a right reserved to the hirer to return the goods during the subsistence of the contract under condition No. 1. According to the dictum of the Supreme Court, therefore, there is no contract of sale in the present case. He has further referred us to a case decided by the Madhya Pradesh High Court in *Indian Finances Private Ltd. v. Sales Tax Officer*¹⁷ where the hire-purchase agreement was almost identical in terms. The Court held that it was not a contract of sale and could not come within the definition of sale. In that view it held that the Explanation to the definition of "sale" contained in the Madhya Pradesh General Sales Tax Act which is identical in terms with the Explanation given in our Act, swept into the category of sales transactions which were not sale transactions under the Sale of Goods Act, 1930, and thus was *ultra vires* of the State Legislature.

Now, there is no doubt that a contract purely of hiring can never come within the definition of sale. A hire-purchase agreement however, as observed by the Supreme Court, takes a variety of forms having a very wide range, and what its exact legal nature is—whether it is a sale or a contract of hiring with a mere option of purchase on fulfilment of certain conditions—will depend upon what that agreement in substance is. It seems to us that the proper test to determine as to what the true nature of the transaction is, is to look at the substance of the transaction, the intention of the parties in entering into that transaction, and what it is really intended by them to be. An option to purchase given to the buyer may no doubt be indicative that no sale may have been intended by the parties. The mere circumstance that an option to the buyer has been given may not necessarily involve the conclusion that it is not a sale, nor intended to be a sale. What has got to be considered, in our opinion, is to consider the terms of the contract including the option which may have been given to the buyer under the terms of the contract and consider what is the real nature of the transaction. Examining the terms of the contract before us and the circumstances under which it was admittedly entered into between the parties, we find that a customer who entered into the contract with the petitioner was a person who was in need of a motor vehicle and wanted to buy it. He had applied to the dealer of the manufacturer, had complied with the formality of giving a guarantee to the dealer, and when his turn came to get the vehicle from the dealer, had gone and selected the vehicle from the dealer. He had not sufficient funds to pay the price of the vehicle to the dealer of the manufacturer and had, therefore, to enter into the present agreement with the petitioner. In order to enter into the present agreement, he agreed that the vehicle which he had selected and wanted to buy from the dealer of the manufacturer should be bought in the first instance by the petitioner and sold to him under a hire-purchase agreement. It was in these circumstances that the contract between the parties has come into existence. The real agreement between the parties is that the petitioner has agreed to sell the vehicle and the customer has agreed to buy it. The payments which the customer is agreeing to pay to the petitioner under this agreement also indicate that they are paid not only by way of hire but also by way of part payment of the price of the vehicle. The part payment of about 25 per cent. of the price of the vehicle is paid by the initial instalment. The further payment is made in monthly instalments and the quantum of the payment fixed is such that he has to make up the total price of the vehicle within a period of a few months. It is no doubt true that for the character which the transaction has been given by the parties, these payments are spoken of as hire under the agreement. There is however no doubt that they are meant to be part payments in respect of the price of the vehicle. The customer gets the vehicle directly from the dealer but he passes a receipt to the petitioner as having received it from it under

the hire-purchase agreement. That is no doubt done because under the transaction settled between the parties, the property in the first place passes from the dealer of the manufacturer to the petitioner. The customer possesses the vehicle, maintains it, keeps it in repairs, has it registered in his own name with the Transport Authorities as owner thereof, and at the end of the period of the instalments on a nominal payment, exercises his option and becomes the full owner of the property. Having regard to these terms of the agreement, it seems to us that the option to purchase which is mentioned in the agreement between the parties is not so much to emphasise the bailment character of the transaction as to emphasise the character of the transaction as a sale. By the said option which is given only to the buyer either to take delivery or not to take it, the seller is precluded from withdrawing his offer to sell the vehicle. Secondly, having regard to the terms of the contract, it would be reasonable to hold that the option not to buy is hardly likely to be exercised by the customer except in very exceptional circumstances where for things beyond his control, he may not be in a position to pay the entire amounts of the stipulated instalments. It appears to us that it is only in order to safeguard the interests of the petitioner in these exceptional circumstances where the customer may find himself unable to buy the vehicle that the option to buy and liberty to return the vehicle to the petitioner have been included in the agreement. On the examination of the type of the contract that is before us, we do not find any difficulty in coming to the conclusion that it is not a contract of bailment but one in which the element of sale forms an integral part of the contract. This element of sale has been brought in right from the inception of the contract by the option given to the buyer to buy the vehicle. It is a contract in effect for buying the vehicle which completely fructifies at the end of the term of the agreement.

It is no doubt true that the State Legislature cannot by extending the definition of sale include within its ambit transactions which are not sales. It cannot however be denied that transactions which are in substance sales or which contain to a predominant extent an element of sale in them can come within the expression "sale of goods" in the legislative entries in the State List. What under entry 48 in the Provincial Legislative List in the Government of India Act, 1935, or entry 54 in the State List in the Constitution the State Legislature can tax are transactions which are in substance sales. It is true that for a transaction to be a transaction of sale, there must be an agreement to sell and passing of property in pursuance of that agreement. We do not find it possible to hold that in every case where an option to buy is reserved to the buyer, there can be no agreement to sell and no passing of the property in pursuance of the agreement. As we have already pointed out earlier, it must depend upon what the purpose of the option is. Even in spite of such an option in a contract of hire-purchase, the contract may still possess the element of sale in it which may enable the State Legislature to treat it as a sale and tax it under the entry of sale of goods.

The view that we are taking does not appear to be unsupported by authority. In *Commercial Credit Corporation v. Dy. Comm. Tax Officer*,¹⁸ the Madras High Court was concerned with a transaction of a similar nature. After having examined the terms of the transaction in the light of the circumstances under which it was entered into, it was held that the transactions constituted sales rendering them liable to sales tax. It was also held that the transactions, though of hire-purchase, could, having regard to their main intent and purpose, be treated as sales at the moment the agreements were entered into, though of course they would be subject to adjustment by the elimination of such portion of the turnover where no sale resulted. The learned Judges quoted the observations of Goddard J. in *Korflex Ltd. v. Poole*¹⁹ which were to the effect that hire-purchase was a very modern development in com-

mercial life, and that commercial men were inventing new methods of business and using documents which were perhaps unfamiliar at the time when they were first brought into use but which were invented to meet the requirements of a particular time or peculiar circumstances and the law had to be moulded and developed to meet the commercial developments which are taking place. Goddard J. (as he then was) observed in the said case (p. 264):

"Now it does not seem to me by any means to follow that the doctrines which were applied to ordinary simple bailments in bygone days apply to this modern class of bailment which has in it, not only the element of bailment but also the element of sale."

This and other authorities establish that a 'hire-purchase' is a complex contract transcending a mere bailment and conferring on the hirer a legal estate. In the words of a modern writer, the interest of a hirer is *sui generis* and cannot be fitted into the general classification of jurisprudence.

The learned Judges of the Madras High Court, after referring to these observations of Goddard J., said (p. 609):

"...This 'sale-element' which started with the grant of 'the option to purchase' at the inception of the agreement of hire-purchase was an integral part of the hire-purchase transaction, as integral and as important as the bailment element in the shape of the 'hire'. It cannot therefore be said that there was no sale at all involved in the hire-purchase so as to preclude the State Legislature from taxing the transactions."

Mr. Deo's objection with regard to this decision is that according to him, the decision ignores the fact that in a hire-purchase agreement of the type with which we are concerned, there is no contract of sale. The essential thing in sale of goods, he says, is an agreement to sell and property passing in pursuance of that agreement. In order that there should be an agreement of sale, there must be an agreement to buy, and in a contract of the nature with which we are concerned, there is no binding agreement to buy on the part of the buyer and, therefore, there could not be a legal agreement to sell. There is no property passing in pursuance of the agreement because the property remains in the petitioner all throughout during the continuance of the agreement and when it eventually passes, if at all it does, it passes not in pursuance of the agreement but on the basis of the option exercised by the buyer. It is only at that stage that the contract assumes the character of an agreement of sale. It would, therefore, be not proper and legal to say that there is an agreement to sell involved in the case of an agreement wherein the terms of the agreement leave it to the option of the buyer whether to buy the goods or not to buy the goods and where liberty is given to the buyer to return the goods to the other party to the contract at any time during the continuance of the agreement. Mr. Deo in this connection has strongly relied upon the case of *Helby v. Matthews*²⁰. He has argued that this is a leading case on the subject of hire-purchase contracts.

Now, in *Helby v. Matthews* one Brewster, under an agreement in writing dated December 23, 1892, with Helby who was the owner of a piano had obtained possession of the said piano. Subsequently on April 22, 1893, Brewster, improperly and without the consent of the appellant, pledged the piano with the respondents, who were pawnbrokers, as security for an advance. Helby, upon discovering this, demanded the piano from Matthews and others, and on their refusing to deliver it, brought an action of trover. The defence of Matthews and others was that they had received the piano from Brewster in good faith, and without notice of any claim on the part of Helby, and that Brewster having bought or agreed to buy it from him they were protected by s. 9 of the Factors Act. In view of the defence taken by the defendants, it became necessary to consider what was the true nature of the agreement between Brewster and Helby. That agreement was in the form of a hire-purchase agreement. Helby was described as the owner and Brewster as the hirer in the said agreement. It was stated that the owner had agreed at the request

of the hirer to let on hire to the hirer the piano which was the subject-matter of the agreement on the terms as stated in the agreement. The material terms of the agreement were that the hirer was to pay the owner on December 23, 1892, a rent or hire instalment of ten shillings six pence and ten shillings six pence on the 23rd of each succeeding month. He was to keep and preserve the said instrument from injury, damage by fire included; to keep the said instrument in the hirer's own custody at the place of the hirer stated in the agreement, and not to remove the same or permit or suffer the same to be removed without the owner's consent in writing. If the hirer did not duly perform this agreement, the owner was at liberty, without prejudice to his rights under the agreement, to terminate the hiring and retake possession of the piano, and for that purpose, leave and licence was given to the owner to enter any premises occupied by the hirer and to retake possession of the instrument. The hirer was at liberty to terminate the agreement and return the instrument to the owner, and in that event the hirer was to remain liable to the owner for arrears of hire up to the date of such return and on no ground was entitled to any allowance, credit, return, or set-off for payments previously made. It was then provided that the owner agreed—

A. That the hirer may terminate the hiring by delivering up to the owner the said instrument.

B. If the hirer shall punctually pay the full sum of £ 18 18s. by 10s. 6d. at the date of signing, and by 36 monthly instalments of 10s. 6d. in advance as aforesaid, the said instrument shall become the sole and absolute property of the hirer.

C. Unless and until the full sum of £ 18 18s. be paid, the said instrument shall be and continue to be the sole property of the owner.

The question before the Court was whether on the true nature of the transaction involved in this agreement it was a contract of buying or a contract of hiring, and the question depended upon whether on a true construction of the agreement Brewster had agreed to buy the piano. It was held at the House of Lords that there was no agreement to buy on the part of Brewster under the terms of the said agreement. Lord Herschell L.C. observed (p. 475):

"...An agreement to buy imports a legal obligation to buy. If there was no such legal obligation, there cannot, in my opinion, properly be said to have been an agreement to buy."

He then proceeded to consider the terms of the agreement and see whether Brewster had agreed to buy under the agreement and found that the position under the agreement was that Brewster might buy or not just as he pleased. The learned Lord Chancellor on a consideration of the terms of the agreement observed (p. 475):

"...He did not agree to make thirty-six or any number of monthly payments. All that he undertook was to make the monthly payment of 10s. 6d. so long as he kept the piano. He had an option no doubt to buy it by continuing the stipulated payments for a sufficient length of time. If he had exercised that option he would have become the purchaser. I cannot see under these circumstances how he can be said either to have bought or agreed to buy the piano. The terms of the contract did not upon its execution bind him to buy, but left him free to do so or not as he pleased, and nothing happened after the contract was made to impose that obligation."

It was observed by the learned Law Lord that although from the terms of the agreement it was very likely that both parties had thought that it would probably end in a purchase, that was far from saying that it was an agreement to buy. There was no indication in the contract from which an intention to buy on the part of the buyer could necessarily be spelt out. The agreement was in terms just as applicable to a case where one was intending to buy as to the case where one only intended to hire and had resolved to continue the payments for a period of three years. The learned Law Lord observed: "In such a case how could it be said that he had agreed to buy when he had not only come under no obligation to buy, but had not even made up his mind to

do so?" Lord Watson in his speech, after referring to the stipulations contained in the contract, observed (p. 479):

"These stipulations, in my opinion, constitute neither more nor less than a contract of hiring, terminable at the will of the hirer, coupled with this condition in his favour, that, if he shall elect to retain it until he has made thirty-six monthly payments as they fall due, the piano is then to become his property. The only obligation which is laid upon him is to pay the stipulated monthly hire so long as he chooses to keep the piano. In other words, he is at liberty to determine the contract in the usual way, by returning the thing hired to its owner. He is under no obligation to purchase the thing, or to pay a price for it. There is no purchase and no agreement for purchase, until the hirer actually exercises the option given to him."

The learned Law Lord further observed (p. 479):

"Apart from the arrangement for hire of the piano, the only right given to Brewster by the agreement in question was the option to become a purchaser. It is true that whilst he was under no obligation to buy, the appellant was legally bound to give him that option, and could not retract it, if the other stipulations of the contract were duly observed by the hirer. But the possession of such a right of option was, in no sense, an agreement by Brewster to buy the piano; and the appellant's obligation to give the option was not, in the sense of law, an agreement by him to sell. In order to constitute an agreement for sale and purchase, there must be two parties who are mutually bound by it. From a legal point of view the appellant was in exactly the same position as if he had made an offer to sell on certain terms, and had undertaken to keep it open for a definite period. Until acceptance by the person to whom the offer is made there can be no contract to buy. So long as the agreement stood unaltered there could, in this case be no contract to purchase by Brewster until he had complied with the terms of the option given him and had duly made the thirty-six monthly payments which it prescribes as the condition of his becoming owner of the piano."

Mr. Deo's argument based on this decision is that in every contract of hire-purchase in which there is an option given to the hirer to purchase on the fulfilment of the terms of the agreement and where the terms of the agreement further entitle him to return the goods at any time during the continuance of the contract and absolve him from any liability to make the further payments under the contract, there is no agreement to buy and no agreement to sell and, therefore, no contract of sale involved. Now, it cannot be denied that the features mentioned by Mr. Deo are features which have an important bearing on determining the true legal nature of the transaction between the parties. What is however necessary to consider is: are these features capable of conclusively determining in each case of hire-purchase the nature of the transaction? Even in *Helby v. Matthews* the learned Lord Chancellor started by saying that it is the substance of the transaction evidenced by the agreement that must be looked at and not mere words. The substance of the agreement no doubt must be ascertained from a consideration of the rights and obligations of the parties to be derived from the terms of the contract itself understood in the light of the surrounding circumstances. In *Helby v. Matthews* they considered the terms of the agreement which was before them and gathered the substance of the agreement from the said terms having regard to the important feature which they mentioned and concluded that the transaction was a transaction of hiring with a further condition that an option was given to the hirer to become the owner of the hired article if he desired to do so. The terms of the agreement were that there was a uniform payment by way of monthly hire required to be made by the hirer to the owner so long as he possessed the hired article. He was in a position to return it at any time but was also enabled to retain it as an owner if he continued to pay the instalments regularly for a period of 36 months. In view of these terms, their Lordships observed that there was nothing to indicate from the contract that the parties to the contract from the very inception were intending to sell and purchase the article. In other words, the contract before the Court was such which, on a true construc-

tion of all the terms of the agreement, did not indicate that the hirer had made up his intention to buy the article which was hired. There was also no legal obligation undertaken by him to buy whereby he could have been bound. Now, that can no doubt be the case in a large number of hire-purchase agreements. Thus, for instance, if the owner of the article lets it on hire to the hirer on terms that he should pay a monthly hire as long as he wants to possess the instrument; but if at any time during the continuance of the agreement he wants to become the owner of the article, he may, by making a further payment, become the owner of the article, or, for the matter of that, if he continues to pay instalments for a certain interval of time, he may have the option to become the owner of the article if he chose. In such a case obviously no intention to sell on the part of the owner or no intention on the part of the buyer to purchase could be said to have existed at the time the agreement was entered into. Where, however, we have from the nature of the transaction, from its terms and the surrounding circumstances in which the terms have to be construed and understood that there can be no doubt whatever that the owner and the hirer were intending to sell and purchase the article which was the subject-matter of the agreement right from the time the contract was made, the mere circumstance that the contract also included for certain purposes of convenience of the parties a term as to the option of the buyer to buy or a term as to his being able to return the goods during the continuance of the agreement, these terms would not necessarily have the effect of making the agreement different from what it was really intended to be between the parties. It seems to us, therefore, that what has got to be considered is the true nature of the transaction and what that transaction in substance is. In the case of the transactions of the type which are before us there does not appear to be any doubt whatsoever that in spite of the terms of the contract which could possibly be construed as being indicative of different nature, the parties nevertheless intended to enter into an agreement of purchase and sale. The hirer under the agreement is obviously a person who wants to buy a vehicle. He applies to the dealer, selects a vehicle and pays the initial deposit. What he wants is to avail himself of what is called credit buying and it is for the purpose of having the benefit of credit buying that he enters into the transaction with the petitioner. He wants to buy a car but he has not the funds for the payment down in cash for the car. He, therefore, permits the petitioner to buy the car with its funds and then eventually pass it on to him under a hire-purchase agreement. The process in the present transaction, it appears to us, is a process of credit buying taken advantage of by the buyer. The terms of the agreement, apart from the option given to the buyer and the liberty reserved to him to return the goods, are clearly in favour of such a construction. The initial payment of about 25 per cent. of the price of the article and the heavy payments which are required to be made by way of monthly hire are all indicative of the payments being made towards the price of the vehicle and not purely for the hire of the vehicle for the time for which the vehicle is possessed by the hirer. Having regard to these other terms of the agreement, it seems to us that the option given to the purchaser to buy the vehicle is not so much as to leave him free whether to have the article or not and is not so much to indicate that he has not made up his mind to buy when he enters into the agreement but only to bring in the element of sale, thus preventing the petitioner from refusing to sell the article to the buyer. The option again, considered from the point of view of the petitioner, is for the benefit of the petitioner as well, because it safeguards the petitioner as against the rights of the parties which may come into existence during the term of the agreement. The result of the option is that the passing of the property which is intended to pass in pursuance of the agreement is postponed to the end of the agreement. The liberty given to the buyer to return the goods during the continuance of the contract is not so much to keep him a free agent to terminate the contract of hiring whenever he wants but to provide for the exceptional

cases where by reason of things beyond the control of the buyer, he is not in a position to pay the monthly instalments agreed to and thus fulfil the agreement. Having regard to the true nature of the transaction, it seems to us that it is a contract with a predominant element of sale in it from its inception which under the terms of the contract fructifies into a completed sale at the end of it. The parties to the contract have intended to buy and to sell. There is a contract therefore to sell, though the operation of the contract is to take effect in a manner so that it may have during its operation an element of bailment also involved in it. In our opinion, therefore, although no doubt as contended by Mr. Deo relying on the authority of *Helby v. Matthews* that in determining the true nature of a transaction of hire-purchase the term of option given to the hirer and the term of liberty reserved to him to return the goods during the continuance of the contract are terms which have an important bearing in determining the nature of the transaction, we do not think that they are in every case conclusive of the nature of the transaction. They are undoubtedly of great help in determining the true nature of the transaction, but it is on a consideration of the entire terms of the contract read in the light of the surrounding circumstances that the true nature of the transaction has to be determined, and it is possible that even in case where the option to purchase and the liberty to return the goods are reserved in the contract, the contract in its true nature may still be a contract of sale and not merely a contract of hiring with an option to purchase. We must see what is the purpose of introducing the terms as to the option to purchase and liberty to return the goods during the subsistence of the contract. If on a consideration of all the terms of the agreement, it is found that these terms have been intended for the benefit of a buyer who has not made up his mind to buy at the time when he entered into the contract, to leave him free to make up his mind at any later stage and have an option of buying or not buying the article and return it to the owner at any time he liked, then of course the contract will not be an agreement of sale. If, on the other hand, it is clear that the parties to the contract have intended it to be a sale although they have introduced these terms in the working out of the contract for their mutual benefit and convenience, the mere presence of the terms will not, in our opinion, destroy the character of the contract between the parties as an agreement to buy and to sell. What is necessary to consider is whether the transaction in substance is a transaction of sale although an element of bailment is added to it, or whether it is contract of hiring with an added offer to the hirer to buy the hired article at his option.

Another case which may be referred to in this connection is that reported in *Instalment Supply (Private) Ltd. v. Union of India*.²¹ The Supreme Court in that case had to consider the true nature of a transaction of the same type which is before us in the present case. Having considered the true nature of the transaction, their Lordships observed (p. 500) :

"There is, thus, no doubt that the agreement in question does contain not only a contract of bailment *simpliciter* but also an element of sale, which element has been seized upon by the legislature for the purpose of subjecting a transaction like that to the sales tax."

Mr. Deo has brought to our notice the contrary view taken in two cases, the first of which is reported in *Instalment Supply Limited v. State of Delhi*.²² The transaction which was considered in that case was similar in terms to the transaction before us. It was held by the Punjab High Court in that case relying on *Helby v. Matthews* and certain other English cases that having regard to the option given to the buyer there was no contract of sale. The other case referred to by him is of the Madhya Pradesh High Court reported in *Indian Finance Private Ltd. v. Sales Tax Officer*. The same view is taken in that case as has been taken in *Instalment Supply Limited v. State of Delhi* referred to above. It appears to us that in both these cases, the learned Judges

21 (1961) 12 S.T.C. 489.

22 (1956) 7 S.T.C. 586.

who decided them took the view that the presence of the option was always and necessarily destructive of the contract ever being an agreement to sell and to purchase. As we have already pointed out, we are unable to agree with that view. According to us, it is from the real nature of the transaction as gathered from all the terms of the contract including the terms relating to the option and the liberty reserved to the buyer to return the goods that the true nature of the transaction must be determined and it is possible that in the several forms of credit buying transactions which are invented in the present times to serve the needs of the buyers and the sellers, the mere existence of an option will not be sufficient to characterise the transaction as a transaction not intended to be a sale.

If as we have held, the transactions of the type which is before us are substantially intended to be transactions of sale and purchase and contain the elements of sale which fructify at the end of the agreement, there would be no difficulty in holding that they can be regarded as transactions of sale, so as to bring them within the definition of sale under the Act. There will also be no difficulty in treating them as transactions of sale from the inception, subject of course to adjustment in the event the sale element fails to fructify. So far as this contention is concerned, our conclusions are, with respect, the same as have been arrived at by the Madras High Court in *Commercial Credit Corporation v. Dy. Commercial Tax Officer*, namely—

(i) that the transactions of hirepurchase entered into by the petitioner constitute sales rendering them liable to tax on their turnover except in cases where either owing to the default on the part of the hirer in the payment of the instalments of hire, the vehicle was seized by the petitioner or in cases where the vehicle was returned by the buyer to the petitioner under the liberty reserved to him under the agreement;

(ii) that the transactions of hire-purchase of the type before us could, having regard to their main intent and purpose, be treated as sales at the moment the agreements were entered into, subject to adjustment by elimination of such turnover where no sales resulted; and

(iii) that for the purposes of computing the turnover of the petitioner, the total of the hire stipulated to be paid in instalments should be treated as the price or consideration for the sale.

Having regard to the conclusions to which we have arrived, we must hold that the petitioner fails on the first point urged by him, namely, that the notices issued by the Sales Tax Officers in the present case are invalid by reason of a notice under sub-s. (1) of s. 10 not having been issued prior to the issuance of the notices complained of. On the second point which he has urged, he succeeds to the extent that the notices issued against him by the Sales Tax Officers are incompetent for all periods except the last quarter of the year 1959 commencing from October 1, 1959 and ending on December 31, 1959. On the third point which has been urged by him, he fails. Having regard to these conclusions, the petitioner will be entitled to a declaration that the impugned notices issued to him by the Sales Tax Officers, Nagpur and Wardha, are incompetent except for the last quarter of the year 1959 commencing from October 1, 1959 and ending on December 31, 1959, and a further direction not to give effect to the said notices in respect of the period which is covered by them except the said last quarter from October 1, 1959 to December 31, 1959. We order accordingly. We will also make it clear that the petition has been heard by us only in respect of the three contentions which we have set out. All other contentions which the petitioner is entitled to urge before the Sales Tax Authorities and which are not covered by our decision, he will be at liberty to raise. Having regard to the circumstances of the case, there will be no order as to costs.

Order accordingly.

[NAGPUR BENCH]

Before Mr. Justice Tambe and Mr. Justice Abhyankar.

SYED MOHOMMAD ILYAS ALVI v. STATE OF MAHARASHTRA.*

Constitution of India. Arts. 235, 50, 233-237, 310, 311—General Clauses Act (X of 1897). Sec. 16—Government of India Act, 1935 [25 & 26 Geo. 5, Ch. 42], Secs. 253, 254, 255—Bombay Civil Services Conduct, Discipline and Appeal Rules. Appendix I. Civil Services (Classification, Control and Appeal) Rules. Rule 57—Disciplinary jurisdiction over District Judges and Judges subordinate to them—Such jurisdiction whether vests exclusively in High Court—Whether decision regarding holding departmental inquiry or action for misconduct against aforesaid Judges vests exclusively with High Court—Power of dismissal or removal of such Judges how to be exercised—Course to be adopted where High Court finds that probable consequence of charges against judicial officer being proved would end in his dismissal or removal—Observations made by High Court on report of Enquiry Officer or on reply to show cause notice whether must be disclosed to party affected—Such observations whether privileged document.

Under the Constitution of India the disciplinary jurisdiction over District Judges and Judges subordinate to them vests exclusively in the High Court except making an order of dismissal or removal. The decision in the matter of starting a departmental enquiry or action for misconduct against a District Judge or a Judge subordinate to a District Judge vests exclusively with the High Court. The power of dismissal and removal of District Judges and Judges subordinate to District Judges vests in the Governor. The exercise of the aforesaid power of dismissal and removal of District Judges by the Governor has to be in consultation with the High Court.

Where on preliminary investigation the High Court comes to the conclusion that the probable consequence of the charges against a judicial officer being proved would be one of dismissal or removal of the judicial officer, the course that should be adopted would be to refer the matter to the Governor recommending appointment of an enquiry officer which is the first stage of giving a reasonable opportunity to a public servant.

Md. Ghouse v. State of Andhra,¹ concurred with.

Nripendra Nath v. Chief Secy. Govt. W. B.,² commented on.

State of Bombay v. Hospital Mazdoor Sabha,³ *K. V. Rayarappan Nayanar v. K. V. Madhavi Amma*,⁴ *Pradyat Kumar Bose v. The Hon'ble the Chief Justice of Calcutta High Court*,⁵ *Bachhattar Singh v. State of Punjab*⁶ and *Mohd. Ghouse v. State of Andh. Pra.*,⁷ referred to.

The power conferred on the Governor by art. 233 read with art. 310 of the Constitution and s. 16 of the General Clauses Act, 1897, to dismiss or suspend a civil servant has to be exercised in the same manner as the power of appointment under art. 237 is to be exercised, that is, in consultation with the High Court.

The observations of the High Court made on the report of the Enquiry Officer appointed by the Governor on the recommendation of the High Court to hold a departmental inquiry on a charge of corruption against a civil servant and also the observations of the High Court on the cause shown by the civil servant form part of the consultation provided for in art. 233, and the civil servant cannot make a grievance for non-disclosure of these observations to him. Such observations do not form part of the evidence which goes to establish his guilt or innocence.

The observations of the High Court would be a privileged document and, therefore, no complaint can be made of non-disclosure of that document.

*State of Punjab v. S. S. Singh*⁸ and *Har Prasad Gupta v. State of U.P.*,⁹ referred to.

*Decided, August 7, 1964. Special Civil Application No. 12 of 1963.

¹ [1955] A.I.R. Andhra 65.

² [1901] A.I.R. Cal. 1, S.B.

³ [1960] A.I.R. S.C. 610, s.c. 62 Bom. L.R.

553.

⁴ [1949] F.C.R. 667.

⁵ [1955] 2 S.C.R. 1331.

⁶ [1968] A.I.R. S.C. 805.

⁷ [1959] A.I.R. Andhra 497.

⁸ [1961] A.I.R. S.C. 498.

⁹ [1963] A.I.R. All. 415.

Where the original order of dismissal itself is passed by the Governor there can be no appeal to the Governor against his own order under r. 57 of the Civil Services Conduct, Discipline and Appeal Rules.

The authority which is enjoined with a duty to act in a quasi judicial manner must disclose to the person against whom action has been taken material which is in the nature of evidence on the acceptance or rejection of which turns the decision as to the guilt or innocence of the person against whom an enquiry is held or against whom an action is being taken. Evidence tendered to establish a case must not be received behind the back of the person inasmuch as that would result in denial of an opportunity to that person of rebutting that evidence.

State of M. P. v. Chintaman,¹⁰ *State of Mysore v. Manche Gowda*,¹¹ *Ramrao v. Accountant General*,¹² *Brajlal v. Union of India*,¹³ *R. v. Architects' Registration Tribunal*¹⁴ and *R. v. Stafford Borough Justices*,¹⁵ referred to.

THE facts are stated in the judgment.

M. N. Phadke and *M. W. Puranik*, for the petitioner.

R. B. Kotval, Government Pleader, with *G. R. Mudholkar*, Additional Government Pleader, for the State of Maharashtra.

TAMBE J. By this petition under arts. 226 and 227 of the Constitution of India, the petitioner seeks to get quashed the order of his dismissal of date August 30, 1961, and also to get quashed the further order of dismissal of his appeal of date October 16, 1962. The petitioner further prays for issuance of a writ of *mandamus* to the respondent, namely, the State of Maharashtra, to treat the petitioner as if the orders dated August 30, 1961, and October 16, 1962, were not passed.

The petitioner joined the Provincial Judicial Service of the State of Madhya Pradesh. He was recruited as a Civil Judge, Second Class. On the eve of reorganisation of States that is on October 31, 1956, the petitioner was holding a post of an Additional District and Sessions Judge (confirmed) at Seoni. He was allotted on reorganisation to the State of Bombay. The petitioner in the reorganised State of Bombay was holding a post of Assistant Judge and at the material time, that is on September 30, 1959, the petitioner was holding a post of an Assistant Judge and Additional Sessions Judge, Sangli. Prior to his posting at Sangli, the petitioner was holding a post of an Assistant Judge and an Additional Sessions Judge at Amravati. The High Court on certain information received by it had directed the District and Sessions Judge, Amravati, Shri Hadole and also the Anti-Corruption Department to hold a confidential enquiry into the conduct of the petitioner. On receiving the confidential report and on its perusal the High Court was of the opinion that there was a *prima facie* case for a regular departmental enquiry to be started against the petitioner. The High Court recommended to the State Government that a departmental enquiry should be started against the petitioner and that the District and Sessions Judge at Nagpur Shri Seth should be appointed an Enquiry Officer. The recommendations of the High Court were accepted by the State Government and by its letter of date September 30, 1959, the State Government informed the Registrar of the High Court that the recommendations of the High Court were accepted, that Mr. Seth, District Judge, Nagpur, was appointed an Enquiry Officer to hold the enquiry and further requested the Registrar to communicate this order to the petitioner and also to request the petitioner to proceed on leave immediately pending completion of the departmental enquiry as an alternative to suspension. The order which the Government had made in this respect was sent to Mr. Seth, District Judge,

10 [1961] A.I.R. S.C. 1623.

11 [1964] A.I.R. S.C. 509.

12 [1962] 65 Bom. L.R. 65, S.C. [1963] A.I.R. Bom. 121.

13 [1964] Mah. L.J. 500.

14 [1945] 2 All E.R. 181.

15 [1962] 1 All E.R. 540.

Nagpur. Intimation of the aforesaid communication was duly given by the Registrar to the petitioner. Mr. Seth framed charges and communicated to the petitioner on or about December 8, 1959, the charges framed against the petitioner and the statements of allegation on the basis of which the charges were framed. The charges framed against the petitioner were two. The first charge framed against the petitioner was that he was guilty of dishonourable and corrupt conduct and had indulged in corrupt practices while working as First Additional District and Sessions Judge, Amravati, during the period from June 21, 1957, to March 31, 1959. In the first charge framed, two specific instances, instances (a) and (b), of the corrupt practices were given. The second charge was that the petitioner knowingly associated himself with litigants whose matters had been decided by him or whose matters were pending before him and were to be heard by him and that he had conducted himself in a manner which was unworthy of a person occupying a judicial office and had thereby brought the judiciary in disrepute. The petitioner after receiving the charges, duly filed his written statement on December 22, 1959. Mr. Seth after holding a departmental enquiry submitted his report of date February 27, 1960. On August 30, 1960, a show cause notice was issued to the petitioner calling upon him to show cause within 30 days of the receipt of the notice why the proposed action, namely, dismissal, should not be taken against him. The petitioner showed cause by his reply dated September 29, 1960. After considering the reply, the order of dismissal was made on August 30, 1961, by the Governor of Maharashtra. The order is signed by the Secretary to the Government of Maharashtra, Law and Judiciary Department, by order and in the name of the Governor of Maharashtra. Along with the order of dismissal of the petitioner a copy of the extract of the letter from the Secretary, Maharashtra Public Service Commission, was also sent to the petitioner. On September 14, 1961, the petitioner submitted an appeal to the Governor through the Secretary, Law and Judicial Department and the Registrar, High Court, purporting to be one under rule 57 of the Civil Services (Classification, Control and Appeal) Rules which have been incorporated as Appendix I in the Bombay Civil Services Conduct, Discipline and Appeal Rules. This appeal was dismissed by an order dated October 16, 1962. By this petition which has been instituted on December 17, 1962, the petitioner, as already stated, is seeking to get quashed these two orders, the order of his dismissal and the order dismissing the appeal against the order of dismissal.

Mr. Phadke, learned counsel for the petitioner, has raised three contentions before us. Mr. Phadke firstly contends that the order made by the Governor on September 30, 1959, appointing Mr. Seth to hold a departmental enquiry in respect of the alleged charges was wholly without jurisdiction, consequently all further orders made, namely, the report of Mr. Seth and the order of dismissal made by the Governor have been vitiated and are invalid and inoperative in law. The jurisdiction to hold a departmental enquiry and to appoint an officer to hold a departmental enquiry exclusively vests in the High Court. Secondly, Mr. Phadke contends that even assuming that the Governor had jurisdiction to appoint an enquiry officer to hold an enquiry, the order of dismissal made is vitiated being one in contravention of principles of natural justice. And, lastly, Mr. Phadke contends that the right of appeal which has been conferred by r. 57 on the petitioner has been denied to him inasmuch as independent mind had not been applied to the consideration of his appeal. Mr. Kotwal, learned Government Pleader, on the other hand, contends that the jurisdiction to hold a departmental enquiry exclusively vests in the Governor and, therefore, the order made by the Governor on September 30, 1959, appointing Mr. Seth to hold a departmental enquiry was a perfectly valid order made with jurisdiction. The order of dismissal made by the Governor has not been vitiated by reason of contravention of any principles of natural justice, and lastly Mr. Kotwal contends that the petitioner gets no right of appeal

under the aforesaid r. 57. We would proceed to consider these contentions of the respective parties seriatim.

The first contention of Mr. Phadke and Mr. Kotwal principally turns on the construction of arts. 227, 233, 234, 235, 309, 310 and 311 of the Constitution of India. We think, before we proceed to deal with the arguments of counsel for parties, it will be convenient to consider relevant provisions of the Constitution.

Part VI of the Constitution relates to the States and Chapter V thereof relates to the High Court in the States. Article 217(1) provides that every Judge of a High Court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the Governor of the State, and, in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court. Article 218 provides that cls. (4) and (5) of art. 124 shall apply in relation to a High Court as they apply in relation to the Supreme Court with the substitution of references to the High Court for references to the Supreme Court. Clauses (4) and (5) of art. 124 relate to the procedure to be followed for the removal of a Judge of the Supreme Court and, with adaption in art. 218, for the removal of the High Court Judge. It would be seen that the Judges could only be removed by the order of the President and after an address by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting has been presented to the President. Article 227(1) provides that every High Court shall have superintendence over all Courts and tribunals throughout the territories in relation to which it exercises jurisdiction. Clause (2) of that article provides that without prejudice to the generality of the powers conferred on the High Court by the aforesaid cl. (1) the High Court may call for certain returns and make and issue general rules, prescribe forms etc.

Chapter VI deals with 'Subordinate Courts' to the High Court and the said Chapter consists of arts. 233 to 237, both inclusive. Article 233 deals with appointment of District Judges and cl. (1) thereof provides that appointments of persons to be, and the posting and promotion of, District Judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State. Clause (2) provides that a person not already in the service of the Union or of the State shall only be eligible to be appointed a District Judge if he has been for not less than seven years an advocate or a pleader and is recommended by the High Court for appointment. Article 234 relates to recruitment of persons other than District Judges to the Judicial service and it provides that the appointments of persons other than District Judges to the Judicial service of a State shall be made by the Governor of the State in accordance with rules made by him in that behalf after consultation with the State Public Service Commission and with the High Court exercising jurisdiction in relation to such State. Article 235 vests in the High Court control over District Courts and Courts subordinate thereto including the posting and promotion of, and the grant of leave to, persons belonging to the judicial service of a State and holding any post inferior to the post of District Judge. Article 236 provides a dictionary for the expression "district judge" and it is sufficient to state that in cl. (a) of art. 236, Assistant Judge is included in the expression District Judge. Clause (b) provides a dictionary for the expression 'judicial service'.

Part XIV of the Constitution relates to services under the Union and the States. Articles 309, 310 and 311 fall in Chapter I of this Part, and art. 309 confers power on the appropriate Legislature to enact law subject to the provisions of the Constitution to regulate the recruitment and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State. The proviso to this article confers power on the President or the Governor to make rules in this respect until provi-

sion in that behalf is made by or under an Act of the appropriate Legislature under this article. Clause (1) of art. 310 provides, except as expressly provided by the Constitution, every person who is a member of a defence service or of a civil service of the Union or of an all-India service or holds any post connected with defence or any civil post under the Union, holds office during the pleasure of the President, and every person who is a member of a Civil service of State or holds any civil post under a State holds office during the pleasure of the Governor of the State.

Article 311, as it stood prior to its amendment by the Constitution (15th Amendment) Act, reads as follows:

"(1) No person who is a member of a civil service of the Union or an all-India service or a civil service of a State or holds a civil post under the Union or a State shall be dismissed or removed by an authority subordinate to that by which he was appointed.

(2) No such person as aforesaid shall be dismissed or removed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him."

We may state here that no law regulating recruitment and conditions of service of persons appointed to the said services has been enacted by the State Legislature nor have there been any rules framed by the Governor after the Constitution came into force. However, there had been rules framed under s. 96(5) of the Government of India Act, 1915, as amended by the Amending Act of 1919. These rules were framed in the year 1930 and they are called Central Civil Services (Classification, Control and Appeal) Rules. It is not in dispute that the rules which may be required to be considered for the purpose of this case are r. 49, which enumerates penalties, r. 52, which relates to the disciplinary authority, r. 85, which prescribes the procedure to be followed at the enquiry and r. 57, which relates to the right of appeal. These rules were continued both under the Government of India Act by virtue of s. 276 and art. 313 of the Constitution. That article provides that until other provision is made in this behalf under this Constitution, all the laws in force immediately before the commencement of this Constitution and applicable to any public service or any post which continues to exist after the commencement of this Constitution, as an all-India service or as service or post under the Union or a State shall continue in force so far as consistent with the provisions of this Constitution.

Considering the aforesaid provisions, the position that emerges is that superintendence and control over all Courts subordinate to it vests in the High Court. The power of posting, promotion and appointment of District Judges is conferred on the Governor in consultation with the High Court. Posting of a person not in judicial service to a post of a District Judge rests with the Governor on the recommendation of the High Court. The power of appointing Judges other than District Judges to the judicial service rests with the Governor. Exercise of that power is controlled in accordance with the rules made by the Governor in that behalf after consultation with the State Public Service Commission and the High Court. Control over the subordinate judiciary (District Judges and Judges subordinate to them) vests in the High Court. Tenure of office of a subordinate Judicial Officer is at the pleasure of the Governor, but it is now well settled that the exercise of that pleasure is subject to two conditions provided in art. 311 of the Constitution, namely, the civil servant cannot be dismissed or removed by an authority subordinate to that by which he was appointed, and the second restriction is that such a person cannot be dismissed or removed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him.

It is the argument of Mr. Phadke that superintendence and control over subordinate Courts vest in the High Court under arts. 227 and 235 of the Con-

stitution. The High Court, therefore, has exclusive jurisdiction in disciplinary matters. No doubt, the power of appointing District Judges as well as Judges subordinate to District Judges rests with the Governor and ordinarily all the powers in relation to suspension and dismissal would by implication also rest with the Governor by virtue of s. 16 of the Central General Clauses Act. But such power cannot be read in arts. 233 and 234 inasmuch as in art. 235 a 'different intention appears'. Article 310 no doubt provides that the tenure of a civil servant shall be at the pleasure of the Governor but that pleasure has to be exercised subject to the qualifications mentioned in art. 311 and one of the qualifications is that he has to be afforded a reasonable opportunity to show cause against the proposed action. That opportunity has to be afforded to him in accordance with the provisions of law. The disciplinary authority being the High Court under art. 235, a reasonable opportunity has to be afforded by the High Court. The High Court, therefore, had to appoint an officer to conduct the departmental enquiry and it was the High Court and the High Court alone which could have made that appointment. According to Mr. Phadke, on the construction of these articles the position that emerges is that the High Court being the exclusive disciplinary authority, it must appoint an officer to hold a departmental enquiry. It is the High Court that must consider the report, and if the High Court comes to the conclusion on consideration of the report that the charges proved merit dismissal or removal, then in that event the High Court has to recommend to the Governor that the said civil servant should be dismissed or removed from service, the Governor being the appointing authority. If, on the other hand, the High Court comes to the conclusion that the charges proved against the civil servant are not such as would require or merit imposition of penalty of dismissal or removal, then it is not necessary for the High Court to refer the matter to the Governor. It can impose penalty it thinks proper on the individual officer. Mr. Phadke placed reliance in support of his contention on the decision of a Special Bench of the Calcutta High Court in *Nripendra Nath v. Chief Secy. Govt. W. B.*,¹ *Mad. Ghose v. State of Andhra*² and *Mohd. Ghose v. State of Andh. Pra.*³

Mr. Kotwal, on the other hand, argued that the proper approach to the case would be first to consider relevant articles other than art. 235 and ascertain their contents. Control that is vested in the High Court under art. 235 is what has not been conferred on other authorities under articles other than art. 235. According to Mr. Kotwal the power of appointing both District Judges as well as Judges subordinate to District Judges rests with the Governor. Reading these articles along with s. 16 of the General Clauses Act, that power of appointing will also include the power to dismiss or suspend District Judges as well as Judges subordinate to District Judges. The power of dismissal and suspension is not expressly given in arts. 233 and 234 because s. 16 of the General Clauses Act was already there. He drew our attention to certain observations in *K. V. Rayarappan Nayanar v. K. V. Madhavi Amma*.⁴ He further argued that the submission made by him is also strengthened because it is the Governor who has been empowered to make rules regulating conditions of service of a civil servant. Expression 'conditions of service' include the circumstances under which a person could be dismissed or removed. Further under art. 310 a civil servant in the State holds office during the pleasure of the Governor. No doubt the pleasure has to be exercised subject to the conditions mentioned in art. 311. But it is the Governor who has to afford a reasonable opportunity to the public servant who is proposed to be removed or dismissed from service. Reading all these provisions together, it is the Governor who has a right to appoint, therefore a right to dismiss. It is the Governor who has power to frame rules regulating conditions of service which in-

1 [1961] A.I.R. Cal. 1, S.B.

2 [1955] A.I.R. Andhra 65.

3 [1959] A.I.R. Andhra 407.

4 [1949] F.C.R. 667.

clude the power to make rules relating to the circumstances and the tenure of office of District Judges and Judges subordinate to the District Judges. The combined effect of all these powers leaves no doubt that it is the Governor who is the sole disciplinary authority. Mr. Kotwal placed reliance on a decision of the Supreme Court reported in *Pradyat Kumar Bose v. The Hon'ble the Chief Justice of Calcutta High Court*.⁵ According to Mr. Kotwal, therefore, the control vesting in the High Court is not disciplinary control. On the other hand, the control conferred is on Courts and not Judges of the Courts save and except three matters, namely, posting, and promotion of and grant of leave to Judges subordinate to the District Court.

With respect to the learned counsel appearing for both sides we find it difficult to adopt the approach of either of them. Mr. Phadke wants us to construe art. 235 by itself and then proceed to other articles while Mr. Kotwal wants us first to consider articles other than art. 235 and then to come to art. 235. In our opinion, the rule of construction requires that all the relevant provisions of a statute must be considered together in order to understand the legislative intent. It is first necessary to ascertain what is the true meaning of the two expressions 'court' and 'control' occurring in art. 235 of the Constitution. These two expressions have not been defined in the Constitution. The Constitution does not provide any dictionary for these two expressions. In Halsbury's Laws of England (3rd edn.) Vol. 9, at page 342 the meaning of Court has been given in the following terms:

"Originally the term 'Court' meant, among other meanings, the Sovereign's palace; it has acquired the meaning of the place where justice is administered and, further, has come to mean the persons who exercise judicial functions under authority derived either immediately or mediately from the Sovereign."

A similar meaning of the expression 'court' is given in volume 21 of *Corpus Juris Secundum* in the following terms:

"While the meaning of the term 'court' will vary with the context in which it is used, generally speaking a court is a body in the Government to which the public administration of justice is delegated, being a tribunal officially assembled under authority of law, at the appropriate time and place, for the administration of justice, through which the State enforces its sovereign rights and powers... A Court has also been defined as a place where justice is judicially administered."

Having regard to this accepted definition of the expression 'court' there can hardly be any doubt that the expression means not only the building or the place where justice is administered but also the Judges who administer justice.

The Oxford English Dictionary, Vol. II, has given the meaning of the word 'control' as

"to exercise restraint or direction upon the free action of; to hold sway over, exercise power or authority over, to dominate, command."

Webster's Dictionary has defined 'control' in the following terms:

"To exercise such an influence over (something) as to guide, direct, manage or restrain (it); to have under command, to check."

We find no reason to give a restricted meaning to the expression 'control'.

Other part of art. 235 itself indicates that the meaning of the word 'control' is the ordinary meaning which we have quoted above. It would be noticed that the later part of art. 235 provides, but nothing in this article shall be construed as taking away from any such person any right of appeal which he may have under the law regulating the conditions of his service or as authorising the High Court to deal with him otherwise than in accordance with the conditions of his service prescribed under such law. The later half of art. 235 indicates that the nature of control is such that the exercise thereof may give rise to a right of appeal under the law regulating the conditions of his service. If we turn to the rules to which we have already referred, we

find that there is no right of appeal save and except where disciplinary action imposing penalty is taken. The clause in the later half "to deal with him otherwise than in accordance with the conditions of his service" indicates that the exercise of the right of control is in respect of the conditions of his service. Reading the article as a whole there is hardly any doubt that the control vested in the High Court is the control which is disciplinary in nature over District Judges and Judges subordinate to the District Judges. In other words, the control vested in the High Court under art. 235 is disciplinary control over subordinate Courts. An argument was advanced by Mr. Kotwal that the nature of the control vested in the High Court is indicated in the article itself and that is the posting and promotion of, and the grant of leave to persons belonging to the judicial service of a State and holding any post inferior to the post of District Judge. According to Mr. Kotwal, that is the only control. We find it difficult to accept this construction put on the article by Mr. Kotwal, because what has been mentioned in the article is "the control... including the posting and promotion of, and the grant of leave to..." The definition is thus an inclusive definition and it is a well-settled principle which has been reiterated by their Lordships of the Supreme Court in *State of Bombay v. Hospital Mazdoor Sabha*:⁶

"...the words used in an inclusive definition denote extension and cannot be treated as restricted in any sense. Where the Courts are dealing with an inclusive definition it would be inappropriate to put a restrictive interpretation upon terms of wider denotation."

The clause "including the posting and promotion of, and the grant of leave to, persons belonging to the judicial service" cannot, therefore, have the effect of a restrictive than ordinary meaning of the word control, or to confine its meaning only to these three things. The view taken by us also finds support in the legislative history and arts. 50 and 237 of the Constitution. We need not trace it prior to the Government of India Act, 1935. Sections 253, 254 and 255 of the Government of India Act are the special provisions as to judicial officers. Section 254 relates to appointments, posting and promotion of District Judges and the provisions of art. 233 in the Constitution are the corresponding provisions in s. 254 of the Government of India Act. Section 255 of the Government of India Act is the corresponding provision of art. 234 of the Constitution relating to recruitment of persons other than District Judges who have been termed in s. 255 of the Government of India Act "subordinate civil judicial service". It would, however, be noticed that though by virtue of sub-s. (3) of s. 255 the power of posting and promotion of, and the grant of leave to, persons belonging to the subordinate civil judicial service of a Province and holding any post inferior to the post of District Judge, was vested in the High Court, there was no provision there vesting in the High Court control over District Courts and Courts subordinate thereto. It has been for the first time vested in the High Court by art. 235 of the Constitution of India. It would, therefore, be legitimate to assume that the "control" vested in the High Court was something more than power of posting and promotion of and grant of leave to subordinate judicial officers. It has to be noticed that the makers of the Constitution were framing Constitution of a Sovereign Democratic Republic and by arts. 233 to 237 were making provision for Courts subordinate to the High Court. High Court was independent of the Executive. Such, however, was not the case relating to the judiciary subordinate to the High Court. Certain measure of a Representative Government was introduced by enactment of the Government of India Act, 1935. The then Joint Parliamentary Committee in its report pointed out:

"We have been greatly impressed by the mischiefs which have resulted elsewhere from a system under which promotion from grade to grade in a judicial hierarchy is in the hands of a Minister exposed to pressure from members of a popularly elected Legis-

lature. Nothing is more likely to sap the independence of a magistrate than the knowledge that his career depends upon the favour of a Minister.... It is the subordinate judiciary in India who are brought most clearly into contact with the people, and it is no less important, perhaps indeed even more important, that their independence should be placed beyond question than in the case of the superior judges."

It is also pertinent to note that the power to posting and promotion of, and grant of leave to, persons belonging to the subordinate civil judicial services of a Province was conferred on the High Court for the first time under sub-s. (3) of s. 255 of the Government of India Act. It would be reasonable to assume that the Joint Parliamentary Committee's report and the necessity of having independent subordinate judiciary was before the Constituent Assembly at the time of the framing of the Constitution. Article 50 which provides that the State shall take steps to separate the judiciary from the executive in the Public services of the State clearly indicates that the necessity of making subordinate judiciary independent of executive control was before the Constituent Assembly. It is in these circumstances that the control over District Courts and Courts subordinate to District Courts has been conferred on the High Court in addition to the posting and promotion of and the grant of leave to persons belonging to the judicial service. In our opinion, it is a deliberate step taken towards the ultimate objective stated in art. 50 of the Constitution. Article 237 also indicates the same legislative intent. That article provides that the Governor may by public notification direct that the foregoing provisions of this Chapter and any rules made thereunder shall with effect from such date as may be fixed by him in that behalf apply in relation to any class or classes of magistrates in the State as they apply in relation to persons appointed to the judicial service of the State subject to such exceptions and modifications as may be specified in the notification. It is clear that the Constituent Assembly by framing this article has enabled the Governor to take further steps in the matter of separation of judiciary from the control of executive by bringing magistracy under the control of the High Court. In our opinion, therefore, the expression 'control' in art. 235 includes the power to exercise disciplinary jurisdiction over District Courts and courts subordinate thereto.

The question next arises is whether the power conferred is absolute or whether there are any limitations thereon. We have already said that the rule of construction requires that all the relevant provisions of law should be read together and the statute must be so construed that if reasonably possible all the relevant provisions should harmonise with one another and not be in conflict with one another. Articles 233 and 234 confer powers on the Governor to appoint District Judges and Judges subordinate to the District Judges though the exercise of the powers is regulated in the manner provided in those articles.

Section 16 of the General Clauses Act provides

"Where, by any Central Act... a power to make any appointment is conferred, then, unless, a different intention appears, the authority having for the time being, power to make the appointment shall also have power to suspend or dismiss any person appointed, whether by itself or any other authority, in exercise of that power."

It has been the argument of Mr. Phadke that the provisions of art. 235 disclosed a different intention. It has to be noticed that art. 235 does not in express terms say that the Governor shall not have the power to dismiss or suspend or that the High Court shall have exclusive power to dismiss or suspend. It is, therefore, difficult to accept Mr. Phadke's contention that there is any different intention in art. 235 which would exclude application of s. 16 of the General Clauses Act. Article 367 makes the provisions of the General Clauses Act applicable for the interpretation of the Constitution. In *K. V. Rappan Nayanar v. K. V. Madhavi Amma*, their Lordships of the Federal Court have observed that the power to terminate flows naturally and as a

necessary sequence from the power to create. Their Lordships observed (p. 669) :

"...The General Clauses Act has been enacted so as to avoid superfluity of language in statutes wherever it is possible to do so. The legislature instead of saying in O. XL, r. 1, (provision relating to appointment of receiver), that the Court will have power to appoint, suspend or remove a receiver, simply enacted that wherever convenient the court may appoint a receiver and it was implied within that language that it may also remove or suspend him."

It would be noticed from the observations of their Lordships that one of the objects in enacting the General Clauses Act was to avoid superfluity of language in the various enactments that the Legislature enacts. The ratio that emerges from this decision is that the power of appointing District Judges and Judges subordinate to them includes the power of dismissing them and that well settled principle of law will also have to be read in the relevant articles. The Governor has the power to appoint District Judges as well as Judges subordinate to the District Judges. It would, therefore, follow that the legislative intent is that the Governor will also have the power to suspend or dismiss these Judges, namely, District Judges and Judges subordinate to the District Judges. Of course, the exercise of the power to suspend or dismiss will be subject to the same limitation as the power to appoint is.

Apart from the aforesaid position obtaining by reason of the provisions of s. 16 of the General Clauses Act, the same result would also follow by virtue of the provisions of arts. 310 and 311 of the Constitution. Article 310, as already stated, provides that the tenure of office of civil servants shall be at the pleasure of the Governor. No doubt the pleasure has to be exercised subject to certain qualifications contained in art. 311 but, none the less the over-riding power of terminating the tenure of office of a civil servant rests with the Governor. The qualifications for the exercise of this pleasure indicated in art. 311 would also lead to the same result. One of the qualifications is that no authority subordinate to the appointing authority can dismiss a civil servant. In other words, dismissal for misconduct has to be by the appointing authority or the authority superior to the appointing authority. The Governor was the appointing authority in this case. It would naturally follow that the power to dismiss a District Judge or a Judge subordinate to the District Judge would be that of the Governor. None of the decisions to which our attention was drawn by Mr. Phadke has held to the contrary. On the other hand, all the decisions admit that power to pass an order of dismissal is exclusively that of the Governor.

The question that next arises is whether the power to dismiss would also include the power to impose penalty other than dismissal or removal. We have already stated that Mr. Kotwal has so contended. The argument has been that it is the Governor who is the appointing authority and it is the Governor who has the power to make rules regulating recruitment and conditions of service including the provision relating to dismissal for misconduct. It is the Governor who has the power to dismiss. The combination of these three powers exhausts all disciplinary jurisdiction. There is no difficulty in accepting that the conditions of service would include the provision relating to dismissal or to take disciplinary action. But we find it difficult to see why even where there is a combination of all these three powers it should necessarily cover the entire disciplinary field in spite of the provisions to the contrary in the enactment. In the first instance, the aforesaid three powers are not absolutely vested in the Governor. The power of appointing District Judges and Judges subordinate to the District Judges no doubt rests with the Governor, but the recruitment has to be made according to the rules and in consultation with the Public Service Commission and the High Court. The power of dismissal of District Judges has to be read in arts. 233 and 234 of the Constitution with the aid of s. 16 of the General Clauses Act. The exercise of the power of dismissal will, therefore, have to be in the same manner as the exercise of the power of appointment

and therefore even the power of dismissal will have to be exercised by the Governor in consultation with the High Court. The power of making rules relating to recruitment and conditions of service is not the Governor's absolute power. Primarily the power is conferred on the Legislature. It is only by way of a transitional provision that the Governor is empowered to make rules till the enactment of the Legislature has been made. It will thus be seen that the power of the Governor in this matter is not absolute. Further, as we have stated, art. 235 on its true construction vests disciplinary jurisdiction in the High Court. It is, therefore, not possible to accept Mr. Kotwal's argument. On the other hand, it would be reasonable to hold that the power vested in the High Court for taking disciplinary action against District Judges and Judges subordinate to the District Judge is limited only to the extent it has been limited by other provisions which could legitimately be read in other articles and not by process of any artificial implication. The decision in *Pradyat Kumar Bose v. The Hon'ble the Chief Justice of Calcutta High Court* on which reliance has been placed by Mr. Kotwal in this respect is not of much assistance to him. In that case the question was whether the High Court had power to dismiss the Registrar of the High Court, and after reviewing judicial history and having regard to the fact that the appointing authority was the Chief Justice and that the Chief Justice had the power to make rules, their Lordships of the Supreme Court held that the power to take disciplinary action against the staff of the High Court rested exclusively with the Chief Justice. It would be noticed that under art. 229 absolute power vests in the Chief Justice in the matter of appointments of officers and servants of the High Court. He has not to consult anybody in this matter. It would also be noticed that there is no other article in the Constitution conferring power in respect of disciplinary action on any other authority. In our opinion, therefore, reading all these articles together the position that emerges is—

(1) That the disciplinary jurisdiction over District Judges and Judges subordinate to them vests exclusively in the High Court except making an order of dismissal or removal;

(2) It follows that the decision in the matter of starting a departmental enquiry or action for misconduct against a District Judge or a Judge subordinate to District Judge vests exclusively with the High Court.

(3) The power of dismissal and removal of District Judges and Judges subordinate to District Judges vests in the Governor.

(4) The exercise of the aforesaid power of dismissal and removal of District Judges by the Governor has to be in consultation with the High Court.

The question that next arises is whether in cases where dismissal or removal is a probable consequence the Governor has to be associated with the departmental enquiry at the stage of appointing an enquiry officer or at the stage after the High Court on consideration of the report of enquiry officer has come to a tentative conclusion that the charges have been proved and that the penalty of dismissal or removal should be imposed on the delinquent civil servant. It has been Mr. Phadke's contention that it is the High Court and the High Court alone that has exclusive jurisdiction to appoint enquiry officer and it is only after the High Court comes to a tentative conclusion that the charges have been proved and that the penalty that is required to be imposed is dismissal or removal, that the Governor has to be associated. Mr. Phadke has read the judgment of the Special Bench of the Calcutta High Court reported in *Nripendra Nath v. Chief Secretary Government of West Bengal* in support of his argument. Facts in that case were peculiar. A senior member of the West Bengal Judicial Service officiating in the higher judicial service and an Additional District Judge over a quarter of a century and when about to reach 55 years, was served with a notice to appear before the Disciplinary Tribunal and its finding was dismissal from service by an order of the State Government. The High Court had not conducted disciplinary proceedings nor was it consulted by the Government before the Disciplinary Tribunal was appointed by

the Government to conduct enquiry. All that was done by the Government was to present to the High Court accomplished facts that charges had been framed against the civil servant and results obtained on the enquiry held by the Anti-Corruption Department and that the appointment of the Commissioner of Burdwan Division had been made to hold a departmental enquiry under rule 55 of the Civil Services (Classification, Control and Appeal) Rules. The aforesaid member of the Judicial service had challenged the order on various grounds, one of the grounds being that the control over District Court and Courts subordinate thereto was vested in the High Court under art. 235 of the Constitution and the authority competent to take disciplinary proceedings against him or to deal with him was the High Court and not any other authority. A Special Bench was constituted to consider the contentions raised including the aforesaid one. After considering the various articles of the Constitution, to which we have already referred, Mr. Justice P. B. Mukharji in para. 28 of the judgment made the following observations on which very strong reliance has been placed by Mr. Phadke. These observations read (p. 8) :

"It is no doubt true that under Article 311 read with Articles 310, 233 and 234 of the Constitution the appointing authority in respect of a member of the judicial service of a State being the Governor, the actual dismissing authority must also be the Governor. That only means that the actual order of dismissal has to be made by the Governor. It does not however mean that in supersession of the control of the High Court under Article 235 of the Constitution the Governor or the Government will be entitled to conduct disciplinary proceedings or set up disciplinary Tribunal apart from the High Court. Different Articles of the Constitution on the same subject should, wherever possible, be read consistently and not in resistance with one another. The best reconciliation of these different Articles of the Constitution will lie in the High Court conducting the disciplinary enquiry and sending its report at the conclusion of the enquiry to the Government to make the appropriate order of dismissal or removal. That the Government may not in a particular case accept the report and recommendation of the High Court exercising disciplinary jurisdiction cannot alter the interpretation of the Constitution when it provides dual authority first by vesting control in the High Court under Article 235 and secondly by resting appointment, tenure and dismissal with the Government under Articles 233, 234, 310 and 311 of the Constitution. This duality is not an unmixed evil but is an example of that wholesome constitutional principle of checks and balances so that no one institution can afford to be tyrannical in the exercise of its powers and thereby ensuring the much needed security of public services in India."

With utmost respect, in our opinion, the mode of reconciliation mentioned in the aforesaid observations has the tendency to affect effective exercise of the power of dismissal and removal resting with the Governor. It has been held that the Governor should be associated after the High Court has considered the report of the Enquiry Officer and reached a tentative conclusion that the charges have been proved and the penalty of removal or dismissal is called for. Article 311 enjoins a duty on the appointing authority or an authority not subordinate to him, in whom rests the power of dismissal or removal, to give a reasonable opportunity to the person to show cause why proposed action should not be taken against him. It has now been well-settled by various decisions of the Supreme Court that this opportunity consists of two stages: the first stage is to give an opportunity to the person to show that the charges framed against him are not well founded. In other words, the allegation on which the charges are framed are not true and, the second stage is that even if the charges are held proved, the proposed penalty is uncalled for. The latest decision of the Supreme Court in this respect so far as we are aware is the one reported in *Bachhattar Singh v. State of Punjab*.⁷ In that case their Lordships were considering whether a departmental enquiry is divisible in two stages: (a) the enquiry which involves a decision of the question whether the allegations made against the servant are true or not, and (b) taking action (i.e. in case the allegations are

found to be true) whether the servant should be punished or not and if so in what manner. Their Lordships observed (p. 39):

"...There is just one continuous proceeding though there are two stages in it. The first is coming to a conclusion on the evidence as to whether the charges alleged against the Government servant are established or not and the second is reached only if it is found that they are so established. That stage deals with the action to be taken against the Government servant concerned."

Both these stages are equally judicial. It is clear that a departmental enquiry though in two stages is one continuous proceeding. The Governor being the authority empowered to dismiss or remove and art. 311 enjoining a duty on him to give the civil servant a reasonable opportunity in this respect in our opinion he has to be associated with the departmental enquiry from the first stage and not at the second stage. Mr. Phadke, however, contends that it is not possible, merely on considering the allegations against a civil servant, that the punishment required to be imposed on him would be one of dismissal or removal. That conclusion could only be reached after the departmental enquiry has been completed and the High Court has considered the report of the enquiry officer. There is, therefore, no scope for associating the Governor at a stage prior to the second stage. We find it difficult to accept the aforesaid argument of Mr. Phadke as one of general application. It may be that in some cases it may not be possible to say that the allegations if proved would necessarily require imposition of the penalty of dismissal or removal, but, on the other hand, there may be clear cases where the allegations, if proved, would call for no penalty other than removal or dismissal. For instance, a case where the allegation against a judicial officer is one of corruption. There is hardly any room to assume that a judicial officer against whom charges of corruption have been established should still be retained in judicial service. Of course, each case will depend on its own facts. In our opinion, therefore, where on preliminary investigation the High Court comes to the conclusion that the probable consequence of the charges against a judicial officer being proved would be one of dismissal or removal of the judicial officer, the course that should be adopted would be to refer the matter to the Governor recommending appointment of an enquiry officer which is the first stage of giving a reasonable opportunity to a public servant.

Turning to the facts of the present case, the High Court on receiving certain information directed the District and Sessions Judge, Amravati, Shri Hadole and also the Anti-Corruption Branch, to hold a confidential enquiry into the conduct of the petitioner. These officers after making a confidential enquiry submitted their report to the High Court. The confidential report received by the High Court disclosed a *prima facie* case of corruption on the part of the petitioner calling for a regular departmental enquiry being started against him. The charges framed indicate that the confidential enquiry disclosed that the petitioner had demanded 20 seers of ghee from one Vasudeo Vithal Chimote of Amravati as consideration for favouring him in the matter relating to certain appeals pending before him and had in fact accepted 5 seers of ghee from him after arguments in the appeals were heard by him but prior to the decisions of these appeals. The other allegation was that he had accepted two tins of ghee from one Atmaram Tukaram Zanzad of Badnera whose appeals had been decided by him and whose suits against the same parties were also pending before him. The allegation was that the petitioner's peon had gone to Badnera to fetch ghee tins and brought the same from the said Atmaram Zanzad. There were also other allegations against him that he was knowingly associating himself with the litigants whose matters were pending before him. These being the charges and allegations against the petitioner, the necessary consequence, if these allegations were proved, was one of dismissal or removal of the petitioner from service. It is in these circumstances that the High Court had recommended to the State Government that a departmental enquiry should be started

against the petitioner and that the District and Sessions Judge, Nagpur, should be appointed as Enquiry Officer to conduct this enquiry. These recommendations of the High Court were in their entirety accepted by the State Government and accepting these recommendations of the High Court, the Governor had appointed Shri Seth, District and Sessions Judge, Nagpur, to hold enquiry, on September 30, 1959. It would be noticed that the Governor had appointed the Enquiry Officer to hold the departmental enquiry on the recommendations of the High Court. Disciplinary proceedings thus were initiated by the High Court and not by the Governor. In the circumstances, for the reasons stated above, in our opinion, the order made by the Governor is not one without jurisdiction.

Other two decisions on which reliance has been placed by Mr. Phadke do not run counter and are not in conflict with the view taken by us. It may be stated that both these decisions relate to disciplinary proceedings against one and the same man the petitioner coming to the High Court by a writ petition both against the order of suspension during the pendency of the enquiry and later against the order of dismissal. It is true that the departmental enquiry there was held by a Judge of the High Court appointed by the Chief Justice. But it has to be kept in view that the rules framed by the State provided that departmental enquiry against a judicial officer was to be held by the High Court. It is also to be noticed that the decision does not go to the extent of holding that the appointment of the Enquiry Officer is exclusively within the jurisdiction of the High Court and, therefore, the appointment of the Enquiry Officer by the Governor is without jurisdiction. In this decision it has been held that disciplinary jurisdiction is conferred on the High Court under art. 235 of the Constitution. With respect we concur with this view and we have already so held. The principle has been succinctly laid down by Mr. Justice Subba Rao in *Md. Ghouse v. State of Andhra* in the following terms (p. 68) :

"To illustrate, the High Court has control and superintendence over subordinate courts. This power necessarily implies that the High Court can take disciplinary action against Subordinate Judges in appropriate cases. The control will certainly be ineffective if the authority exercising the control cannot take disciplinary action against a person under its control. To put it in other words, a superior authority cannot control the actions of a subordinate if he cannot take disciplinary action against him."

With respect, we concur in this view.

But, in our opinion, there is no violation of this principle when initiation of departmental proceeding has been taken by the High Court and thereafter an Enquiry Officer has been appointed by the Governor at the instance of the High Court. The facts in the Calcutta case were entirely different where the High Court was not even consulted before a departmental enquiry was ordered and an officer to hold an enquiry was appointed.

For the reasons stated above, the first contention raised by Mr. Phadke must fail.

This brings us to the second contention raised by Mr. Phadke and that is that the departmental enquiry is vitiated inasmuch as it had been conducted in contravention of the principles of natural justice. The contention is founded on certain allegations made in the first return filed on behalf of the respondent. This contention has been for the first time raised in an application for amendment which we have allowed and had given the respondent an opportunity of filing a return in respect of the amendment allowed. The averment in the first return of the respondent on which this contention is based is in the following terms:

"6. ...I further say that the Enquiry Officer Shri Seth forwarded his report to the High Court for onward despatch to the Government. The High Court while forwarding the report to the Government made their own observations on the finding of the Enquiry Officer and also on the question of punishment. After the receipt of the Enquiry Officer's report along with the remark of the High Court a show cause notice was issued to the

petitioner. In reply to the said show cause notice the petitioner filed a long reply. Thereafter the Government again made a reference to the High Court requesting them to offer their remarks about the various contentions raised by the petitioner in his reply to the show cause notice. The High Court thereupon after fully considering the contentions raised by the petitioner in his reply to the show cause notice offered their own observations on each point. After these observations of the High Court were communicated to the Government, the question of punishment was considered and then the Government referred the matter to the Public Service Commission who also agreed that the charges against the petitioner had been proved and that the petitioner should be dismissed from service. It was after this that the final order of dismissal was passed by the Governor of Maharashtra who was empowered to pass the said order."

It is the argument of Mr. Phadke that the admitted position is that the observations of the High Court on the report of the Enquiry Officer as well as the observations of the High Court point by point on the reply sent by the petitioner to the show cause notice were considered by the Governor in reaching the conclusion that the penalty of dismissal should be imposed on the petitioner. According to Mr. Phadke, the aforesaid observations of the High Court was a material on which the Governor had relied against the petitioner in holding that the charges were proved and also in imposing the penalty of dismissal on him. These observations were not shown to the petitioner and that contravened the principles of natural justice, resulting, in vitiating the entire departmental proceeding and the order of dismissal made by the Governor. Reliance is placed by Mr. Phadke on the following decisions: *Union of India v. T. R. Varma*,⁸ *Ramrao v. Accountant General*,⁹ *Vasant Raghunath v. State*,¹⁰ *R. v. Architects' Registration Tribunal*,¹¹ *Brajlal v. Union of India*,¹² *R. v. Stafford Borough Justices*.¹³

Principles of natural justice have been laid down by their Lordships of the Supreme Court in *Union of India v. T. R. Varma*. At page 507 of the Report their Lordships observed:

"Now, it is no doubt true that the evidence of the respondent and his witnesses was not taken in the mode prescribed in the Evidence Act; but that Act has no application to enquiries conducted by tribunals, even though they may be judicial in character. The law requires that such tribunals should observe rules of natural justice in the conduct of the enquiry, and if they do so, their decision is not liable to be impeached on the ground that the procedure followed was not in accordance with that, which obtains in a Court of Law. Stating it broadly and without intending it to be exhaustive, it may be observed that rules of natural justice require that a party should have the opportunity of adducing all relevant evidence on which he relies, that the evidence of the opponent should be taken in his presence, and that he should be given the opportunity of cross-examining the witnesses examined by that party, and that no materials should be relied on against him without his being given an opportunity of explaining them. If these rules are satisfied, the enquiry is not open to attack on the ground that the procedure laid down in the Evidence Act for taking evidence was not strictly followed."

It is not in dispute that charges had been framed against the petitioner and were communicated to him along with the allegations on which the charges were framed. He had been given an opportunity of filing a written statement in reply to the charges framed. Documents asked for by him were made available to him. A lawyer was allowed by the Enquiry Officer. The witnesses examined against him were examined in his presence. He had an opportunity of cross-examining them. The petitioner was also given an opportunity to lead evidence and in fact he has examined one witness whom he wanted to examine. The petitioner was also allowed to make an oral statement before

8 [1958] S.C.R. 499.

9 (1962) 65 Bom. L. R. 65, s.c. [1963] A.I.R. Bom. 121.

10 (1962) 65 Bom. L.R. 54, s.c. [1963]

A.I.R. Bom. 187.

11 [1945] 2 All E.R. 131.

12 [1964] Mh. L.J. 500.

13 [1962] 1 All E.R. 540.

the Enquiry Officer in his defence in addition to the written statement filed by him. It is after that that the Enquiry Officer had submitted his report to the Governor through the High Court in which he held that the charge of corruption relating to demand and acceptance of ghee as a consideration from Chimote was established against him, though other two charges were not established against him. It is after consideration of this report, that the petitioner was given a show cause notice why the proposed penalty of dismissal should not be imposed on him. Cause shown by the petitioner in response to the show cause notice was also considered by the Governor. The only grievance of the petitioner is that the observations of the High Court on the report of the Enquiry Officer as well as on the cause shown by the petitioner were not communicated to him. The question, therefore, that arises is whether the observations made by the High Court was a material relating to which the petitioner was entitled to an opportunity of offering his explanation in respect of these observations. Mr. Kotwal first contends that the material which is required to be shown and explained by the delinquent is only the material that is taken into consideration at the time of the departmental enquiry. Duty to act in a quasi judicial manner is imposed on the authority that holds a departmental enquiry. After the departmental enquiry is concluded and the Governor is dealing with the report of the Enquiry Officer after the report is submitted, the act of imposing penalty is purely an administrative act. The material which the Governor takes into consideration in the discharge of that administrative act, it is not necessary for him to disclose it to the delinquent. In short, the argument of Mr. Kotwal is, after the departmental enquiry concludes, the duty on the disciplinary authority to act quasi judicially ceases and thereafter he acts only in administrative capacity and not in quasi judicial capacity. Mr. Kotwal has in this connection referred to us to a number of decisions: *Board of Education v. Rice*¹⁴; *Local Government Board v. Arlidge*¹⁵; *Denby [William] & Sons Ltd. v. Minister of Health*¹⁶; *Robinson v. Min. Town Planning*¹⁷; *Johnson & Co. v. Minister of Health*¹⁸.

Mr. Kotwal in the alternative contends that in consulting the High Court about its observations, the Governor has only complied with the constitutional requirement of art. 233 which requires the Governor to consult the High Court. Consultation with the High Court constituted part of deliberation on the report of the Enquiry Officer and on the cause shown by the petitioner. In these circumstances, it cannot be a material relating to which the petitioner is entitled to have an opportunity of explaining. And lastly, Mr. Kotwal contends that, at any rate, the observations of the High Court is a privileged document which cannot be disclosed in the interest of public policy. He has in this connection referred to the following decisions: *State of U. P. v. Manbodhan Lal*¹⁹; *Duncan v. Cammell Laird & Co.*²⁰; *State of Punjab v. S. S. Singh*²¹; *Har Prasad Gupta v. State of U. P.*²² Mr. Phadke, on the other hand, contends that the enquiry is quasi judicial in nature right from the stage of enquiry to the stage of imposition of penalty. Imposition of penalty by the Governor is not an administrative act but it is a quasi judicial act and the Governor must act in a judicial manner. In not disclosing the observations of the High Court to the petitioner and giving him an opportunity to explain them, the Governor has acted contrary to the principles of natural justice. The petitioner had made no grievance on the ground that the observations of the Public Service Commission were not shown to him because the constitutional requirements required the Governor to consult the Public Service Commission. There was, however, no obligation on the Governor to consult the High Court. The Governor, therefore, had to supply these observations to the petitioner. Mr. Phadke conceded that if we come to

14 [1911] A.C. 179.

15 [1915] A.C. 120.

16 [1938] 1 K.B. 887.

17 [1947] 1 All E.R. 851.

18 [1947] 2 All E.R. 395.

19 [1957] A.I.R. S.C. 912.

20 [1942] A.C. 624.

21 [1961] A.I.R. S.C. 493.

22 [1968] A.I.R. All. 415.

the conclusion that the constitutional requirement is that the Governor must consult the High Court in imposing penalty of dismissal or removal from service of a civil servant, then the petitioner is not entitled to complain that principles of natural justice had been violated on account of non-disclosure of the observations of the High Court. Lastly, Mr. Phadke argued that there was no privilege in respect of these observations of the High Court, in the event, the Constitution did not require that the High Court should be consulted. It is his argument that the observations of the High Court must necessarily have influenced the mind of the Governor in coming to the conclusion whether the guilt is established or not and whether penalty of dismissal should be imposed or not. The observations of the High Court are in the nature of reasons supplied to the Governor for coming to the conclusion in these matters. There can hardly be any privilege in this respect.

We have already held that in our opinion the power conferred on the Governor by art. 233 read with art. 310 and s. 16 of the General Clauses Act to dismiss or suspend a civil servant has to be exercised in the same manner as the power of appointment under art. 233 is to be exercised, that is, in consultation with the High Court. In the circumstances, the observations form part of the consultation provided for in art. 233 of the Constitution. That being the position, and Mr. Phadke having conceded that if the constitutional requirement is that the High Court should be consulted, then the petitioner could make no grievance for non-disclosure of these observations to him. In the circumstances it is not necessary to deal in detail with the rival contentions raised by counsel for the parties. We would, however, deal with these contentions in brief though not in detail. We have already referred to the decision of their Lordships of the Supreme Court in *Bachhattar Singh v. State of Punjab* in which it has been held that both stages of a departmental enquiry, that is, the enquiry which involves a decision of the question whether the allegations made against a public servant are proved or not and the decision of the question of the action to be taken against him on reaching the conclusion that the allegations have been established are both judicial in nature. This being the principle laid down by their Lordships of the Supreme Court, we find it difficult to accept Mr. Kotwal's contention that after the report of the Enquiry Officer is submitted to the Governor the action taken by the Governor is purely administrative in nature not requiring him to act according to the principles of natural justice. It may be that the act of imposing penalty is an administrative act but nonetheless in view of the aforesaid decision of their Lordships there is a duty cast on the Governor to act according to the principles of natural justice in performance of that duty. He has to act in a quasi judicial manner.

In the English decisions to which reference was made the question considered was whether the report received by the Minister of the Government in respect of acquisition of certain lands by local bodies for purposes of development should be made known to the persons whose lands were being acquired. In those cases, the report had not been shown to the persons whose lands were acquired but was taken into consideration by the Minister in deciding on appeal the question whether the decision taken by the local bodies for the acquisition of lands was proper or not. The decisions go to say that in dealing with an appeal against the decision of the local bodies for acquisition of lands, the Minister was performing an administrative function and it was not incumbent on the Minister to disclose the report. An analogy of these cases would have no application to the facts of the present case.

This brings us to the cases on which reliance has been placed by Mr. Phadke.

The question which was considered in *State of M. P. v. Chintaman*²³ was the grievance made that the document which the party required for purposes of cross-examining the witnesses of other side was not supplied to the public

servant and, therefore, a reasonable opportunity was not afforded to him. It was held by their Lordships that the failure to supply that document hampered the party from cross-examining the witnesses of other side and had, therefore, resulted in the denial of a reasonable opportunity afforded in art. 311 of the Constitution.

In *State of Mysore v. Manche Gowda*²⁴ the disciplinary authority took into consideration the previous record of the Government servant and on the basis of that previous record it had proposed to impose certain penalty. The previous record was not shown to the Government servant. In the circumstances, it was held that the failure to supply the previous record, which had been taken into consideration for the purpose of imposing penalty, was against principles of natural justice and, therefore, had resulted in denial of a reasonable opportunity to the Government servant.

In *Ramrao v. Accountant General* instructions and directions of a higher official were taken into account by the disciplinary authority in determining the guilt of the Government servant without disclosing those instructions and directions to him. It was held that the order of dismissal passed was vitiated as the petitioner had no reasonable opportunity of knowing the instructions and directions which were taken into consideration by the disciplinary authority in passing the order of dismissal.

In *Brajlal v. Union of India*, in consideration of an application for review relating to grant of a mining licence, the Board of Revenue had considered the report of the State Government which they called for without disclosing the report to the person who was making a grievance against refusal to grant licence to him. In the circumstances, it was held that a reasonable opportunity was denied to him.

Remaining two English cases on which reliance has been placed by Mr. Phadke stand in a different class.

The facts in *R. v. Architects' Registration Tribunal* were that an engineer and surveyor had applied to the Architects' Registration Council to be registered as an architect and he gave names of two persons to whom a reference could be made. The admission committee refused to register him. The architect appealed to the Tribunal of Appeal. The Tribunal dismissed the appeal but in arriving at their decision the Tribunal took into account certain other documents which were not divulged to the architect. It was held that the Tribunal which was enjoined with a duty to act in a quasi judicial capacity acted improperly in accepting and considering the evidence additionally obtained without disclosing the same to the architect.

In *R. v. Stafford Borough Justices* after the conclusion of the hearing of a charge of larceny by the justices, the clerk to the justices handed a note to the chairman before the justices retired to consider their verdict. The note contained in substance an argument on the facts for the justices to convict the person charged. It was held that it was highly an improper act on the part of the clerk to hand over the note to the justices. The conviction was quashed on the ground that it has always been the principle of English law that justice should manifestly be seen to be done. Handing over of the note went against the principle.

Considering these decisions together, in our opinion, the principle that follows is that the authority which is enjoined with a duty to act in a quasi judicial manner must disclose to the person against whom action has been taken material which is in the nature of evidence on the acceptance or rejection of which turns the decision as to the guilt or innocence of the person against whom an enquiry is held or against whom an action is being taken. Evidence tendered to establish a case must not be received behind the back of the person inasmuch as that would result in denial of an opportunity to that person of rebutting that evidence. The observations of the High Court cannot be said to be a part of the evidence

going to establish the guilt or innocence of the petitioner. On the contrary, in view of the constitutional requirements which require the Governor to consult the High Court, the observations form part of the deliberations in the matter of imposing penalty on the petitioner. Non-disclosure of these observations to the petitioner in our opinion, therefore, did not constitute any contravention of the principles of natural justice.

Lastly, we agree with the learned Government Pleader that the observations of the High Court would be a privileged document and, therefore, no complaint can be made of non-disclosure of that document.

In *State of Punjab v. S. S. Singh* a complaint was made against non-disclosure or supply of the remarks of the Public Service Commission by the civil servant. On behalf of the Government privilege was claimed and it was held by the Supreme Court that the report of the Public Service Commission was a privileged document to the disclosure of which a public servant was not entitled.

In *Har Prasad Gupta v. State of U. P.*, a question arose whether the correspondence between the High Court and the Government relating to the confirmation of a judicial officer was a privileged communication. On behalf of the petitioner it was claimed that he was entitled to its disclosure. It was his case that the High Court had recommended his confirmation in the past but the Government wrongly did not confirm him. On behalf of the Government privilege was claimed and it was held that the correspondence was a privileged document.

The second contention raised by Mr. Phadke also for the reasons stated above must fail.

Taking all the facts and circumstances of the case, in our opinion, the petitioner had a reasonable opportunity of showing cause against the action proposed to be taken against him. After considering the confidential report of Mr. Hadole, the High Court had come to the conclusion that it was necessary to hold a departmental enquiry against the petitioner, the allegations made against the petitioner being one of corruption. Recommendation was made to the Governor by the High Court to hold a departmental enquiry and appoint Mr. Seth, District and Sessions Judge, Nagpur, as the Enquiry Officer. The Government accepted the recommendations of the High Court and Mr. Seth was appointed an Enquiry Officer. It is not in dispute that Mr. Seth conducted the enquiry in good faith and with all fairness following fully the procedure which he had to follow under r. 55 of the rules. The petitioner was served with a charge-sheet along with the allegations on which the charges were founded. Whatever documents the petitioner wanted to have produced were produced. Witnesses were examined in his presence. He had an opportunity of cross-examining them. Throughout he was allowed assistance of a legal adviser. Witnesses which the petitioner wanted to be examined in his defence were examined. The petitioner wanted to make an oral statement in addition to the written statement filed by him and that was allowed, recorded and considered. After considering the entire evidence and the material before the Enquiry Officer, the Enquiry Officer held that the petitioner was guilty of corruption on one count. After consultation between the Governor and the High Court, a show cause notice was given to the petitioner asking him to show cause why penalty of dismissal should not be imposed on him. The petitioner showed cause that was considered by the Governor and the Governor in consultation with the High Court and the Public Service Commission had imposed the penalty. These being the circumstances of the case, in our opinion, there had been no infringement of the provisions of art. 311 of the Constitution. The only grievance made by the petitioner was that the observations of the High Court made on the report of Mr. Seth as well as on the reply of the petitioner to show cause notice were not disclosed to him. We have held that the objection raised is not tenable. The observations of the High Court was not a material which was in the nature of evidence establishing the guilt or otherwise of the petitioner. On the other hand, the observations were made in the discharge of the constitutional duty cast on the High Court. Apart from this, as we have said, the observations is a privileged document, to the disclosure of which

the petitioner is not entitled to. If disclosure of documents of this type is permitted it may possibly result in affecting free and frank expression of opinion which is very essential in the interest of public policy.

And this brings us to the last contention raised on behalf of the petitioner. It is contended that the appellate order dated October 16, 1962 passed by the Government is vitiated by contravention of the principles of natural justice. Reference is made to rule 57 of the Civil Services Conduct, Discipline and Appeal Rules.

Mr. Kotwal, on the other hand, contends that the petitioner had no right of appeal under r. 57. The original order of dismissal itself was passed by the Governor. That being the position, there could be no appeal to the Governor against his own order. In our opinion, the argument of Mr. Kotwal is well founded. Rule 57 reads as under:—

“A member of a provincial Service, or a member of a Specialist Service under the administrative control of the Local Government of a Governor's Province, may appeal to the Governor from an order passed by the Local Government.”

It is well settled that an appeal is a creature of a statute and unless a right of appeal is conferred by a statute it is not open to any person to claim that he has any right of appeal as such. Mr. Phadke has not been able to show us any provision except r. 57 which conferred a right of appeal on a member of a Provincial Service, to which the petitioner belonged. In order to bring his case within r. 57, the petitioner must establish two conditions; firstly, he must establish that he was a member of a Provincial Service which was under the administrative control of the Local Government of a Governor's Province, and secondly, he must establish that the order against which he seeks to file an appeal is the order made by the Local Government. Both these conditions, in our opinion, are not satisfied in the instant case. It has not been the case of the petitioner that he is under the administrative control of the Local Government of a Governor's Province. On the other hand, all the arguments advanced by Mr. Phadke on the first contention wholly militate against such a position. Nor is the Government claiming in the instant case such position. We have already said that art. 227 confers the right of superintendence on the High Court over all Courts and it was held by their Lordships of the Supreme Court in *Hari Vishnu Kamath v. Syad Ahmad Ishaque*²⁵ that superintendence is both administrative and judicial.

The first condition, therefore, is clearly not satisfied. The order against which an appeal is preferred also is not one made by the Local Government. The order of dismissal is document No. 9 filed along with the petition. The order in terms says that the Governor of Maharashtra is hereby pleased to dismiss Shri S. M. I. Alvi, Assistant Judge and Additional Sessions Judge (on leave) from Government service with effect from August 30, 1961. The order is also signed by the Secretary to the Government of Maharashtra, Law and Judiciary Department, by order and in the name of the Governor of Maharashtra. Clause (2) of art. 166 of the Constitution provides that orders and other instruments made and executed in the name of the Governor shall be authenticated in such manner as may be specified in rules to be made by the Governor, and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the Governor. The order of dismissal passed by the Governor had been authenticated by the Secretary to the Government of Maharashtra, Law and Judiciary Department. It has not been shown that the Secretary was not the person authorised to authenticate the order. In the circumstances it has to be accepted that the order has been properly authenticated. It, therefore, cannot be said that the order has not been made by the Governor. This being the position, in our opinion, r. 57 had no application to the facts of the present case. The petitioner, therefore, had no right of appeal against the order of dismissal.

We may state that the return filed by the respondent says that the memo of

appeal was considered by the Council of Ministers as a memorial and the Council of Ministers was satisfied that there was no injustice done to the petitioner.

The third contention of Mr. Phadke must also fail.

These are all the contentions which have been raised before us by the petitioner. We may state that the contention raised in ground No. 5 was not pressed before us by Mr. Phadke and, in our opinion, rightly.

In the result, the petition fails and the rule is, therefore, discharged. We however make no order as to costs.

Rule discharged.

Before Mr. Justice Tambe and Mr. Justice Naik.

PRALHAD BAIDAS CHAUDHARI v. THE CHIEF EXECUTIVE OFFICER, ZILLA PARISHAD.*

Maharashtra Zilla Parishads and Panchayat Samitis Act (Mah. V of 1962), Secs. 59(c), 66, 76—Bombay Village Panchayats Act (Bom. I of 1959), Sec. 32—Maharashtra Zilla Parishads (President & Vice-President) and Panchayat Samitis (Chairman) (Current Administrative Duties) (after the Expiry of the Term of Office) Rules, 1963. Rule 2—Bombay Municipal Boroughs Act (Bom. XVIII of 1925), Sec. 19(2)—Whether Sarpanch carrying on current duties of his office after expiration of his term continues to be Sarpanch—Applicability of s. 66 of Mah. Act V of 1962—Chairman of Panchayat Samiti carrying on prescribed duties after expiration of his term whether entitled to convene meeting of Samiti.

For the purposes of proviso (c) to s. 59 of the Maharashtra Zilla Parishads and Panchayat Samitis Act, 1961, where after the expiry of his term of office a Sarpanch carries on the current duties of his office, he does not during this period continue to be a Sarpanch.

Section 66 of the Maharashtra Zilla Parishads and Panchayat Samitis Act, 1961, comes into play only when the term of office of a Chairman has come to an end by reason of the expiration of his term and not when the term of office of a Chairman comes to an end on account of any other reason.

The Chairman of a Panchayat Samiti who carries on the prescribed current administrative duties of his office after the expiration of his term is not entitled to convene a meeting of the Panchayat Samiti.

THE facts appear in the judgment.

Sharad Manohar, for the petitioner.

M. A. Rane, for opponents Nos. 1 and 2.

V. H. Gumaste, Additional Government Pleader, for opponent No. 3.

TAMBE J. The question that arises for consideration in this case is, whether the petitioner, who had been elected first as a member of the Panchayat Samiti of Shahada under s. 57(1)(f) of the Maharashtra Zilla Parishads and Panchayat Samitis Act, 1961 (hereinafter referred to as the Act of 1961) and later on elected as the Chairman of the said Samiti on August 7, 1962, continues still to be a member of the said Samiti after December 1, 1963, and in the alternative, in spite of the fact that he has ceased to be a member of the said Samiti as and from that date, he is entitled to carry on as a Chairman the current administrative duties as are prescribed by the rules. To appreciate the contentions raised, it is necessary to state certain facts. In the year 1959 the petitioner was initially elected to be a member of the Group Grampanchayat of the village Kalsadi in Shahada block. Later in the same year, he also became the Sarpanch of the said Group Grampanchayat. Under the Act of 1961, the bodies constituted are Zilla Parishads and the Panchayat Samitis. Section 56 of the Act pro-

*Decided, October 19/20, 1964. Special Civil Application No. 446 of 1964.

vides that for every Block, there shall be a Panchayat Samiti and the Panchayat Samiti shall have all such functions as are vested in it by the Act or otherwise. Sub-section (3) of s. 2 of the Act defines 'block' as such local area in a District as the State Government may constitute to be a Block under s. 5. Section 57 of the Act deals with the constitution of Panchayat Samitis and a reading of the section would show that the constitution consists of members taken from different bodies. It is not necessary to go into the details. But, it would be sufficient to say that under cl. (a) of sub-s. (1) of s. 57 of the Act of 1961, all Councillors who are elected to the Zilla Parishad from the electoral divisions included in the Block automatically become members of the Panchayat Samiti. (Clause (f) of the said sub-section provides:

"Sarpanch elected by members of *panchayats* in accordance with the provisions of sub-section (2)".

Sub-section (2) provides:

"For the purposes of clause (f) of sub-section (1), each electoral division in a Block shall be divided into two electoral colleges of members of *panchayats* in such manner as may be determined by the State Government; and the members of *panchayats* in each electoral college shall elect from amongst the *Sarpanchas* of those *panchayats*, one *Sarpanch* in accordance with the rules prescribed by the State Government".

We have already stated that the petitioner initially got elected as a member of the Group Grampanchayat of the village Kalsadi and later on became its Sarpanch in 1959. Under the aforesaid cl. (f) of sub-s. (1) of s. 57 of the Act of 1961, the petitioner got elected as a member on the Panchayat Samiti of Shahada Block. Section 64(1) of the Act provides that every Panchayat Samiti shall be presided over by the Chairman, who shall be elected by the Panchayat Samiti from amongst members falling under cls. (a) and (f) of sub-s. (1) of s. 57. The petitioner being a member falling under cl. (f) of sub-s. (1) of s. 57 was eligible to be elected as the Chairman, and was duly elected as its Chairman on August 7, 1962. Now, it may be stated that the term of the members of the Village Panchayat is four years. The term of the Grampanchayat of village Kalsadi came to an end in November 1963 (though the exact date is not known). Section 32 of the Bombay Village Panchayats Act, 1958 (hereinafter referred to as the Act of 1958) provides:

"After the expiry of his term of office, the *Sarpanch* shall continue to carry on the current duties of his office until such time as a new *Sarpanch* is elected and takes over charge."

Thus, though the term of the village panchayat of Kalsadi came to an end in November 1963, the petitioner continued to carry on the current duties of the Sarpanch of the village Kalsadi by reason of the provisions of s. 32 of the Act of 1958. In the reconstitution of the village panchayat of Kalsadi, the petitioner again got duly elected as its member and also got re-elected as its Sarpanch on December 1, 1963. On March 3, 1964, the Block Development Officer, Shahada, respondent No. 2 herein, who, under the provisions of sub-s. (5) of s. 57 of the Act of 1961, is the Secretary (ex-officio) of the Panchayat Samiti, Shahada, wrote a letter to the petitioner. It appears that prior to this letter, there was a discussion between the petitioner and the Block Development Officer relating to the petitioner's right to continue as the Chairman of the Panchayat Samiti. In this respect, the Block Development Officer had written to the petitioner that on this subject he had along with his letter had enclosed a copy of the letter received by him from the Chief Executive Officer, Zilla Parishad, Dhulia, respondent No. 1 herein. It may be stated that Shahada Block is in the District Dhulia. In his letter dated February 29, 1964, the Chief Executive Officer has drawn the attention of the Block Development Officer, Shahada, to the Government letter dated November 3, 1962, read with s. 59(c) of the Act of 1961. A copy of that letter has not been enclosed as an annexure along with the petition. But the Additional Government Pleader for the State has supplied us with a copy. The letter indicates that the Government had taken

the view that a member of a Panchayat Samiti who has been elected in his capacity as a Sarpanch holds office only so long as he continues to be a Sarpanch. Under s. 32 of the Act of 1958, after the expiry of his term of office as Sarpanch he does not continue to be a member of the Panchayat Samiti, even though he might be carrying on the current duties of his office. It may be stated that the said letter was issued prior to the amendment of s. 59(c) of the Act of 1961, and this view has not been pressed before us. It is sufficient to state that a dispute started between the Block Development Officer and the petitioner as to his right to continue as a member. On receiving the letter of the Block Development Officer dated March 3, 1964, the petitioner wrote a letter to the Block Development Officer on March 7, 1964, and pointed out that under s. 59(c) as amended a person falling under category in cl. (f) of sub-s. (1) of s. 57 holds office so long as he continues to be a Sarpanch or carries on the current duties of the office of the Sarpanch. The petitioner pointed out that he was carrying out at that time the duties of the office of the Sarpanch of Kalsadi, and, therefore, he continued to be the Sarpanch. The petitioner also pointed out to the Block Development Officer that s. 66 of the Act of 1961 is clear and it at any rate empowers him to carry on the current administrative duties of the Chairman of the Samiti until his successor relieves him. Further, a complaint is also made by the petitioner in this letter that the Chief Executive Officer's letter was not clear as to what action was proposed to be taken against him. The petitioner claimed therein that he was of the opinion that "there is no impediment in my way to hold the office of Chairman and continue to discharge the current administrative duties". On these grounds the petitioner in this letter directed the Block Development Officer to convene a meeting of the Panchayat Samiti on March 17, 1964, at 2 p.m. To this letter of the petitioner, the Block Development Officer sent a reply vide his letter dated March 10, 1964, stating that he has forwarded the petitioner's letter to the Chief Executive Officer and has sought further orders from him (Chief Executive Officer). Later the Block Development Officer by his letter dated March 13, 1964, sent to the petitioner a copy of the letter of the Chief Executive Officer dated March 12, 1964. The material part of the letter of the Chief Executive Officer complained of by the petitioner is in the following terms:

"...It is not correct that he (the petitioner) can remain as a member of the Panchayat Samiti because he is re-elected as Sarpanch of the same village. It is necessary for him to get elected on the Panchayat Samiti only after contesting the election through the electoral college. As he is not even liable to continue to be the member of the Panchayat Samiti, he is not definitely eligible to continue to be the Chairman of the Panchayat Samiti..."

After receiving the aforesaid letter from the Block Development Officer, Shahada, on March 13, 1964, and its enclosure viz., Chief Executive Officer's letter dated March 12, 1964, the petitioner wrote a letter to the Block Development Officer on March 16, 1964, wherein the petitioner purporting to exercise his powers under s. 76 of the Act of 1961 directed the Block Development Officer to prepare agenda and notice convening the meeting of the Panchayat Samiti on March 26, 1964, at 2 p.m. It appears that along with this letter, the petitioner had annexed the agenda of the meeting proposed by him. The petitioner has further pointed out that any impediment put in his way by the Block Development Officer would be viewed very seriously by him. The Block Development Officer by his reply dated March 18, 1964, again pointed out to the petitioner that in view of the instructions received by him from the Chief Executive Officer under his letter of March 12, 1964, he was unable to convene the meeting of the Panchayat Samiti as required by the petitioner. It is in these circumstances that on March 23, 1964, this petition has been filed.

In this petition, the petitioner prays that the orders passed by the Chief Executive Officer on February 29, 1964, and March 12, 1964, be quashed; and that writ of *mandamus* be issued against the Chief Executive Officer, the Block

Development Officer and the State Government, respondents Nos. 1 to 3, respectively, requiring them not to interfere with the petitioner's right to be the Chairman of the Panchayat Samiti, Shahada, until August 7, 1967, or in the alternative till a new Chairman is duly elected. Other reliefs prayed for have not been pressed before us. The State Government (respondent No. 3) has not filed any return in reply to the petition. It is only respondents Nos. 1 and 2, i.e. the Chief Executive Officer and the Block Development Officer, who have entered an affidavit in return in reply to the petitioner. Now, in the affidavit the stand taken by these respondents is that the petitioner has ceased to be a member of the Panchayat Samiti with effect from December 1, 1963, and, therefore, he could no longer function as the Chairman of the Samiti after that date. It has been further contended by these respondents that this casual vacancy is to be filled in by fresh election as provided in s. 75(1) of the Act of 1961 and pending the election of the Chairman, the Deputy Chairman is to exercise the powers and perform the duties of the Chairman as provided in s. 77(1)(c) of the said Act. Respondents Nos. 1 and 2 further contended that s. 66 of the Act has no application to the facts of the present case. According to these respondents, s. 66 comes into play only in the event of the Samiti's term expiring. It has also been contended that the petitioner is not entitled to direct the Block Development Officer to call a meeting because that is not vested in him even if it is assumed that the petitioner has been on the current administrative duties under s. 66 of the Act.

Mr. Sharad Manohar, for the petitioner, raised two contentions before us. His first contention is that on a true construction of cl. (c) of the proviso to s. 59 of the Act of 1961 the petitioner's term of office as a member of the Panchayat Samiti has not come to an end and, consequently, the petitioner's term of office as the Chairman of the Samiti also has not come to an end. In the alternative, the second contention urged by Mr. Sharad Manohar is that, even assuming that the petitioner's term of office as the Chairman has come to an end, the petitioner has a right by virtue of the provisions of s. 66 of the Act, to carry on current administrative duties of his office of the Chairman of the Panchayat Samiti until his successor enters upon the office and his successor not having been elected, he had every right to ask the Block Development Officer to call the meeting. In order to appreciate the argument on the first contention, it is necessary to read the relevant provisions of s. 59 of the Act of 1961. It runs thus:

"The term of office of members of a *Panchayat Samiti* shall be co-extensive with the term of office of the Councillors:

Provided that, a member of a *Panchayat Samiti*—

(a) and (b) ...

(c) referred to in clause (f) of sub-section (1) of section 57 shall hold office only so long as he continues to be a *Sarpanch* or carries on the current duties of the office as *Sarpanch*".

The first part of the section refers generally to the term of office of members and provides that the term of office of members shall be co-extensive with the term of office of the Councillors. Sub-section (9) of s. 2 of the Act of 1961 defines 'Councillor' to mean a member of a Zilla Parishad constituted under the Act of 1961. Sub-section (2) of s. 10 of the said Act provides:

"The term of office of Councillors shall, except as otherwise provided in this Act, be five years:

Provided that, persons who are Councillors by virtue of their being Chairman of a *Panchayat Samiti* or of a co-operative society, shall hold office so long as they continue to hold the office of such Chairman".

It would thus be seen that the normal term of office as provided in the main part of s. 59 of the Act of 1961 is five years. However, there are exceptions provided in the clauses to the proviso to the said section to this normal term of office of members, in case of some members falling under different categories.

We have already stated that the petitioner has been elected as a member of the Panchayat Samiti under cl. (f) of sub-s. (1) of s. 57. His term of office, therefore, is governed by cl. (c) of the proviso to s. 59 of the said Act. The question, therefore, that arises for consideration is the construction of cl. (c) of the proviso to s. 59 of the said Act. Now, under this clause, a person who is elected under cl. (f) of sub-s. (1) of s. 57 of the Act is entitled to hold office of a member of a Panchayat Samiti (a) so long as he continues to be a Sarpanch, or (b) carries on the current duties of the office as Sarpanch. The argument of Mr. Sharad Manohar is that it may be that from November 1963 to December 1, 1963, the petitioner was merely carrying on the current duties of the office as Sarpanch of the Village Panchayat of Kalsadi, but on December 1, 1963, he got re-elected as a Sarpanch of the said Village Panchayat. Therefore, the petitioner continues to be a Sarpanch within the meaning of cl. (c) of the proviso to s. 59 of the Act of 1961.

It is not possible to accept this argument in view of the clear language of cl. (c) of the proviso to s. 59 of the Act. That clause itself makes a distinction between the status of a person when he "continues to be a Sarpanch" and when he "carries on the current duties of the office as Sarpanch". Obviously, the first part of the clause "continues to be a Sarpanch" has reference to that office of Sarpanchship which entitles him to get elected to the Samiti under cl. (f) of sub-s. (1) of s. 57 of the Act. This clause has, therefore, to be read together with the provisions of s. 32 of the Act of 1958 under which village panchayats are constituted. That section provides:

"After the expiry of his term of office, the *Sarpanch* shall continue to carry on the current duties of his office until such time as a new *Sarpanch* is elected and takes over charge."

During the period the Sarpanch carries on the current duties of his office, he does not continue to be Sarpanch as such. During that period, he would be an ex-Sarpanch, but, by reason of the provisions of s. 32 of the Act of 1958, he merely carries on the current duties of his office. The petitioner thus has ceased to be a Sarpanch in November 1963 when his term of office as Sarpanch had expired. From that time till December 1, 1963, he did not continue to be a Sarpanch but was an ex-Sarpanch carrying on the current duties of his office by reason of the provisions of s. 32 of the Act of 1958. There was thus a break from November 1963 to December 1, 1963, in the tenure of the petitioner as a Sarpanch. The continuity was broken. Therefore, his being re-elected on December 1, 1963 as Sarpanch would not have the effect of "his continuing to be a Sarpanch" within the meaning of cl. (c) of the proviso to s. 59 of the Act of 1961. It is not in dispute that as and from December 1, 1963, he ceased to carry on the duties of a Sarpanch. In our opinion, therefore, the petitioner has ceased to be a member of the Panchayat Samiti on December 1, 1963.

It is not in dispute that on cessation of the term of the petitioner's office as a member of the Panchayat Samiti, his term of office as the Chairman of the said Samiti also expires. The question that next arises is whether the petitioner is entitled to carry on "such current administrative duties of his office as may be prescribed by rules made by the State Government, until his successor enters upon his office." Mr. Sharad Manohar argued that by reason of the provisions of s. 66 of the Act of 1961, the petitioner is entitled to carry on such current administrative duties until his successor enters upon his office. The petitioner's successor has not been as yet elected. The respondents are, therefore, in error in saying that the petitioner is not entitled to carry on such current administrative duties. Mr. Gumaste, the learned Additional Government Pleader for the State, respondent No. 3, as well as Mr. Rane, for respondents Nos. 1 and 2, on the other hand, contend that the petitioner is not entitled to carry on the current administrative duties. It is their argument that s. 66 of the Act of 1961 has application only when the term of the entire village Panchayat Samiti as such expires. According to them, the term of the Pancha-

yat Samiti expires on August 7, 1967, and it is only at that time that s. 66 would come into play and that really was the intention of the Legislature in enacting s. 66. In our opinion, in view of the clear language of s. 66, it is not open to us to speculate about the legislative intent. There is no ambiguity in the language in which s. 66 is couched. It is a fundamental rule of construction that it is the duty of the Court to give effect to the clear and unambiguous language used by the Legislature and give effect to the legislative intent as clearly expressed by it in the statute enacted by it. Section 66 of the Act of 1961 in terms provides "notwithstanding the expiration of his term" the Chairman shall continue to carry on such current administrative duties. That section does not say "notwithstanding the expiration of the term of the Panchayat Samiti". To accept the contention of Messrs. Gumaste and Rane, we would be required to read in this section the clause "notwithstanding the expiration of the term of Panchayat Samiti" in place of the existing clause "notwithstanding the expiration of his term." That would amount to rewriting the statute and that course is not open to us. Further, reference to other statutes relating to local bodies, discloses that when the Legislature has intended to allow a Chairman of the local body to continue to carry on current administrative duties in the event of expiration of the term of the body as such, it has in express terms said so. For instance, we may refer to the Bombay Municipal Boroughs Act, 1925, and reading s. 19 thereof, it becomes clear that a distinction is made between the expiry of the term of office of a president or vice-president as contradistinguished from the expiration of the term of the municipality. Sub-section (2) of s. 19 of that Act provides:

"On the expiry of the term of office of a municipality the president and vice-president shall continue to carry on the current administrative duties of their offices until such time as a new president and vice-president shall have been elected and shall have taken over the charge of their duties."

Such, however, is not the position in this case. The Legislature in express terms conferred a power on the Chairman of the Panchayat Samiti to carry on such current administrative duties until his successor enters upon his office, notwithstanding the expiration of his term. A reference to s. 64 of the Act of 1961 would show that a person who is eligible to be elected as a Chairman shall be from amongst members falling under cls. (a) and (f) of sub-s. (1) of s. 57 of the said Act. The members falling under cl. (a) of sub-s. (1) of s. 57 are Councillors directly elected to the Zilla Parishad by their respective constituencies and their term of office in accordance with the provisions of the Act is five years, while members falling under cl. (f) are Sarpanchas of the village panchayat elected under the provisions of the Act of 1958 and their term of office is only four years. The Legislature was thus aware that there were likely to be cases where the term of office of a Chairman would expire prior to the expiry of the term of the Samiti. In spite of this, in s. 66 of the Act of 1961 it has been provided that the Chairman shall notwithstanding the expiration of his term would continue to carry on such current administrative duties. Having regard to the clear language used in s. 66 and having regard to the other provisions to which we have made reference, in our opinion, the petitioner would be entitled to carry on such current administrative duties of his office as may be prescribed by rules made by the State Government until his successor enters upon his office.

It would be noticed that the Chief Executive Officer in his letter has taken the view that s. 66 of the Act of 1961 has no application because in his opinion the Deputy Chairman would be his successor by virtue of the provisions of s. 77 of the Act. The same stand has been reiterated in the return filed by the Chief Executive Officer. Mr. Rane, and in our opinion quite rightly, has not supported this stand before us. It was also suggested in the course of the arguments that the interpretation put by us would bring about startling results enabling a Chairman, who has been removed on account of a disqualification,

to carry on the current administrative duties. In our opinion, the suggestion made in the course of the arguments has not been well-made. The term of office of a Chairman may come to an end on account of various reasons, for instance, death, resignation on incurring of a disqualification, removal for misconduct, expiry of the term of his office etc. Section 66 comes into play only when the term of office of a Chairman has come to an end by reason of the expiration of his term and not when the term of office of a Chairman comes to an end on account of any other reason. The apprehension expressed during the course of the argument is, therefore, without foundation. In our judgment, therefore, the petitioner, though his term of office as a Chairman has expired, is entitled to carry on the current administrative duties as are prescribed by the rules made by the State Government, until his successor enters upon his office, that is, until a new Chairman is elected.

The question which next arises is whether the petitioner was entitled to direct the Block Development Officer, Shahada, to convene a meeting on March 26, 1964, at 2 p.m. and whether the Block Development Officer was in error in not giving effect to the direction given to him by the petitioner. Now, we have held that the petitioner is entitled to carry on the current administrative duties as are prescribed. The powers and functions of Chairman of Panchayat Samiti are enacted in s. 76 of the Act of 1961. Sub-section (1) of that section enumerates the duties which are obligatory and sub-s. (2) enumerates the powers and functions which he may undertake in his discretion. Sub-section (1) consists of cls. (a) to (d) and cl. (a) provides:

"The Chairman of a Panchayat Samiti shall—

(a) convene, preside at and conduct meetings of the Panchayat Samitis;"

It has to be seen whether this power which the Chairman has under cl. (a) of sub-s. (1) of s. 76 still remains with him as part of the current administrative duties, and that brings us to the rules prescribed by the State Government under s. 274 of the Act. In exercise of the powers conferred upon it, the State Government has framed rules called the Maharashtra Zilla Parishads (President and Vice President) and Panchayat Samitis (Chairman) (Current Administrative Duties) (after the Expiry of the Term of Office) Rules, 1963. These Rules were framed in the year 1963 and it is not in dispute that these rules were at material time in operation. Rule 2 provides:

"Notwithstanding the expiration of his term every President, Vice President or Chairman of a Panchayat Samiti, shall continue to carry on until his successor enters upon his office, the current administrative duties specified in columns 1 and 2 of the Table hereto."

When we turn to the Table, we find that the only powers and functions that are retained with the Chairman on the expiry of the term of his office are those contained in cls. (b) and (c) of sub-s. (1) of s. 76 and cls. (a) and (b) of sub-s. (2) of the said section. It is clear that the power to convene a meeting does not fall within the prescribed current administrative duties. The petitioner, therefore, had no right to direct the Block Development Officer to convene a meeting. The Block Development Officer was, therefore, not in error in not giving effect to that direction.

In the result, the petition is partly allowed. The respondents are directed not to interfere with the petitioner's right to carry on the current administrative duties as are prescribed until his successor enters upon his office. The other reliefs sought by the petitioner are hereby rejected. In the circumstances of the case, we make no order as to costs.

Petition partly allowed.

Before Mr. Justice Tambe and Mr. Justice Naik.

DINKAR TUKARAM GAJARE v. PREMCHAND UTTAMCHAND
PAGARIYA.*

Maharashtra Co-operative Societies Act (Mah. XXIV of 1961), Secs. 2(13), 75—Maharashtra Co-operative Societies Rules, 1961. Rule 22—Board of directors of society, election of—Whether board of directors to be elected at general meeting of society—Applicability of r. 22 to election of directors.

There is no express provision in the Maharashtra Co-operative Societies Act, 1960, that the board of directors be elected by a society at its general meeting. In each case it will have to be seen whether by reason of the bye-law made by the society, right to elect directors is given to the general meeting or not. If the bye-laws give a right to the general meeting to elect its directors, rule 22 of the Maharashtra Co-operative Societies Rules, 1961, would govern the election of the board of directors. If, on the other hand, the bye-law does not give a right to the general meeting to elect its board of directors, but otherwise provides for the election of the directors, then rule 22 of the Rules will have no application to the election of directors.

THE facts appear in the judgment.

G. N. Vaidya and R. M. Purandare, for the petitioner.

M. V. Paranjpe and R. A. Jahagirdar, for opponent No. 2.

V. H. Gumaste, Additional Government Pleader, for opponent No. 7.

TAMBE J. By this petition under art. 227 of the Constitution of India, the petitioner seeks to get quashed the order made by the Maharashtra State Co-operative Tribunal, respondent No. 6 hereto, on April 22, 1964, setting aside the election of petitioner to the Board of Directors of the Jalgaon District Central Co-operative Bank Ltd., respondent No. 2 hereto.

Facts in brief are: respondent No. 2 is a Federal Co-operative Society. Sub-section (13) of s. 2 of the Maharashtra Co-operative Societies Act, 1960 (hereinafter referred to as the Act) defines a "federal society" thus: "federal society" means a society (a) not less than five members of which are themselves societies, and (b) in which the voting rights are so regulated that the members which are societies have not less than four-fifths of the total number of votes in the general meeting of such society. It would thus be seen that the membership of the federal society consists of shareholders falling under two categories: (1) society and (2) individual shareholders. It would also be seen that sub-s. (13) of s. 2 requires that voting rights at the general meeting have to be so regulated that the members which are societies have not less than four-fifths of the total number of votes. In other words, the voting rights at the general meeting have to be so regulated that the individual shareholders have not more than 1/5th of the voting strength of the total number of votes. To achieve this object, the State Government, in exercise of its rule making power, have framed rule 22 of the Maharashtra Co-operative Societies Rules, 1961. The said rule *inter alia* reads:

"22. In the case of federal societies, the voting rights of individual members [which term shall include firm, company or body corporate, society registered under Societies Registration Act, 1880, State Government, local authority, and public trust registered under any law for the time being in force relating to registration of public trusts but shall not include a society (society has been defined in sub-section (27) of section 2 of the Act as "a co-operative society registered, or deemed to be registered, under this Act;")] may be regulated as follows:—

(a) Immediately after the 30th June of every year and, as soon as possible before the annual general meeting, individual members (hereinafter referred to as "the relevant date"), shall elect delegates equal to one fourth of the number of societies admitted to

*Decided, October 28, 1964. Special Civil Application No 871 of 1964.

membership up to the relevant date or one delegate for every twenty-five individual members (fractions being neglected) whichever is less. The delegates so elected will continue in office till their successors are elected after 30th June next.

(b) Every society through its properly authorised representative and every delegate referred to in clause (a) above shall have one vote in the general meeting."

The other sub-clauses of the rule are not material for the purposes of this case. Now, there was an election held on September 30, 1963, for electing a Director on the Board of Directors of respondent No. 2 from the Jalgaon, Erandole, Parola and Amalner constituency of individual shareholders. The petitioner and respondents Nos. 1, 3, 4 and 5 were the rival candidates. At the election, votes were cast not by the delegates of the shareholders but by the individual shareholders themselves. The petitioner secured the highest number of votes, and he was declared as elected on the Board of Directors of respondent No. 2. Respondent No. 1 lodged a dispute before the Registrar, challenging the validity of the election of the petitioner. The contention raised by him was that the election was invalid inasmuch as it was in contravention of the provisions of the aforesaid rule 22. According to respondent No. 1, the individual shareholders were not competent to vote at the election, but, on the other hand, persons competent to vote for the election were the delegates elected by the individual shareholders and not the individual shareholders. The Registrar sent the dispute to his nominee for decision. The nominee dismissed the application of the respondent. Against that respondent No. 1 appealed to the Co-operative Tribunal. The tribunal has allowed the appeal, set aside the order of the nominee and set aside the election of the petitioner. Hence this petition.

Before us respondent No. 1 has not appeared to contest the petition. So also respondents Nos. 3, 4 and 5, who were the contesting candidates, have not appeared to defend the petition. Respondent No. 2 is represented by its counsel Mr. Jahagirdar. He has supported the petition. Mr. Gumaste, learned Additional Government Pleader appearing for respondent No. 7, State of Maharashtra, stated before us that respondent No. 3 would submit to the order of the Court. In short he has also not opposed the petition. There is no appearance on behalf of respondent No. 6, which is the Tribunal. We have, therefore, not the benefit of an argument in opposition to the contentions raised by the petitioner. We would, however, take the view taken by the Tribunal as the case of respondent No. 1, inasmuch as we have been informed that respondents Nos. 3 and 5 have remained *ex parte* throughout. The view expressed by the Tribunal is founded on the aforesaid provisions of rule 22 and bye-law No. 18 framed by respondent No. 2 society. It would be necessary to reproduce the material part of bye-law 18. Bye-law 18 falls under the heading "General Meeting", so also bye-law No. 24, to which we would advert later. Material part of bye-law No. 18 reads:

"18. The Supreme Authority of the Bank shall be vested in the General Meeting consisting of delegates from affiliated societies, and of all the delegates of members other than affiliated societies. The voting rights of the individual members (which term shall include any company or body corporate, society registered under Societies Registration Act, 1860, State Government, Local Authority, and Public Trust registered under any law for the time being in force relating to registration of public trusts but shall not include a society) shall be regulated as follows:—

(1) Immediately after 30th June of every year and as soon as possible before the Annual General Meeting individual members admitted to membership upto the 30th June of the preceding year hereinafter referred to as 'the relevant date', shall elect delegates equal to one fourth of the number of societies admitted to membership upto the relevant date or one delegate for every twenty-five individual members (fractions being neglected) whichever is less. The delegates so elected will continue in office till their successors are elected after 30th June next.

(2) Every society through its properly authorised representative and every delegate referred to in serial No. 1 above shall have one vote in the General Meeting."

It may be stated that the closing date of the year is 30th June. Rule 5 provides that the

“lists in the case of Individual Shareholders, shall contain the name and father's name of every person entitled to be registered as a voter with such other particulars as may be necessary to identify him.”

Rule 7 relates to the correction of voters' lists. Rule 8 provides that

“a final copy of voters of each constituency will be available to members only on payment of Re. 1/- each.”

Rule 9 provides that

“there shall be prepared lists of voters for the following constituencies as mentioned in Bye-law No. 24(1) of the Bank.”

Bye-law 24(1) creates as many as 5 constituencies relating to the election of the Directors, and one of the constituencies is individual shareholders. Now, this principal constituency of individual shareholders is sub-divided by rule 9 into three sub-constituencies as mentioned therein. It may be stated that the talukas of the District of Jalgaon have been distributed in the three constituencies. One of them is Jalgaon, Erandol, Parola and Amalner. Rules 18 to 29 relate to the procedure of recording votes, and rule 27 provides that the voter shall place the voting paper in the ballot box kept for the purpose. These are all the relevant rules which need be noticed for the purpose of this petition. It may also be stated at this stage that the validity of these rules has not been challenged before us and was not challenged before the Tribunal.

Now, the position emerging on the consideration of these rules is clear. For the purpose of electing a Director, it is the individual share-holder who gets a right to vote. It is his name that is entered in the list of voters. Each voter has been given a single vote at the election of the Directors. That being the position it is clear that the person who has a right to vote at the election of the directors is the individual share-holder and not his delegate. Bye-law 20 provides that the election of the directors has to be held according to the rules framed by the Board of Directors and approved by the Registrar. It is not in dispute that these rules have been approved by the Registrar. That being the position, in view of bye-law 20 and the rules is that though at the time of the annual general meeting with the afore-said rules framed by the Board of Directors and approved by the Registrar.

Before Mr. Justice Patel and Mr. Justice Tulzapurkar.

THE LIFE INSURANCE CORPORATION OF INDIA

v.

THE BOMBAY MUNICIPAL CORPORATION.^o

Bombay Municipal Corporation Act (Bom. III of 1888), Secs. 154, 195E—Bombay Rents, Hotel and Lodging House Rates Control Act (Bom. LVII of 1947), Secs. 7, 5(10), 10-10AAA—Whether rateable value of property limited by Rent Act—Permitted increases under Rent Act whether can be added to rental for purposes of rateable value—Whether education cess can be added to rent for arriving at annual letting value.

Under s. 154 of the Bombay Municipal Corporation Act, 1888, the annual letting value of property is only the standard rent provided by the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, and which alone the landlord can recover from his tenants. Permitted increases do not form part of the rent and therefore these cannot be allowed to be added to the rental for the purposes of rateable value.

An education cess imposed on property as an additional tax by the Municipal Corporation under s. 195E of the Bombay Municipal Corporation Act, 1888, cannot be added to the rent for the purposes of arriving at the annual letting value of the property.

*Corporation of Calcutta v. Sm. Padma Debi*¹ and *Maneklal v. Municipal Comr.*,² referred to.

THE facts appear in the judgment.

V. H. Gumaste and *M. P. Hegde*, for the appellants.

C. J. Shah, with *A. M. Desai*, for the respondents.

PATEL J. This appeal is brought by the Life Insurance Corporation of India who will be referred to as the Corporation against the judgment of the Chief Judge of the Small Causes Court, Bombay, in a valuation matter under the Bombay Municipal Corporation Act of 1888. Before the learned Judge there were several appellants and the questions that arose were common. The Corporation owns the 'Indian Globe Chambers' at the junction of Hornby Road and Mangesh Shenoy Street. It is a landlord and has many tenants of the Corporation. The rateable value for the property is fixed by the Municipal Corporation. It is an additional tax known as education cess. The annual letting value of the property is fixed by the Corporation of

be added to the actual rental for the purpose. He, therefore, made orders accordingly. The Corporation challenges the decision of the learned Judge.

The answer to the question raised depends upon the construction of the relevant provisions of the City of Bombay Municipal Act read in the context of the Bombay Rent Act. Section 154 of the Act does not independently define what is rateable value of a property but it contains a clear provision that it is the amount of annual rent for which the land or building may be reasonably expected to let from year to year less ten per cent. of the said rent. It has been consistently held that under this section the rateable value is the amount of rent that a hypothetical tenant may reasonably pay for the premises if they are let from year to year, both the landlord and the tenant being willing to let and to take the building. It has also been held that the annual letting value may not always be equivalent to the actual rent which is recovered by the landlord. It may be that in some cases the actual rent may be more than the annual letting value and in some cases it may be less, depending upon several circumstances. If there had been no Rent Act, which in effect staggered the rents, there could be no question as to how the Corporation would have valued the property in question. The difficulty has arisen because of the Rent Act which prevails in this State.

Under the scheme of the Rent Act, no landlord is entitled to charge under s. 7 anything in excess of the standard rent. The section expressly provides that it would not be lawful for a landlord to claim or receive on account of rent of any premises any excess above the standard rent, barring a few exceptions, which are not relevant for the present purpose. Section 18 of the Act makes it penal for any landlord to recover any amount in contravention of the provisions of s. 7. Section 5(10) defines what standard rent is and in this connection it must be noticed that it does not include anything by way of a permitted increase under the provisions of s. 10 to s. 10AA of the Act. The incidence of the municipal taxes under the City of Bombay Municipal Corporation Act falls in this State on the owner. After the Rent Act came into force it was realised, when the prices showed upward trend, the injustice in preventing the landlord from recovering normal rents and at the same time requiring the landlord to meet the taxation on the property and in order to mitigate the hardships created by reason of the necessities of the times some relief was afforded to the landlord by which the landlords were, in certain stated cases permitted to recover extra taxes which they were required to pay to the Corporation from their tenants. It is indeed true that ss. 10A, 10AA and 10AAA, when they speak of the increase, speak of it as increase in rent but the sections also make it clear that it shall not be deemed to be increase in rent under s. 7. It is clear, therefore, from the provisions of these related sections that what is allowed to the landlord in addition to the standard rent is not some sort of increase in the rent at all but it merely provides in a specified way the transfer of the burden of some portion of the tax to the tenants because of the rigours of the Rent Act.

The first question is whether the rateable value is limited by the provisions of the Rent Act and if it is so limited whether in any case the burden which is transferred to the tenant can be counted as additional rent which the landlord recovers from the tenant for the purposes of the municipal taxes.

Mr. Gumaste has referred to the decision of the Supreme Court in the case of *Corporation of Calcutta v. Sm. Padma Debi* where the provision of s. 127(a) of the Calcutta Municipal Act was interpreted by the Supreme Court. The rent of the premises in question was fixed by the Rent Controller at Rs. 550 per month with effect from April 1951 and at Rs. 632-8-0 per month with effect from August 1951. The Municipal Corporation fixed the rateable value at Rs. 1,450 per month. This valuation was challenged. It was contended on be-

be added to the actual rental for the purpose. He, therefore, made orders accordingly. The Corporation challenges the decision of the learned Judge.

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half of the Corporation that the rateable value under the Municipal Act had no relation to the standard rent earned by a landlord and in support of this argument it relied upon the decision of the House of Lords in *Poplar Assessment Committee v. Roberts*.² Their Lordships pointed out the distinction which obtained between the English law and the Indian law—the distinction between the incidence of taxation in the two cases. It has been pointed out that in England the tax falls on the tenants while in India the tax falls on the landlord. In view of this, their Lordships said that where the rents that a landlord can earn are circumscribed by Rent Act, the rateable value will be limited by the rent earned by the landlord. In other words, the rateable value can only be the rent obtainable under the Rent Act. An argument was raised before their Lordships on behalf of the Corporation that any additional burden could be passed on to the tenant by the landlord and, therefore, the landlord would not suffer any prejudice whatsoever. Their Lordships observed that the acceptance of that reasoning—

"would land us in a vicious circle and would enable one to circumvent the provisions of the Rent Control Act, for though a tenant is not liable under an Act to pay a rent higher than the standard rent, by this process he would be compelled to pay a higher rent." (p. 155).

They observed (p. 155) :

"...On the other hand, the scope of that section can legitimately be confined to situations giving rise to increase of taxes such as the increase in the rate, etc."

Mr. Shah contends that though it is true that the landlord cannot earn anything more than the standard rent inasmuch as under the provisions of the Rent Act, the burden could be passed on to the tenant when the Municipal Act imposes burden on the landlord, there can be no reason why once the landlord makes the increase by reason of the taxation, it should not also be regarded as a part of the rent which the tenant pays to the landlord and thus be regarded as increasing the rateable value of the property in question. We would repeat that this must land us again into a cycle of increments every year from figure to figure never intended by the framers either of the Rent Act or of the Municipal Act. This may be illustrated thus: Take for example a building, the rateable value of which is a lac of rupees—at least in Bombay there may be some buildings, which do have this annual letting value. The educational cess would be Rs. 1,500 in respect of this building. Next year, the rateable value, according to the contention of the Municipal Corporation, would be more by Rs. 1,500. If incidence of the educational cess is increased from one and half per cent. to five per cent., the rateable value would increase by Rs. 6,000 and not by Rs. 1,500. All the taxes payable by the landlord would increase in proportion, including the educational cess. A year thereafter, all this further addition would be added on to the rent and treated as annual letting value. One does not know where the limit would be reached. It seems to us, therefore, that from a practical aspect, if such a result could be avoided, it ought to be. It is argued by Mr. Shah that ultimately it is the reasonable rent which a hypothetical tenant would pay to the landlord that has to be determined by the Court. Any tenant would be prepared to pay this amount in addition to the standard rent on a reasonable view of the matter and, therefore, this should be considered to be a proper addition to the rent for determining the rateable value of the building. But then, looking to the hardship of accommodation to-day, a tenant would not only be prepared to pay this addition but a far greater addition and it was in order to prevent such payments that the Rent Act was enacted. The framers are also careful in providing that the increase by the landlord made by reason of the additional tax burden in the rent would not be regarded as an increase in the standard rent and such increase is not also included in the definition of the standard rent. It is obvious, therefore, that the standard rent is not affected by any increases

allowed under the Rent Act by reason of the additional taxation and if, therefore, the rent or the standard rent which the landlord can recover is limited by the Rent Act under the authority of the decision cited above, we do not see how any further amount can be added to the actual rental and be called the rent of the building which the landlord recovers.

It is undoubtedly true, as has been pointed out, that no limit is set either way to the determination of the rateable value under s. 154 of the Municipal Act. We do not see why it should not be held that the Rent Act does set a limit to the rateable value assessable under s. 154. If the landlord cannot recover anything more than the standard rent, then that is a limitation which acts on s. 154 and if that is so, the amount of the increases permitted by the Rent Act because of the increase in taxation cannot be allowed to be added to the rental for the purpose of rateable value.

The learned Judge has observed:

"So far as the word 'rent' goes in the City of Bombay, it is undisputed that the landlords recover from their tenants such amount as includes all the taxes on the property which are recovered by the Bombay Municipality from the landlord in respect of their properties. If so I cannot understand why this amount which is recovered from the tenants in lieu of the property taxes payable by the landlords as education cess cannot be included as part of the rent."

The landlords recover rents and the tenants pay rents which depend upon the rule of demand and supply. If a property which remained idle for a long time is being occupied by a tenant, the landlord does not consider whether he pays 'X' tax or 'Y' tax. He is more anxious to let the property to a tenant. If, on the other hand, the tenant is a needy tenant, the landlord does not charge less rent merely because he pays a particular amount of tax. The learned Judge is also in error when he says that the education cess is a part of the property tax of that it is in lieu of the property tax. Section 195E, under which the educational cess is levied, does not justify this inference. The educational cess is in addition to the general tax, which the Corporation recovers and s. 195E provides that it may be recovered as an addition to the general tax. In fact it is recovered merely as an educational cess separately. The learned Judge has observed:

"All these years in the total annual rent which is calculated by the Bombay Municipality under Sec. 154 of the Bombay Municipal Corporation Act, these factors are taken into account and it is the total amount which the tenants pay to the landlord by way of consideration for the occupation of the tenements that is considered as rent which can be expected by a landlord of the property from a hypothetical tenant. There is no estoppel, and practice does not necessarily make law. Whether or not the same considerations would apply to the general tax, a part of which is being probably recovered from tenants as permitted increase for determining the rateable value, does not fall to be considered just now, inasmuch as we are concerned only with the educational cess."

The learned Judge, in this, followed the decision of Mr. Justice Datar in *Municipal Comr. v. Manecklal*³ where the learned Judge has held that the deduction of ten per cent. in the annual letting value allowed under s. 154 was intended to be for all purposes and no further deduction could be made from the annual letting value. Against this decision, there was a Letters Patent Appeal being *Maneklal v. Municipal Comr.*,⁴ where we differed from the learned Judge and held not that any further deductions could be made out of the annual letting value in addition to ten per cent., but that the annual letting value itself, was the gross amount recovered by the landlord minus a reasonable return to him for his investment in providing additional amenities to the tenant. Out of the amount determined, ten per cent. deduction has to be made for other outgoings as provided by the Act. In our view, really speaking, the ratio of the decision of the learned Judge cannot apply to the question that

falls to be decided in the present case. There is no question of making any deduction whatsoever and the only question with which we are concerned is, what is the annual letting value of the property which, in view of what we have said above, is only the standard rent provided by the Rent Act and which alone the landlord can recover from his tenant. Permitted increases do not become part of the rent and as such not the annual letting value.

In the result, we set aside the decision of the learned Judge and we direct the Corporation to determine the rateable value by deducting the amount of the education cess from the amount fixed by the Assessor and Collector.

We are surprised that no one so far has considered the injustice of allowing a deduction of only ten per cent. for all outgoings. The costs of materials and labour charges have gone very high as much as even four and five times of what they were in days past. It is no wonder, therefore, that no landlord even if he wants to make repairs can afford to do so, as the returns are limited and the ten per cent. of the rent is too meagre. The result is that so many properties become useless for habitation and ultimately the tenants suffer. If one has regard to the litigations in the Small Causes Court, there would seem to be large number of defaults in the payment of small amount of rents. Under English Statute the deduction is much higher, varying between forty and twenty per cent. of the letting value of buildings without land other than garden land and ten per cent. for land only. (See the Rating and Valuation Act, 1925 and the Valuation (Metropolis) Act, 1869 as amended by the Rating and Valuation Act, 1928 and by s. 7 of the Rating and Valuation (Apportionment) Act, 1928). It is time that the provision as to deduction is rationalized to meet the present day costs for determination of letting value in all Municipal Acts.

The parties to bear their own costs.

Order set aside.

THE NAGPUR BENCH

Before Mr. Justice K. K. Desai and Mr. Justice Paranjpe.

THE NAGPUR HOTEL OWNERS' ASSOCIATION

v.

THE STATE OF MAHARASHTRA.*

Constitution of India, Art. 254(2)—Minimum Wages (Maharashtra Amendment) Act, (Mah. Act VI of 1963)—State Legislature passing Act amending Central Act—State Act repealed by Central Amending Act—State Legislature again passing another amending Act re-enacting repealed law—Competency of State Legislature to enact such law.

Article 254(2) or the provisions hereunder of the Constitution of India does not limit the powers of the State Legislature so as to preclude it from enacting on the same point again after the Parliament has once acted under the proviso to override an earlier amendment made by the State Legislature under art. 254(2).

Minimum Wages (Maharashtra Amendment) Act, 1962, is not *ultra vires* of the powers of the State Legislature.

The facts appear in the judgment.

M. N. Phadke, M. W. Puranik, N. S. Munshi and P. T. Trivedi, for the petitioners.

G. R. Mudholkar, Additional Government Pleader, for the respondents.

S. W. Dhabe and C. S. Dharmadhikari, for the interveners.

*Decided, November 10, 1964. Special Civil Application No. 491 of 1968.

PARANJPE J. In this petition under art. 226 of the Constitution, the petitioners have prayed that two notifications under the Minimum Wages Act, as locally amended, should be quashed.

Acting under s. 3 read with s. 5(2) of the Minimum Wages Act, the State of Maharashtra issued a notification on September 9, 1963, whereby the minimum wages for skilled, semi-skilled and unskilled labourers employed in residential hotels, restaurant or eating house were fixed. On October 1, 1963, the State Government issued another notification under s. 30(2)(c) of the Minimum Wages Act for determining the computation of the cash value of the wages which are permitted to be paid in kind to these workers. Petitioner No. 1 is the Nagpur Hotel Owners' Association and petitioners Nos. 2 and 3 are owners of hotels which are run at Nagpur. These three petitioners contend that the said notifications are *ultra vires* of the powers vested in the Government and, therefore, they ought not to be enforced. The State of Maharashtra have contended that the notifications are perfectly valid and there is no reason or ground to interfere with them.

Before we proceed to consider the submissions of the respective advocates in this connection, it will be useful to trace the history of the legislation, "Minimum Wages Act," so far as it concerns the employees in residential hotels, restaurants or eating houses. The Central Act No. XI of 1948 was passed to provide for fixing minimum rates of wages in certain employments. This subject of the enactment was under entry No. 27 in the Concurrent Legislative List (List No. III) in the Government of India Act, 1935. Initially, only twelve classes of employment were mentioned in the first part of the Schedule. Under s. 27 of the Minimum Wages Act, the State Government were given power to include in this Schedule other employments for which minimum rates of wages could be fixed. Accordingly, the then State of Bombay added "employment in any residential hotels, restaurant or eating house" as defined in the Bombay Shops and Establishments Act, 1948, as item No. 13 in Schedule I, Part I, on August 26, 1951. Under the original Minimum Wages Act s. 3(I) had three sub-cl. (i), (ii) and (iii) with respect to the employments specified in Part I of the Schedule, employments specified in Part II of the Schedule and employment added subsequently under s. 27, respectively. Under the proviso to sub-cl. (ii) of s. 3(I) with respect to employments specified in Part II of the Schedule (which relate mostly to agricultural employments) the State Governments were given power of fixing minimum rates of wages under that sub-clause either for the whole State or for a part of the State, but no such proviso was added to the other two sub-clauses of s. 3(I) in the original Act.

This subject of minimum wages, which falls under the heading "Welfare of labour", falls under item No. 24 in the Third (Concurrent) List in the Seventh Schedule of the Constitution. Therefore, the Parliament, as also the State Legislature, have power to make laws with respect to this subject. Accordingly, the Maharashtra State Legislature passed the Amending Act No. X of 1961, and after receiving the President's assent it came into force on February 15, 1961. By s. 2 of this Amending Act, the original s. 3 in the Central Act No. XI of 1948 was amended and provisos permitting the fixation of minimum wages for the whole State or for a part of the State were added to all the three sub-clauses of s. 3. With this amendment, the State Government was given the power to fix minimum wages for employments including employment in hotels, restaurant etc. either for the whole State or for a part of the State. Shortly after this local Amending Act was passed, the Parliament enacted Act No. XXXI of 1961 for amending the Minimum Wages Act No. XI of 1948. By this amendment, the three clauses to s. 3 were consolidated into one and the proviso permitting the fixation of wages for a part of the State was added only with respect to employments mentioned in Part II of the Schedule which related mostly to agricultural employments. It is not disputed that this Amend-

ing Central Act No. XXXI of 1961 had the effect of abrogating and repealing the Maharashtra Amending Act No. X of 1961.

Thereafter the Maharashtra State Legislature again enacted Act No. III of 1963. By this new Amending Act, the provisos to s. 3, as incorporated by the Central Act No. XXXI of 1961, were substituted by the following proviso:

"Provided that, the State Government may, instead of fixing minimum rates of wages under this clause for the whole State, fix such rates for a part of the State or for any specified class or classes of such employments in the whole of the State or any part thereof; and in the case of an employment under any local authority, the State Government may fix such rates for any specified local authority, or class of local authorities."

This Act No. III of 1963 was reserved for the consideration of the President and it received his assent on January 9, 1963, and came into force on January 14, 1963. It is under this Act that the impugned notifications have been issued.

According to Mr. Phadke, advocate for the petitioners, the impugned notifications are unsustainable because Act No. III of 1963 under which they have been issued, is itself *ultra vires* of the powers of the State Legislature. He did not dispute that under art. 254(2) of the Constitution, the State Legislature had power to enact Act No. X of 1961. However, he contended that once the Parliament itself had virtually repealed or abrogated the Maharashtra Act No. X of 1961 by passing Act No. XXXI of 1961 under the proviso to art. 254(2) of the Constitution, the power of the State Legislature to pass under art. 254(2) a legislation, which was repugnant to the Central legislation and to reserve that legislation for the consideration of the Parliament, came to an end, and, therefore, this subsequent Act No. III of 1963, though it had received the assent of the President, was entirely beyond the powers of the State Legislature. In his opinion, once the Parliament took the field by ousting the Maharashtra Amending Act No. X of 1961, it was no longer open to the State Legislature to purport to re-enact another law, which had been superseded by the Parliament itself, and the assent of the President would not give validity to an Act which was *prima facie* beyond the powers of the Legislature. According to Mr. Mudholkar, Additional Solicitor General and Pleader, on the other hand, the powers given to the State Legislature by art. 254(2) were not intended to be exhausted on being used only once. While not disputing that the Parliament always had power under the proviso to art. 254(2) to overrule an Amending Act by the State Legislature, Mr. Mudholkar contended that the power of the State Legislature to pass an enactment on matters in the Concurrent List in the Seventh Schedule always remained intact subject to the President giving his assent to such an amendment.

While elucidating his argument Mr. Phadke was submitting that art. 254(1) enunciated the main provision, namely, that though both the Parliament and the State Legislature had power to enact laws with respect to matters stated in the Concurrent List, the law passed by the Parliament was to prevail and the law passed by the State Legislature was to prevail to the extent to which it was repugnant to the law passed by the Parliament. He then submitted that art. 254(2) of the Constitution, which authorised the State Legislature to get over the repugnancy with respect to the law passed by the Parliament by passing an Amending Act with the assent of the President, was only by way of a proviso and, in that view, he did not dispute that the Maharashtra State Legislature had acted entirely within its power under art. 254(2) by passing the Amending Act No. X of 1961 and in obtaining the assent of the President. His main contention, however, was that after the Maharashtra State Legislature had passed the Amending Act No. X of 1961, the Parliament had intervened with intent to undo the provisions made by the Maharashtra Amending Act and had passed Act No. XXXI of 1961 in accordance with the proviso to art. 254(2) of the Constitution. Having thus ousted the law made by the Amending Act passed by the State Legislature, the Parliament had taken the field and, therefore, the powers of the State Legislature to again

pass a second Amending Act on the lines of the first Act, which had been superseded by the parliamentary amendment, must be deemed to have come to an end and, consequently, the Amending Act No. III of 1963 ought to be considered illegal and *ultra vires* of the powers of the State Legislature.

In advancing this argument Mr. Phadke was assuming that once the Parliament has exercised its power under the proviso below art. 254(2) to amend or to override a legislation passed by the State Legislature under art. 254(2), the power of the State Legislature to pass any such legislation came to an end and it could not act for a second time to pass any legislation with respect to the matters covered by the Parliament's legislation under the proviso to art. 254(2). However, there did not seem to be any warrant for making any such assumption. The wordings in art. 254(2) or the proviso thereunder do not lend to such an interpretation of the provisions. There is nothing therein to limit the powers of the State Legislature so as to preclude it from enacting on the same point again after the Parliament has once acted under the proviso to override an earlier amendment made by the State Legislature under art. 254(2). While not disputing that the wordings of the article itself do not provide such a meaning, Mr. Phadke was submitting that if his interpretation were not accepted, there would be an unhealthy competition between the Parliament and the State Legislature and each one would try to override the other. We do not think that such a fear is well founded. If a Legislature and the Parliament try to enter into this sort of a competition in passing contradictory legislations, the matter will immediately be put a stop to by the President by withholding his assent or refusing to give his assent under art. 254(2). Though the State Legislature has power to enact a legislation on a subject in a Concurrent List, as its own area is concerned, the assent of the President is always essential and we are not prepared to subscribe to the fear of Mr. Phadke that due care would not be taken while resorting to art. 254(2). Mr. Phadke was also not right in assuming that the President's act was only an executive act. The heading of Part XI of the Constitution in which this art. 254 comes is "Distribution of Legislative Powers" and consequently the act of the President in giving his assent under art. 254(2) would not be merely an executive act but would be a part of the legislative powers which ultimately make such a law valid.

The argument of Mr. Phadke would also virtually amount to saying that though a State Legislature has power to enact on matters in the Concurrent List, its legislative power with respect to a particular subject would come to an end or would become exhausted the moment the Parliament passes a legislation on that subject under the proviso to art. 254(2). We do not think that that was the intention of the framers of the Constitution. If that was the intention, there was nothing to prevent the framers of the Constitution from saying so, in so many words. The Central Act No. XXXI of 1961 certainly does not specifically say that it has been passed for repealing the Bombay Act. However, it is beyond doubt that it is not necessary to mention specifically that a particular Act was intended to be repealed. It will be seen from *Zaverbhai v. State of Bombay*¹ that even when the Parliamentary legislation does not expressly state that a particular law is repealed, the State law will be void if it conflicts with a later law passed by the Parliament with respect to the same matter. Though the State Act No. X of 1961 has thus been repealed by the Parliamentary Act No. XXXI of 1961, the power of the State Legislature to pass a fresh legislation with respect to the repugnancy in accordance with the proviso to art. 254(2) of the Constitution, still remains intact and that power has been properly exercised after reserving the Act for the consideration of the President. It is not disputed that the President has accorded his assent to the Maharashtra Act No. III of 1963, which was validly passed by

¹ [1954] A.I.R. S.C. 752, at para. 7, s.c. 57 Bom. L.R. 589, at p. 593.

the State Legislature. Consequently, the impugned notifications, which were issued under Act No. III of 1963, cannot be challenged.

The next contention of Mr. Phadke was with respect to the fixation of rates for skilled, semi-skilled and unskilled labourers. According to him, these rates were arbitrarily fixed at a very high level as compared to the rates prevalent for other employments falling under the Minimum Wages Act. The learned Additional Government Pleader, however, pointed out that the rates in other employments mentioned in the petition were already revised in accordance with the procedure laid down by the Minimum Wages Act and were duly published in the Gazette. In view of that statement of the learned Additional Government Pleader, Mr. Phadke did not press this ground of attack.

The last contention of Mr. Phadke was that the State Government had acted illegally and arbitrarily in fixing the cash value of the payments to be made to the employees in kind. According to him, rule 20 mandatorily required that the Government should take into consideration the prevailing market rates before fixing the cash value of the payments in kind. According to him, the cash value fixed by the Government in the notification on October 1, 1963, had no relation whatsoever to the prevailing market value and, therefore, he wanted us to interfere with those rates. The contention of the petitioners that the Government had not considered the prevalent market rates did not appear to be well founded. In para. 12 of the return, the State Government had denied this allegation of the petitioners. It was the case of the Government that the Committee duly appointed under the Act had considered all relevant factors including the prevailing market rates. We have no material before us to say that the market rates were not considered, as was the case of the petitioners. We do not think that there was any question of taking judicial notice of the prevailing market rates and to hold that the rates, as fixed by the Government, are ridiculously low as compared to those rates. After all, the prevailing rates in the market would be the rates charged to an individual consumer whereas the rates considered by the Committee were apparently on the basis of the cost to the Government. There is no material on which we could interfere with the Government.

The petition is dismissed with costs.

Petition dismissed.

Before Mr. Justice V. S. Desai.

THE SOCIETY OF SERVANTS OF GOD

v.

MAJOR HANMANTRAO NARAYANRAO JAGTAP.*

Bombay Court-fees Act (Bom. XXXVI of 1929) s. 6(iv)(d) & (iv)(j)—Bombay Rents, Hotel and Lodging House Rates Control Act (Bom. LVII of 1947)—Suit by sub-tenant for declaration that he is entitled to be sub-tenant of landlord on termination of head-tenant's tenancy—Consequential relief for injunction restraining landlord from evicting him—Whether suit governed by s. 6(iv)(d) of Bombay Court-fees Act.

The word "tenancy" as used in s. 6(iv)(d) of the Bombay Court-fees Act, 1959, relates to tenancy as understood under the ordinary law, which is interest in immovable property, and not to statutory tenancy under the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, which is not tenancy of immovable property.

Therefore, a suit by a sub-tenant of the original tenant for a declaration that he is entitled to be the sub-tenant of the landlord on the termination of the tenancy of the head-tenant in view of s. 14 of the Rent Act and for an injunction restraining the landlord from evicting him from the suit premises, is not a suit governed by

*Decided, November 26, 1964. Civil Revision Application No. 1642 of 1964.

s. 6(iv)(d) of the Bombay Court-fees Act, 1959. The appropriate provision applicable to the suit is s. 5(iv)(j) of the Act.

*Rodrigues, In re*¹ and *State of Bombay v. Virendra Motabhoj*,² referred to.

Quære: Whether power of revision given to the Courts of appeal under the Rent Act is only in respect of such decrees or orders in suits or proceedings where the right of appeal is taken away by the provisions of s. 29 of the Act itself and not in respect of those from which no appeal lies under the Civil Procedure Code.

THE facts appear in the judgment.

H. G. Advani, M. G. Mane and Madhukar H. Kania, instructed by *Amarchand & Mangaldas & Malvi Ranchhodas & Co.*, for the petitioners.

B. H. Shrotri, for respondent No. 1.

(Note to binder: Insert this slip before p. 211).

CORRIGENDA.

On page 211 of 67 Bom. L.R. in line 2 read s. 6(iv)(j) instead of s. 5(iv)(j); and in line 11 read *B. N. Shrotri* instead of *B. H. Shrotri*.

... one half of the ad valorem duty. It further came to the conclusion that the Bench could be held to be 20 times the annual rent. It accordingly directed the plaintiffs to pay Court-fees on the valuation arrived at by it. Aggrieved by this order the plaintiffs-petitioners have filed the present Civil Revision Application.

Mr. Shrotri, who appears for respondent No. 1, has taken a preliminary point that the revision application is not competent and in support of his said contention he has relied on s. 29(3) of the Bombay Rent Act. Section 29 of the Rent Act provides for appeals from decrees or orders in suits or proceedings made by Courts exercising jurisdiction under s. 28 of the Rent Act. Under sub-s. (1) it is provided that in Greater Bombay from a decree or order made by the Court of Small Causes, Bombay, the appeal will lie to a Bench of two Judges of the said Court and elsewhere the appeal will lie to the District Court. The proviso to the said sub-section restricts the right of appeal by providing that no appeal will lie from decrees or orders in suits or proceedings falling within the four parts of the said proviso, the first being where from the decree or order in the suit or proceeding no appeal lies under the Civil Procedure Code. Under sub-s. (2) it is provided that except for the appeal that is provided under sub-s. (1), there will be no further appeal. Sub-section (3) then states:—

"Where no appeal lies under this section from a decree or order in any suit or proceeding in Greater Bombay, the Bench of two judges specified in clause (a) of sub-section (1) and elsewhere the District Court may, for the purpose of satisfying itself that the decree or order made was according to law, call for the case in which such decree or order was made and pass such order with respect thereto as it thinks fit."

Mr. Shrotri has argued that in view of the said provision that remedy of the plaintiffs against the order passed by the trial Court was to the District Court and not to the High Court under s. 115 of the Civil Procedure Code.

It seems to me doubtful whether interlocutory order in suits or proceedings, which are not appealable under the Civil Procedure Code and which by virtue of s. 105 of the said Code can be challenged only in the appeal from the decree or final order in the suit or proceedings are made revisable at an interlocutory stage by the Court to which the appeal lies under the said sub-section. Under the first part of the first proviso to sub-s. (1) of s. 29 the right of appeal given under the main sub-section is made available subject to the provisions of the Civil Procedure Code. In other words, the availability of appeals from decrees and orders in suits or proceedings under the Rent Act is the same as under the ordinary law except that the appeals from the decrees or orders in the suits or proceedings under the Rent Act will lie to the special Courts of appeal specified in the Act. The further parts of the first proviso, however, take away the right of appeal from decrees and orders in certain suits and proceedings specified in the said parts irrespective of whether an appeal lies from such decrees or orders under the Code of Civil Procedure. It is, therefore, arguable that power of revision given to the Courts of appeal under the Rent Act is only in respect of such decrees or orders in suits or proceedings where the right of appeal is taken away by the provisions of s. 29 itself and not in respect of those from which no appeal lies under the Civil Procedure Code. I do not, however, find it necessary to go further into the matter and express my final opinion on it because even if it is assumed that the order in the present case was capable of being revised by the District Court under s. 29(3) it will in no way affect this Court's jurisdiction to entertain and deal with it under its revisional power under s. 115 of the Civil Procedure Code. It is well-settled that even in cases where an appeal is provided to another Court or an alternative remedy is available, the High Court can exercise its powers under s. 115 of the Civil Procedure Code. (See, for instance, *Sashi Kanta v. Nasirabad Loan Office*, *Goel v. Kadambari*, *Kadambini Dasi*,² and *Babu Ram v. Manohar Lal*.)

It cannot, therefore, be said that the present Civil Revision Application is not maintainable. The only question is whether this Court should entertain it. As I have already pointed out earlier, it does not appear to be quite clear whether the order is revisable by the District Court. Moreover, the revision application is already admitted and the point involved is an important one affecting a large number of suits under the Rent Act. Even if the matter is returned to the District Court, it is quite likely to come back again to this Court in revision from the order passed by it. Even assuming, therefore, that the order was capable of being revised by the District Court under s. 29(3) of the Rent Act, I do not propose to decline to entertain it on that ground and will, therefore, proceed to deal with it on merits.

Proceeding then to the merits of the revision application, the short question to be considered is whether the plaintiffs' suit falls within s. 6(iv)(d) of the Court-fees Act as held by the trial Court. Section 6(iv)(d) reads as follows:—

"In suits for declaration in respect of ownership, or nature of tenancy, title, tenure, right, lease, freedom or exemption from, or non-liability to, attachment with or without sale or other attributes, of immovable property, such as a declaration that certain land is personal property of the Ruler of any former Indian State or public trust property or property of any class or community—one-fourth of *ad valorem* fee leviable for a suit for possession on the basis of title of the subject-matter, subject to a minimum fee of eighteen rupees and seventy five naye paise."

The third proviso thereto is:

"Provided also that, in any of the cases falling under this clause except its first

1 [1936] A.I.R. Cal. 786.

2 [1944] A.I.R. Cal. 809.

3 [1938] All. 22.

proviso, when in addition any consequential relief other than possession is sought the amount of fee shall be one half of *ad valorem* fee and when the consequential reliefs also sought include a relief for possession the amount of fee shall be the full *ad valorem* fee;"

The view of the trial Court is that, as the plaintiffs have sought a declaration as to the nature of their tenancy and have sought a further consequential relief by way of injunction restraining respondent No. 1 from evicting them from the suit premises in execution of the decree obtained by him against respondent No. 2, the suit is governed by s. 6(iv)(d) read with the third proviso referred to above. It seems to me, however, that the plaintiffs' suit is not for a declaration of the nature of their tenancy of any immovable property. The word "tenancy" as used in this provision relates to tenancy as understood under the ordinary law, which is interest in immovable property. The plaintiffs in the suit filed by them do not claim any tenancy rights in any immovable property. Their suit is for a declaration that they, having been the sub-tenants of the original tenant, are, in view of the provisions of the Rent Act, entitled to be the statutory tenants of the landlord on the termination of the tenancy of the head-tenant in view of s. 14 of the Rent Act. In other words, the plaintiffs want a declaration that they are entitled to the status of statutory tenants and to the protection afforded to them under the Rent Act and consequent on this declaration they want an injunction against the landlord restraining him from evicting them from the suit premises. Statutory tenancy under the Rent Act, it is well settled, is not tenancy of immovable property. A statutory tenant has no rights or interest in any immovable property. As has been held by this Court in *Rodrigues*, In re⁴ the statutory tenancy to which an insolvent becomes entitled under the Bombay Rent Act is not his 'property'. The right of a statutory tenant is merely a personal right to retain possession. It is not a right, which he can assign or deal with and no relationship of landlord and tenant is created between him and the landlord (See *State of Bombay v. Virendra Motabhai*⁵). Statutory tenancy does not involve a right of property but merely gives a personal right or a status of irremovability. As is often said, the term 'tenancy' used in relation with the right of a statutory tenant is really a misnomer. The declaration, therefore, which the plaintiffs have sought in the present case, cannot be considered as a declaration in respect of the nature of tenancy of any immovable property. It is not contended that the declaration sought by the plaintiffs would come within the ambit of s. 6(iv)(d) in any other manner excepting as a declaration of their status as statutory tenants. It must, therefore, be held that the plaintiffs' suit is not governed by s. 6(iv)(d) of the Bombay Court-fees Act. The appropriate provision of the Bombay Court-fees Act, which, in my opinion, will be applicable to the plaintiffs' suit, is the provision of s. 6(iv)(j), which is as follows:—

"In suits where declaration is sought, with or without injunction or other consequential relief and the subject-matter in dispute is not susceptible of monetary evaluation and which are not otherwise provided for by this Act—thirty rupees."

In view of this provision, the plaintiffs were entitled to pay the fixed Court-fee of Rs. 30 on the claim in suit.

I accordingly hold that the Court-fee of Rs. 30 paid by the plaintiffs on the plaint was the correct Court-fee to be paid by them in the present case and the order of the trial Court, requiring them to pay *ad valorem* Court-fees on the value of the suit property as determined by it, is erroneous. The order passed by the trial Court is, therefore, set aside and the rule is made absolute. There will be no order as to costs.

Rule made absolute.

4 (1944) 46 Bom. L.R. 916.

5 (1950) 52 Bom. L.R. 627, at p. 635.

APPELLATE CIVIL.

Before Mr. Justice Kotval and Mr. Justice Bal.

NARESH SHRIDHAR MIRAJKAR

v.

HIS LORDSHIP THE HONOURABLE MR. JUSTICE TARKUNDE.*

Constitution of India, Arts. 225, 226, 227, 214-216—Letters Patent. Cl. 36—Judicial order passed by Single Judge of High Court—Jurisdiction of Bench of same High Court to interfere with such order by writ.

In respect of an order passed by a Single Judge of the High Court in his judicial capacity no other Bench of the same Court has jurisdiction to issue any writ against him, in the exercise of its constitutional powers.

Rex v. Justices of the C. C. C.: London County Council, Ex parte,¹ Skinner v. Northallerton County Court Judge² and Hastings (No 3), In re,³ applied.

Emperor v. Krishnaji Vitthal,⁴ distinguished.

T. C. Basappa v. T. Nagappa⁵ and In re Babul Chandra,⁶ referred to.

THE facts appear in the judgment.

A. S. R. Chari, instructed by Kantilal Parikh & Co., for the petitioner.

H. M. Seervai, Advocate General (*Amicus Curiae*).

KOTVAL J. Pursuant to the order passed by a Division Bench on October 28, 1964, we have heard the Advocate General *amicus curiae* on the question of competency and the jurisdiction of this Court to issue a rule or writ in the instant case. This matter was originally presented to this Court as an appeal but it appears that at the said hearing before Mody and Gokhale JJ., the memorandum of appeal was amended, and the petitioner now seeks to invoke our constitutional powers under art. 226. Though this is a matter which is merely placed before us for admission, it is necessary to pass a full order and indicate our reasons because it involves an important point and counsel were heard at length.

The plaint in pending suit No. 912 of 1960 was presented on the Original Side of this Court some time in 1960. In that suit, Nathnaraj M. D. Thackersey has claimed damages of Rs. 3,00,000 for publication of an alleged malicious libel in the weekly journal "Blitz" from its editor and publisher R. K. Karanjia and from the paper itself. The article under the caption "Scandal Bigger than Mundhra" was published on September 24, 1960.

The hearing of evidence commenced on June 24, 1964, and evidence is still being recorded before Mr. Justice Tarkunde, the sole respondent before us. One Bhaichand Goda was a witness on behalf of the defendants. He had given evidence and was probably discharged, but it transpired that there were some statements made by him to the Income-tax authorities between the years 1954 and 1963 which were required to be put to him and so with the permission of the Court he was summoned for recording of further evidence. He appeared before Mr. Justice Tarkunde on Friday, October 23, 1964, and it is in connection with what transpired at that hearing that the petitioner asks for an "appropriate writ or order or direction".

Since we are at the stage of admission only, we will accept the statements of the petitioner in paras. 9 and 10 of the petition as correctly representing what transpired on October 23, 1964. The petitioner says that

(Para 9:) "On Friday, the 23rd October, 1964 when the said Bhaichand Goda came to the witness box he made a prayer to the trial Judge respondent No. 1 to the effect that the publication in the press of his earlier evidence had caused loss in business to

*Decided, November 9/10, 1964. Special Civil Application No. 1085 of 1964.

1 [1925] 2 K.B. 43.

2 [1899] A.C. 439, at p. 440.

3 [1959] 1 Ch. 368.

4 (1948) 50 Bom. L.R. 293.

5 [1955] 1 S.C.R. 250.

6 [1952] A.I.R. Pat. 309.

him, and that the learned Judge should protect him against his present evidence being reported in the press.

(Para 10:) Arguments were addressed to His Lordship and His Lordship said that his evidence should not be published. It being pointed to him that the daily press (viz.) the Times of India and the Indian Express gave only brief accounts and that the Blitz gives a full report, His Lordship told Mr. L.M. Zaveri, counsel for defendants 1 and 2 that the petitioner who was the reporter for Blitz should be told not to publish reports of Bhaichand Goda's evidence in Blitz. The petitioner all along has been reporting the proceedings in the said suit in Blitz."

Then the petitioner alleges that after this order was passed when the hearing of the suit was resumed on Monday, October 26, 1964, counsel for the defendants in the suit pointed out to the learned Judge that a fundamental principle in the administration of justice was being infringed in so far as the proceedings must be public and open to the public and that exceptions to such public administration of justice were rare. It has been further stated that it was urged before the learned trying Judge that "no witness could claim protection from publicity on the ground that his evidence if published might adversely affect his business" and that the "Blitz" would publish a report of the evidence if the learned Judge had merely made a suggestion or given advice but that if the learned Judge gave a written order forbidding such publication the "Blitz" would naturally obey it. It is further alleged that Mr. Justice Tarkunde stated that he had already made an oral order and that no written order was necessary and he expected obedience to his oral order. It is against the said oral order that the applicant has presented this application.

The petitioner was not a party to the suit. The petitioner claims to be a reporter serving on the staff of the "Blitz" of which the publisher and editor was defendant No. 1. Neither the plaintiff nor the defendants in the suit are parties to this petition but the sole respondent is Mr. Justice Tarkunde. The petitioner claims that the oral orders of the trying Judge have affected "the fundamental principle in the administration of justice... that the proceedings shall be open to the public and the public should have the right to inform themselves of the manner in which justice is administered by reading fair and accurate reports of proceedings in Court". He has also averred that "the fundamental right of the freedom of speech and of the press" which embraces the right to publish faithful and accurate reports of proceedings in open Court has been infringed thereby.

When this matter came up for admission before Mody and Gokhale JJ., they felt that it was necessary to ascertain at least *prima facie* that the petition was competent against the sole respondent. They, therefore, invited the learned Advocate General to address them on the question whether the Division Bench could in the circumstances have jurisdiction to issue a writ against the respondent, a Judge of this Court.

After hearing the learned Advocate General *amicus curiæ* and Mr. Chari on behalf of the petitioner, we are pleased that in this case this Court can have no jurisdiction to issue a writ in respect of the order passed by Mr. Justice Tarkunde nor any writ against him. We may briefly state our reasons as follows:

The principal argument has been that in respect of an order passed even by a single Judge of the High Court in his judicial capacity, no other Bench of the same Court can issue a writ having regard to the powers given under arts. 225, 226 and 227 of the Constitution. Article 225 lays down generally the jurisdiction of the High Courts and it says that subject to the provisions of the Constitution and to the provisions of any law of the appropriate Legislature made by virtue of powers conferred by the Constitution,

"the jurisdiction of, and the law administered in, any existing High Court, and the respective powers of the Judges thereof in relation to the administration of justice in

the Court,...sitting alone or in Division Courts, shall be the same as immediately before the commencement of this Constitution".

Thus the powers of the Judges in relation to the administration of justice in the High Court and the law to be administered, remain the same as before the Constitution save and except that it is modified by any provision of the Constitution or by legislation by an appropriate Legislature.

In order to find out what were the powers prior to the Constitution we must turn to cl. 36 of the Letters Patent of this Court. Clause 36 declares that

"...any function which is hereby directed to be performed by the said High Court of Judicature at Bombay, in the exercise of its original or appellate jurisdiction, may be performed by any Judge, or by any Division Court thereof..."

The clause, it is not in dispute, speaks of the judicial functions of the High Court and it is clear, therefore, that where a single Judge is performing judicial functions on the Original Side of the Bombay High Court he is as much the High Court, as a Judge sitting singly on the Appellate Side. Clause 36 draws no distinction between the Original and the Appellate Sides. It says in terms that each and every function of the High Court can validly be performed by a single Judge sitting on either side of the Court.

The combined effect of art. 225 read with cl. 36 of the Letters Patent is, therefore, clear. After the Constitution the respective powers of the Judges in relation to the administration of justice remain the same as before the Constitution—and in all their pristine plenitude. Those powers are of course subject to and may be modified by any provision of the Constitution or by any law made by the appropriate Legislature duly empowered by the Constitution which now includes the Letters Patent. Any Judge of the Bombay High Court no less than a Division Bench or Full Bench of the High Court may, therefore, perform all the judicial functions of that Court in exercise of its Original as well as Appellate jurisdiction. The judicial decision of a single Judge, whether given in the exercise of Original or Appellate jurisdiction would be a decision of the High Court as much as any similar decision given by two or more Judges sitting together.

In the due performance of his judicial function, therefore, a single Judge is no whit inferior to any other Judge or Judges. Sitting as he was in exercise of the Original jurisdiction of this Court Mr. Justice Tarkunde was, undoubtedly, functioning judicially and as the High Court and the question that arises is whether a Division Bench or any two or more Judges of the High Court can lawfully interfere with that function.

Article 225 of the Constitution is expressly made "subject to the provisions of this Constitution" and that would let in arts. 226 and 227. Article 225 must, therefore, be read as subject to arts. 226 and 227. Mr. Chari relied on the provisions of art. 226 to spell out a power in this Court to issue a writ against the learned Single Judge. He urged that art. 226 gives every High Court the power "throughout the territories in relation to which it exercises jurisdiction to issue to any person or authority..." including Government,—directions, orders or the writs specified for the enforcement of fundamental rights or for any other purpose and that so far as Mr. Justice Tarkunde was concerned, he would come within the ambit of the words "any person or authority".

The plenary words of art. 226 are "Every High Court shall have power..." and we have already shown that Mr. Justice Tarkunde sitting on the Original Side was as much the High Court as any two or more Judges thereof sitting together as a Divisional Bench or a Full Bench. The power thus exercised is in any case that of the High Court. Now there is nothing in art. 226 to suggest that one and the same High Court can issue rules or writs against itself, nor it seems, should we hold so, unless we are forced to that conclusion by the clearest and the most compelling language. Such a principle would impart a dangerous want of finality to the decisions of this Court and render the

law uncertain. We shall show a little later when we come to consider the nature of the writs mentioned in art. 226, that the same conclusion will also follow from a consideration of the scope and extent of the writ of *certiorari* which alone is involved in the present case.

So far as art. 227 of the Constitution is concerned, it gives power to every High Court "of superintendence over all Courts and Tribunals throughout the territories in relation to which it exercises jurisdiction." The power is one of superintendence and, in our opinion, by its very nature, is a power over subordinate Courts and Tribunals within the territories in which the High Court exercises jurisdiction. Article 227 does not indicate that a single Judge of a High Court, as we have shown functioning judicially as the High Court, can be corrected by the same High Court or by any two or more Judges of the same High Court in exercise of its power of superintendence. In fact, sub-art. (1) of art. 227 uses the words "every High Court" in contra-distinction with "all Courts and Tribunals throughout the territories in relation to which it exercises jurisdiction". It can hardly be urged that in the words "all Courts and Tribunals throughout the territories in relation to which it exercises jurisdiction" would also be included the High Court itself. Neither art. 226 nor art. 227, therefore, leads to the conclusion that two or more Judges of one and the same High Court can either exercise superintendence over the judicial functions of a single Judge of that Court, whether sitting on the Original or Appellate Side, or correct him in any way so long as he is exercising judicial function.

Next Mr. Chari sought to draw a distinction between a Judge presiding in a Court and the Court itself. He pointed out that clause 36 of the Letters Patent speaks of a Judge whereas art. 226 of the Constitution makes no reference to a Judge but only to the High Court. No doubt, the distinction is understandable but if we have regard to other provisions of the Constitution, it does not appear that so far as the exercise of judicial functions by a Judge or Judges is concerned, the High Court is different from the Judge or Judges of that High Court. Article 214 lays down that there shall be a High Court for each State. Article 215 says that "every High Court shall... have all the powers of such a Court including the powers to punish for contempt of itself". Then art. 216 lays down that "every High Court shall consist of a Chief Justice and such other Judges as the President may from time to time deem it necessary to appoint". Therefore, every Judge is part of the constitution of the High Court. The High Court itself consists of the Chief Justice and the other Judges. Every Judge functioning, whether on the Original or the Appellate Side of a High Court, is functioning as the High Court. There is, therefore, no scope for drawing a distinction between the Judges of the High Court and the High Court itself so far as the question of exercise of judicial functions is concerned.

Even looking to the terms of cl. 36 of the Letters Patent the same conclusion would follow. Clause 36 says

"any function which is hereby directed to be performed by the said High Court of Judicature at Bombay, in the exercise of its original or appellate jurisdiction, may be performed by any Judge, or by any Division Court thereof..."

The clause itself uses the word "Judge" where a single Judge is intended to be referred to, but uses the words "Division Court" where more than one Judge is intended to be referred to. It does not say "a Judge or a Bench of two or more Judges". Thus the clause itself makes no distinction between the Court as such and a Judge or Judges composing it.

Then it was urged that even having regard to the provisions of art. 226 of the Constitution, there is a distinction between the Original Side and the Appellate Side of a High Court. It was urged by Mr. Chari that so far as the Original Side of the High Court is concerned, cls. 11 and 12 of the Letters Patent indicate that its jurisdiction is of a limited nature. The function of

the High Court in its Original jurisdiction extends only to the area of Greater Bombay whereas the function of the High Court in the exercise of its Appellate Jurisdiction extends to the area of the entire State. It was, therefore, urged that a single Judge sitting in the exercise of the Original Jurisdiction of this Court would be a Court inferior or subordinate to a Court exercising Appellate Jurisdiction.

This argument, in our opinion, fails to draw a distinction between the area over which a particular Judge or Judges of the High Court may for the sake of convenience be exercising Original or Appellate function and the jurisdiction inherent in the Court over which the Judge presides. We have already referred to arts. 214, 215 and 216. Every High Court is a Court for each State and consists of the Chief Justice and other Judges as the President may appoint from time to time. Article 226 confers jurisdiction on the High Court throughout the territories in relation to which it exercises jurisdiction. Therefore, the power under art. 226 would be exercisable by every Judge of a High Court throughout the territories in relation to which the High Court of which he is a Judge exercises jurisdiction. That is the fundamental jurisdiction conferred upon every Judge of a High Court and, therefore, it cannot be urged that a single Judge sitting on the Original Side has his jurisdiction limited only to the area of Greater Bombay.

The distinction between the Original Side and the Appellate Side was brought into existence by cls. 11, 12, and 13 of the Letters Patent. But if we turn to cl. 36 of the Letters Patent we find the same idea expressed though in different language. We have already quoted the clause and what is of prime importance are the use of the words "any function" in the opening part of cl. 36 and the use of the words "in the exercise of its Original or Appellate jurisdiction" in the subsequent portions of the clause. The distinction is between a function to be performed and the Original or Appellate jurisdiction of the Court. What we have referred to in the preceding paragraph as the inherent or fundamental jurisdiction of the High Court is referred to in this clause as the "function" of the High Court in contradistinction with "appellate or original jurisdiction". When Mr. Justice Tarkunde sitting on the Original Side of the Bombay High Court decided this matter, he was performing the function of the High Court, but a function within the Original jurisdiction of the Court. He was, therefore, functioning as the High Court, as much as any other Judge of the High Court, whether in the exercise of Original or Appellate jurisdiction. Nothing, therefore, turns upon this distinction between the Original Side and the Appellate Side of this High Court.

Reference was then made to a decision of this Court in *Emperor v. Krishnaji Vithal*. That was a case where a question of construction of s. 435 of the Code of Criminal Procedure, which gives revisional jurisdiction to the High Court in criminal cases, arose before a Division Bench of this Court. Section 435(1) of the Criminal Procedure Code gives power to the High Court and a Sessions Judge to call for and examine the record of any proceeding before

"any inferior criminal court situate within the local limits of its or his jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings",

and the question that arose before the Division Bench was whether a single Judge sitting in the exercise of criminal jurisdiction with the aid of a Jury in the High Court of Sessions was a Court inferior to the High Court. The Learned Chief Justice held that it was an "inferior criminal Court" within the meaning of s. 435 of the Code of Criminal Procedure. It was urged by Mr. Chari on the strength of this decision that if a Judge sitting to decide a case with the aid of a Jury in the High Court of Sessions was held to be a Court inferior to the High Court under s. 435 of the Criminal Procedure Code,

then by analogy the learned single Judge sitting on the Original Side who disposed of this matter would also be a Court inferior to the High Court.

The decision in that case, however, turned on a question of interpretation of that particular statute, the Criminal Procedure Code. The question was what was the meaning of the words "inferior criminal Court" having regard to the hierarchy of Courts empowered by that Code to try criminal cases. We shall show presently that the expression "inferior Court" in the Criminal Procedure Code carries a totally different meaning than the expression "inferior Court" when used in contradiction with "superior Court" when we are considering a question of the jurisdiction of Courts. For the time being however we may say that it would be dangerous to apply the interpretation put upon a certain expression in such a special statute as the Code of Criminal Procedure to the interpretation of any other statute not *in pari materia* and it would be much more dangerous to do so where the question arises as to a provision of the Constitution. We do not think that an interpretation which prevailed so far as the particular terms of a statute relating to criminal law ought to govern the construction of a provision of the Constitution.

Article 226 in the first place does not refer to superior or inferior Courts nor does it make any distinction in the matter of subordination of Courts. Secondly, when speaking of the powers and jurisdiction of a Court the distinction which we make between superior and inferior Courts comes to us from the long history of the English Courts. How it arose is explained by Halsbury (Simonds' edn.) in Vol. 9 at p. 348 et seq. arts. 817 to 821. It has been explained that the inferior Courts were so called because, they were and are in the great majority of cases subject to the control and supervision of the Court of King's Bench or Queen's Bench Division as the superior Court. One of the distinctions between the superior Courts and the inferior Courts is thus stated in article 820:

"It is in connexion with jurisdiction that we find the chief distinction between superior and inferior courts... Prima facie, no matter is deemed to be beyond the jurisdiction of a superior court unless it is expressly shown to be so, while nothing is within the jurisdiction of an inferior court unless it is expressly shown on the face of the proceedings that the particular matter is within the cognizance of the particular Court."

Another distinction is that the Courts of superior jurisdiction are Courts which always have the jurisdiction to decide finally a question whether they have jurisdiction or not in a particular matter.

Bearing this distinction in mind and having regard to the constitutional provisions to which we have already referred, it is clear that a single Judge sitting on the Original Side is in no sense a Court inferior to the High Court or any two or more Judges of the High Court. The meaning of the same words in the Criminal Procedure Code cannot thus apply even by analogy. The authority, therefore, of *Krishnaji's* case cannot apply here.

Article 226 of the Constitution in laying down the power of the High Court to issue writs, directions or orders specifically includes "writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari or any of them". In the early years of the Constitution it was a question of acute debate as to what was the scope and extent of the power thus conferred by including by name these specific and well-known writs issued by the Supreme Court in England. In some decisions the view was taken that by the specification of the writs it was intended that the High Court must conform to all the limitations and follow the exact procedure, as in England in regard to these writs, whereas other decisions took the view that even though these writs were particularized it was only in order to illustrate the scope and extent of the power and, therefore, only the broad principles upon which these writs were being issued in England ought to be followed. This controversy has now been set at rest by several decisions of the Supreme Court. We may only

refer to one such decision in *T. C. Basappa v. T. Nagappa*.² At page 256: Mr. Justice Mukherjea (as he then was) laid down the following principles:

"...In view of the express provisions in our Constitution we need not now look back to the early history or the procedural technicalities of these writs in English law, nor feel oppressed by any difference or change of opinion expressed in particular cases by English Judges. We can make an order or issue a writ in the nature of *certiorari* in all appropriate cases and in appropriate manner, so long as we keep to the broad and fundamental principles that regulate the exercise of jurisdiction in the matter of granting such writs in English law.

One of the fundamental principles in regard to the issuing of a writ of *certiorari* is, that the writ can be availed of only to remove or adjudicate on the validity of judicial acts."

We have quoted this passage *in extenso* in order to emphasize two points: Firstly, that it is only the broad principles which normally govern the issuance of these writs in England that ought to govern the exercise of the power conferred by art. 226 and, secondly, that a writ of *certiorari* is alone available against judicial acts, and then "only to remove or adjudicate" their validity.

In the present case, the Order which Mr. Justice Tarkunde passed was without doubt a judicial Order, and if at all we have the jurisdiction to interfere with it the appropriate writ would be a writ of *certiorari*. Now, in regard to that writ, the High Court in England has consistently refused to exercise its jurisdiction to issue it where the Order is passed by a single Judge of the High Court. The decision is to be found in *Rex v. Justices of the C. C. C. : London County Council*, Ex parte.³ That was an extraordinary case. By the Central Criminal Court Act, 1834, the salaries and expenses of the Central Criminal Court were ordered to be paid as to a certain proportion of them by the treasurer of the County of London. An order was made by the Central Criminal Court that any taxes demanded by the Inland Revenue authorities in respect of an honorarium payable to Sir Herbert Austin a clerk of that Court shall be paid by the public bodies by which the salaries of the Court's officials are payable. It was against that order that the King's Bench Division was moved to issue a writ of *certiorari*. At page 53 of the Report Lord Hewart Chief Justice discussed the position of the Judges of the Central Criminal Court under the said Act and observed:

"...That then is the Court to which it is urged that a writ of *certiorari* should be issued by this Court. In other words, it is said that the well known remedy for removing into the King's Bench Division an order made by an inferior Court is a remedy which is applicable to the Central Criminal Court. In my opinion, not only is there no authority for that proposition, but all the authority which one can find is in the opposite direction."

After discussing the several authorities the learned Chief Justice went on to state (p. 58):

"With regard to the main question in the case it only remains to add that various inquiries, no doubt of no little historical interest, have been stirred in argument. I shall not enter into these inquiries because, with due respect, they seem to me to throw little light upon the immediate question. I think it right, however, to remark that a clear distinction is to be drawn between two matters, on the one hand the removal, by means of *certiorari*, of indictments or presentments in order to bring about what may be called the domestic or internal arrangement or rearrangement of business, and on the other hand the removal for the purpose of quashing it of an order which has been made by a superior Court. In other words, in my opinion, the statutes and decisions in regard to mere change of venue are not upon the same plane with a proposal to bring from a superior Court an order which has been made by that Court for the purpose of quashing it. In the one case the superior Court is making for good reason a useful redistribution of its business; in the other case the superior Court is invited to quash that which itself has done, and the process involves the rather ludicrous position that it calls upon judges to show cause to themselves why they should not be directed to remove, so that it may

be quashed, something which they themselves have determined. In my opinion the beginning of the truth about this matter is to distinguish the things which ought to be distinguished. There is no authority for the proposition with which those who seek to support this order nisi must begin—namely, that in a case of this kind there is jurisdiction in this Court to issue a writ of certiorari.”

Another decision which lays down the same principle is to be found in *Skinner v. Northallerton County Court Judge*.⁴ There the order impugned was an order passed in the exercise of bankruptcy jurisdiction by a County Court Judge. But the Bankruptcy Act of 1863, gave the County Court Judge sitting in bankruptcy the powers of the High Court. Against a warrant issued by the County Court Judge a writ of *certiorari* was asked for. It was alleged that the warrant was in form wrong and liable to be quashed. The Lord Chancellor Lord Haldane affirmed the refusal of the writ holding (p. 441):

“Now, this county court judge was sitting in bankruptcy, and the confusion which is imported into it is that because, as I will assume for the moment, the judge issued a warrant which in form was wrong, but could have been put right, therefore, it could have been put right, not in the Court in which it was issued, but in the High Court. The absurdity of that is that the statute itself has made the county court the High Court for this purpose. You might just as well argue that a warrant, defective in form, issued by the Court of Queen’s Bench could be set right by certiorari. Of course that is absurd. This is the High Court for this purpose. If the warrant was ever so bad, it was issued by a bankruptcy judge in respect of bankruptcy proceedings which were before him, of which he was seized—a warrant which he had perfect jurisdiction to issue. If there was any irregularity or inaccuracy in point of form in the warrant that did issue, that could be put right by proper proceedings, but the proper proceedings would be in that Court itself, and not proceedings by certiorari in the Court of Queen’s Bench.”

The same principle applies—contrary to common belief—even to the writ of *habeas corpus*. Until the Judicature Acts were passed in 1873 in England an exception so to say was made to this principle in the matter of issuing of the writ of *habeas corpus* and an applicant could apply successively to the several Judges of the same High Court for a writ; but since the Judicature Act of 1873 the Courts of Queen’s Bench Division and the Court of Chancery no longer exist as separate Courts. There is but one Supreme Court to which all Judges are appointed and they are then assigned to do the business of the Court in a particular Division. A comparatively recent decision in *Hastings (No. 3)*, *In re*.⁵ illustrates the principle. Hastings had already applied twice for the issue of a writ of *habeas corpus* to the Court of the Queen’s Bench Division. He applied a third time for the issue of a similar writ in his favour to the Chancery Division. The application was negatived on the ground that there was no such writ available once the Queen’s Bench Division had declined to grant the writ. Vaisey J. laid down the principle in language which is at once memorable and instructive. At page 377 of the Report he said:

“...The mistake the applicant or his advisers made was to assume that the Chancery Division is a separate entity, a separate court, and that either by single judges or by a Divisional Court it can deal with the matter afresh.

The applicant used an expression which he must suppose to be flattering to us who are sitting here. He said in his affidavit that he had decided to come for a ‘complete hearing before a hitherto unconnected and impartial bench, and this I seek in the Chancery Court’. The number of misconceptions which are bound up in that sentence is almost beyond reckoning. To begin with, while I hope it is an impartial bench, it is certainly not an independent bench. Indeed, as Lord Parker has ruled with, I think, perfect accuracy, as soon as the Divisional Court of the Queen’s Bench Division has come to its conclusion there is an end of the matter, and, as I observed yesterday, it always has to be remembered that our orders are not orders of any particular Division or any particular Divisional Court: our orders are orders of the High Court. How we, judges of the High Court, could be heard to override, overrule, or otherwise interfere with a judgment which was the result of the

hearing by the Divisional Court, or how we could be heard to say that the conclusion of that Court, and its order—an order of our own court, the only court which exists, the High Court of Justice—was wrong, and that something else should be done, is beyond my comprehension.”

Mr. Chari sought to brush aside the impact of the principles laid down in these decisions by urging that these decisions were the result of the special and peculiar historical growth of these writs in England, with which we in India are not concerned. He argued that we should confine ourselves to the express terms of art. 226 or 227 and ought not to interpret the power to issue those writs in the light of the historical back-ground that prevailed in England. In our opinion, the decisions to which we have referred have nothing to do with the historical growth of the writs. The decisions have crystallised the broad and general principles upon which those writs can be issued and it is precisely such broad principles which their Lordships of the Supreme Court have in *Basappa's* case directed us to follow. To quote

“...We can make an order or issue a writ in the nature of *certiorari* in all appropriate cases and in appropriate manner so long as we keep to the broad and fundamental principles that regulate the exercise of jurisdiction in the matter of granting such writs in English law.”

Applying these principles, therefore, this petition for a writ against Mr. Justice Tarkunde must fail.

We have indicated above that, in our opinion, the Order which Mr. Justice Tarkunde passed was a purely judicial order to which if at all a writ would be attracted it would be a writ of *certiorari*. We would here make it clear that whatever we have said in the foregoing discussion, we have said only in relation to a judicial order. We notice that in *Rex v. Justices of the Central Criminal Court* it could have been held that the order was an administrative order. In the notes of arguments of the Attorney General Sir Douglas Hogg at p. 47 of the Report it does appear that the point was raised but the learned Chief Justice did not rest his decision on the short point that it was an administrative order and therefore a writ of *certiorari* would not lie but on the ground that the Judges of the Central Criminal Court were themselves the Supreme Court of England. *A fortiori* that judgment would apply where the order is a judicial order as in the present case. In *In re Babul Chandra*,⁶ it has been observed that even where an order is made by the High Court on its administrative side, a Bench of the High Court has no jurisdiction to issue any writ or direction or order to the High Court. As to that part of the Patna decision we say nothing. We are not here concerned with an administrative order.

It was finally urged by Mr. Chari “*ad misericordiam*” that if the view which we have taken is to prevail, then the unfortunate petitioner will be left without a remedy and that were he to go to a higher Court it would not be an equally convenient or cheap remedy and that that would work great hardship upon him. In the first place, in determining a question of jurisdiction such as has arisen in this application, hardship or otherwise of a case can hardly be material. But we do not think that the petitioner is entirely without a remedy and even as convenient and cheap a remedy as is available under art. 226. We think he can still apply to the learned Judge who decided the matter for a review of his own order, if he so chooses. He has also a remedy by way of an application for special leave to the Supreme Court under art. 136 of the Constitution.

We are clearly of the opinion that there is no jurisdiction in this Court to issue any writ against the respondent in respect of the Order impugned in this petition. The petition is summarily dismissed. We record our appreciation of the valuable assistance we have received from the learned Advocate General appearing as “*amicus curiae*”.

Petition dismissed.

CRIMINAL APPELLATE.

Before Mr. Justice Gokhale.

KALA BHIKA BARIA v. THE STATE OF MAHARASHTRA.*

Indian Penal Code (Act XLV of 1860), Sec. 336—Act committed with intention of causing injury—Whether such act a rash or negligent act—Intentional pelting of stone whether covered by s. 336.

If a person commits an act with the intention of causing an injury to somebody else, it is an intentional act done with consideration and cannot, therefore, be a rash or negligent act within the meaning of that expression in s. 336 of the Indian Penal Code, 1860.

Where the accused pelts a stone at the complainant with a view to assault him a charge under s. 336 of the Indian Penal Code cannot be sustained against him.

Mahendra v. State,¹ *Gaya Prasad v. Emperor*,² *Babu Ram v. Emperor*,³ *Maung Ba Kyi v. Emperor*,⁴ *Empress of India v. Idu Beg*⁵ and *Smith v. Emperor*,⁶ agreed with.

THE facts appear in the judgment.

D. P. Shukla, for the petitioner.

R. S. Bhosale, Hon. Assistant Government Pleader, for the State.

GOKHALE J. This is a revision application against the order of the learned Presidency Magistrate, 25th Court, Girgaon, Bombay, convicting the petitioner-accused for having committed an offence under s. 336, Indian Penal Code, and sentencing him to pay a fine of Rs. 10, or, in default, to suffer simple imprisonment for two days. The prosecution case is that the complainant Gangaram Bapu worked as a driver of refuse van No. BMS 7622 on August 15, 1963. That was the day on which the municipal workers in Bombay had been on strike. The complainant, who had apparently not joined the strike, had taken the van near the Marwadi Vidyalaya in a lane on the backside of Opera House at about 12 a.m. A police party consisting of three or four policemen accompanied the van for its protection. In the van there were six sweepers and one Mukadam for collecting refuse. At the place where the van was stationed the sweepers were collecting refuse and loading it in the van. The police party were in the police van, which was standing at a distance of 10 or 12 feet from the van of which the complainant was the driver. After the van was loaded and the complainant was about to enter the van, at about 12.15 p.m. the accused came there and abused the complainant and pelted a stone at him. The stone missed the complainant but hit the front right wheel of the van. The police chased the accused and apprehended him at some distance from the police station and the first information report was recorded. On these allegations the accused has been prosecuted and convicted and sentenced as stated above, for the offence under s. 336, Indian Penal Code.

The prosecution have examined three witnesses including the complainant Gangaram Bapu. The other two witnesses are Murlidhar Govind and Jagan-nath Maruti, both police constables, who were members of the party in the police van which was on the spot to protect the van of the complainant. The learned Magistrate has considered the evidence of these three witnesses and has observed that the evidence of the complainant is supported fully by the two police constables who were standing nearby. He has accepted the evidence of the two police constables to the effect that they saw the accused pelting a stone at the complainant. The learned Magistrate then observed as follows:—

*Decided, November 16, 1964. Criminal Revision Application No. 284 of 1964, against the order of conviction and sentence passed by T. S. Bhole, Presidency Magistrate, 25th Court, Girgaum, Bombay, in Case No. 42/P of 1964.

¹ (1954) I.L.R. 33 Pat. 1006.

² [1928] A.I.R. All. 745.

³ [1925] A.I.R. All. 896.

⁴ [1937] A.I.R. Ran. 273.

⁵ (1881) I.L.R. 8 All. 776.

⁶ (1925) I.L.R. 53 Cal. 333.

"Voluntarily pelting a stone at others is definitely a rash act so as to endanger human life or safety of others and it amounts to an offence under s. 336, I.P.C."

Mr. Shukla, who appears for the accused, contends that the findings of the learned Magistrate that the accused was the person who pelted a stone at the complainant was, on the face of it, unsupportable by the evidence led by the prosecution. It was his contention that if the circumstances in which the alleged offence is stated to have been committed are taken into consideration, it is unbelievable that the accused should be held to have pelted the stone at the complainant. The evidence of the complainant and the two police constables was read over to me by Mr. Shukla and I am unable to accept the contention that the finding of the learned Magistrate that the accused pelted the stone at the complainant, which missed its target but, instead, hit the right front wheel of the van, is erroneous. It is not possible to rely on minor variations in the evidence of these witnesses for holding that the accused was not the person who pelted the stone. I am satisfied that the evidence of the prosecution is consistent so far as the main allegation is concerned, viz., that the accused threw the stone aiming it at the complainant but it did not hit the complainant but, instead, hit the right front wheel of the van. This is a revision application and I do not see any reason for interfering with the finding made by the learned Magistrate in this regard.

It was contended on behalf of the accused that he was on sick leave from October 7, 1961, to the date of the incident and that he had gone to the doctor for treatment. The plea of the accused has also been considered by the learned Magistrate. No evidence is given as to who the doctor was and as to whether the accused really went to the doctor on that day. In the face of the consistent evidence of the prosecution witnesses, I would confirm the finding of the learned Magistrate that the accused pelted the stone at the complainant, but the stone hit the right front wheel of the van.

Mr. Shukla then submitted that if this finding of the learned Magistrate that the accused pelted the stone at the complainant were to be accepted, the accused cannot be convicted for the offence under s. 336, Indian Penal Code. He pointed out that the complainant has stated in his evidence that the accused wanted to pelt the stone at the complainant. Murlidhar Govind, one of the police constables, examined by the prosecution has stated that the accused threw the stone deliberately and that he actually saw the accused throwing the stone. Jaganath Maruti has also stated to the same effect. Moreover, all the three witnesses are consistent in the story that before the stone was pelted the accused abused the complainant in filthy language. On the basis of this evidence Mr. Shukla contends that the act of the accused in pelting a stone at the complainant was not a rash or negligent act but was a deliberate act. Section 336, Indian Penal Code, to the extent to which it is relevant, provides as follows:—

"Whoever does any act so rashly or negligently as to endanger human life or the personal safety of others, shall be punished with..."

Mr. Shukla says that the offence consists of danger caused to human life or the personal safety of others, by an act which can be called rash or negligent. When a person deliberately attempts to assault or assaults another person and when such act is preceded by consideration, it cannot be called rash or negligent. There is considerable substance in this contention of Mr. Shukla. He invited my attention to a judgment of the Patna High Court in *Mahendra v. State*¹. The learned single Judge observed (p. 1008):—

"...A rash act is primarily a hasty act, and is thus opposed to a deliberate act. Of course, a rash act is also a voluntary act... An act done voluntarily may be a rash act, if it is done without due deliberation and caution."

The learned Judge relied on two cases of the Allahabad High Court. In *Gaya Prasad v. Emperor*² it was observed as follows (p. 745):—

"...A rash act is primarily an overhasty act and is opposed to a deliberate act.

Even if it is partly deliberate, it is done without due thought and caution. Here there is no question of want of thought or want of caution. The applicant desired a certain result to follow from the throwing of bricks and he deliberately threw the bricks at the temple for that purpose. According to the findings of the two subordinate Courts, there was neither rashness nor negligence in the act."

The same view has also been taken in *Babu Ram v. Emperor*.³ In *Maung Ba Kyi v. Emperor*,⁴ Spargo J. observed that if the act complained of was a deliberate act it cannot be called a rash or negligent act. The position has been very succinctly stated by Straight J. in *Empress of India v. Idu Beg*.⁵ The learned Judge has observed as follows (p. 779) :—

"...I may remark that criminal rashness is hazarding a dangerous or wanton act with the knowledge that it is so, and that it may cause injury, but without intention to cause injury, or knowledge that it will probably be caused. The criminality lies in running the risk of doing such an act with recklessness or indifference as to the consequences. Criminal negligence is the gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury either to the public generally or to an individual in particular, which, having regard to all the circumstances out of which the charge has arisen, it was the imperative duty of the accused person to have adopted."

These observations of Straight J. were quoted with approval by a Division Bench in *Smith v. Emperor*.⁶ I respectfully agree with the view taken in these cases. Where a person commits a wanton or dangerous act with the knowledge that it is so and he commits it without knowing that it may probably cause injury or without the intention of causing it, it will be a rash act. In such a case the person committing the act does not know that the result of its recklessness or negligence may probably cause injury to somebody, and he never intends that such an injury would be caused. When a person is negligent as to the consequences of his act and there is a failure on his part to take reasonable and proper care and precaution to guard against injury to somebody else, it may be a negligent act. But if, on the other hand, a person commits an act with the intention of causing an injury to somebody else, it is an intentional act done with consideration and cannot, therefore, be a rash or negligent act. In the present case, the entire prosecution case is directed towards proving that the accused intentionally threw a stone at the complainant. The evidence also consistently shows that before the stone was pelted, the accused had abused the complainant. There can be no doubt on the evidence that the act of the accused was an intentional act, namely, of pelting a stone at the complainant with a view to assaulting him. This cannot be said to be an act undertaken rashly or negligently. It is undertaken with a positive intention of causing injury to the complainant. The fact that the act may endanger human life or the safety of others may be a common factor both in the cases of intentional as well as rash and negligent acts. But that by no means is the decisive factor. Even the finding of the learned Magistrate leaves no room for doubt that the accused had intentionally pelted the stone at the complainant. The fact that the stone missed its target makes no difference. It may be that on the facts established the charge could have been for attempt to cause hurt, but I fail to see how the charge could be of a rash and negligent act, as the present charge is, under s. 336, Indian Penal Code. In this view of the matter, while confirming the finding of the learned Magistrate that the accused pelted the stone at the complainant but the stone missed the complainant but, instead, hit the right front wheel of the van, I cannot confirm the conviction and the sentence imposed on the accused for the offence under s. 336, Indian Penal Code.

I would, therefore, set aside the order of conviction and sentence imposed on the petitioner-accused for the offence under s. 336, Indian Penal Code, and acquit him. Fine, if paid, shall be refunded.

Order of conviction and sentence set aside.

3 [1925] A.I.R. All. 390.

4 [1937] A.I.R. Ran. 273.

5 (1881) I.L.R. 3 All. 770.

6 (1925) I.L.R. 53 Cal. 333.

Before Mr. Justice Abhyankar.

STATE v. MADHUKAR GOPINATH LOLGE.*

Bombay Prohibition Act (Bom. XXV of 1949)—Test whether liquid claimed to be liquor is in fact liquor or not—Syke's Hydrometer test whether a reliable test for this purpose.

Syke's Hydrometer test furnishes no data to determine whether a particular liquid is liquor or contains alcohol. Once it is known that a particular liquid contains alcohol, the percentage of alcohol in that liquid may be found by the Hydrometer test. Therefore when the basic question to be determined is whether the liquid does or does not contain alcohol, the Hydrometer test alone is not the proper test to come to any such determination.

*State v. Shantaram Gangaram Mandavkar,*¹ *State v. Anubai Dinkar Raje,*² *State v. Pandu Natha Mandale,*³ *State v. Davji Mahadu Nadge,*⁴ *State v. Pira Mhatarba Jedgule,*⁵ *State v. Uttam Bala Gaikwad,*⁶ *State v. Bhagavan Daji Pawar,*⁷ *State v. Hanumanta Ramayya*⁸ and *Ganga Piru Gaoli v. State,*⁹ referred to.

THE facts appear in the judgment.

C. R. Dalvi, Hon. Assistant Government Pleader, for the State.

S. S. Shinde, (appointed), for the accused.

ABHYANKAR J. This is an appeal by the State challenging the acquittal of Madhukar Gopinath Lolge, a tonga driver, of Ahmednagar, under s. 66(I) of the Bombay Prohibition Act, by the Judicial Magistrate, First Class, III Court, Ahmednagar.

The respondent, Madhukar, was charge-sheeted before the Judicial Magistrate, First Class, Ahmednagar, on the accusation that on September 13, 1962, early in the morning, at about 2-30 o'clock, the respondent, Madhukar, and his co-accused, Khandu, were found going on a bicycle, carrying illicitly distilled country liquor in two bladders having a total quantity of 24 bottles. They were thus charged with having committed offences under ss. 66(I)(b) and 83 of the Bombay Prohibition Act.

Both the accused pleaded not guilty. The respondent Madhukar stated in his examination, under s. 342 of the Code of Criminal Procedure, that he had been falsely implicated in this case by the Police Inspector Pawar, that he was in the service of one Vithal Hari Lagade as a tonga driver who owned a tonga, that on the night in question, at about 1-30 a.m., he had returned to the Sarjapura locality in the tonga from the railway station, that he kept the tonga and its horse behind the Police Head Quarters and started going home on foot. When he came near the chowk in the Sarjapura locality, a policeman came near him in a Jeep car and told the respondent that he was called by the Home Inspector Pawar. He was taken in the Jeep car near the petrol pump. He was beaten by the Home Inspector. At that time two rubber bladders and one bicycle were found lying near the Police Inspector Pawar. He denied that he had ridden the bicycle or that he had borrowed it from anyone. He also denied that he was transporting liquor on that bicycle. He further alleged

*Decided, November 19, 1963. Criminal Appeal No. 612 of 1963, against the order of acquittal passed by S. N. Joshi, Judicial Magistrate, First Class, III Court, Ahmednagar, in C. C. No. 4798 of 1962.

1 (1961) Criminal Appeal No. 1014 of 1961, decided by Tambe and Chandrachud JJ., on November 24, 1961 (Unrep.).

2 (1962) Criminal Appeal No. 38 of 1962, decided by Chandrachud J., on April 16, 1962 (Unrep.).

3 (1957) Criminal Appeal No. 411 of 1937, decided by Vyas and Palnitkar JJ., on August 12, 1957 (Unrep.).

4 (1962) Criminal Appeal No. 911 of 1961,

decided by Chandrachud J., on March 13 1962 (Unrep.).

5 (1962) Criminal Appeal No. 1646 of 1961, decided by Chandrachud J., on March 5, 1962 (Unrep.).

6 (1962) Criminal Appeal No. 1854 of 1962, decided by Shah J., on August 26, 1962 (Unrep.).

7 (1962) Criminal Appeal No. 36 of 1962, decided by Chittale J., on July 24, 1962 (Unrep.).

8 (1963) Criminal Appeal No. 57 of 1963, decided by Shah J., on July 12, 1963 (Unrep.).

9 (1961) Criminal Revision Application No. 97 of 1961, decided by Kotval J., on February 22, 1961 (Nagpur Bench), (Unrep.).

that he was implicated on a mere suspicion and that the witness Shankar Kadekar, who was examined as a Panch, had given false evidence as he had not given him a free lift in his tonga.

At the trial the prosecution examined one Shankar Kadekar, who in his examination-in-chief supported the prosecution case to a substantial extent, but admitted in cross-examination that his elder brother Gulab was a policeman and that since the last 2 or 3 years Gulab was serving as an orderly constable under the Police Inspector Pawar who had challaned this case. He also admitted that this Gulab occupies quarters in the Police Head Quarters and that the witness was also residing with Gulab. To further questions by the Court, the witness also admitted that he had made certain statements before the Court because he was told to say so by the Inspector Pawar and that he had made a false statement in his examination-in-chief that he had seen accused Nos. 1 and 2 throwing down the bicycle and running away. It is obvious, therefore, that this witness did not inspire the confidence of the Magistrate and not much reliance has been placed on the testimony of this witness in this Court either.

The second witness examined by the prosecution was one Rabha Hari, who apparently supported the prosecution case in his examination-in-chief, but gave it up altogether when he stated that he failed to disclose during investigation that the respondent was then driving the bicycle or that the other accused was on the bar of that bicycle. He admitted that he had seen accused No. 2 for the first time in Court after he saw him on that night and that he could see the face of accused No. 2 that night for a second. Even the testimony of this witness was not, therefore, of much assistance to the prosecution.

The third witness is one Shaikh Shabir Hussein Rajabali. Possibly he was examined to show that the bicycle, which was seized at the spot, was hired or borrowed by the respondent, Madhukar, but the witness did not support this part of the prosecution case. In fact, he stated that he had given this bicycle to one Moti Mahomed, that Moti Mahomed did not return the bicycle to him and that it was Moti Mahomed who told him that he had given the bicycle to the respondent. This Moti Mahomed not having been examined by the prosecution, the prosecution failed to connect the possession of the bicycle with the respondent. It was this bicycle which was alleged to be ridden on the night in question by the respondent and on the bar of which the bundle containing the liquor tubes was supposed to be carried. The prosecution thus failed to prove that the bicycle found on the spot, where it was alleged to have been thrown away, in fact belonged to the respondent or that it was borrowed by him.

The only witnesses from whom the prosecution could derive support was the police constable Abubakar Lalbhai and Inspector Pawar. Of these, Abubakar, the head constable, seems to have been examined as an expert. He claims that he had undergone training in testing liquor by the Syke's test. He brought a Hydrometer as well as a thermometer to test the contents of the two sealed rubber bladders brought before the Court. After taking the necessary tests he stated that the liquid contained in each of the two bladders was liquor containing 48.8 per cent. of alcohol and 51.2 per cent. of water. Inspector Pawar proved the prosecution case to the extent that he saw two persons riding a bicycle as he was about to get down from the police Jeep, the two persons got down, threw down the bicycle and took to their heels and ran towards the Maidan. He despatched two policemen to catch these two persons, but only one of them was actually caught in pursuit and that person was the respondent Madhukar. He claimed that he had seen the faces of both the persons who were riding the bicycle and, according to Pawar, the respondent Madhukar was riding the bicycle and the other accused was occupying the bar of that bicycle. It was Pawar's case that a bundle was attached to the handle of the bicycle, that it was wrapped in a Dhoti and that the bundle contained two rubber bladders in which about 8 gallons of liquor was alleged to be discovered.

After holding a *panchanama* he arrested the respondent. He thereafter charge-sheeted the two accused.

The learned Magistrate found no difficulty in acquitting both the accused. There was practically no evidence against the second accused, i.e., Khandu, who was not caught at the spot. As regards Madhukar also, i.e. the respondent, the learned Magistrate felt grave doubt whether he was really detected riding the bicycle which had the bundle alleged to be containing liquor in tubes. The learned Magistrate felt that the respondent could not be convicted on the sole testimony of the Police Inspector Pawar, especially because the witnesses who were called by the police were obviously got-up witnesses. In fact, the learned Magistrate came to the conclusion that there was an obvious attempt made by the police in this case to fabricate evidence in which they had failed. Giving benefit of doubt, the respondent was acquitted by the learned Magistrate.

It appears that the question whether the liquid found in the tubes was or was not liquor as deposed to by the police head constable Abubakar Lalbhai on the basis of the Hydrometer tests, has not been specifically decided by the learned Magistrate.

In support of this appeal it is contended that the evidence of the Police Inspector Pawar should have been accepted as the respondent was caught running away, keeping the bicycle there, after he was detected riding the bicycle. I do not see any compelling reason to differ from the finding of the learned Magistrate, who had an opportunity to see the witnesses in the witness-box, that it may be unsafe to convict the respondent on the sole testimony of the Police Inspector Pawar, in view of the circumstances of this case. But, in my opinion, there is a further infirmity in the prosecution evidence which goes to the root of the matter. There is no legal evidence, in my opinion, on which it could be held that the liquid, for the possession of which the respondent was charged-sheeted, is, in fact, established to be liquor or prohibited liquor by any legal evidence which can be accepted and acted upon. The testimony of Abubakar Lalbhai is brief and is to the following effect:—

"I have undergone training in testing liquor by the Syke's test. I have brought today a Hydrometer and a thermometer to test the contents of the two sealed rubber bladders now before the Court. (Note: The seals on the two bladders are intact and they are removed in the presence of the Court and the two accused and their pleader and the witness is [are] asked to examine their contents). After taking necessary tests I say that the liquid contained in each of the two rubber bladders is liquor containing 48.8 per cent. of alcohol and 51.2 per cent. of water."

Relying on this testimony, it is urged by the learned Assistant Government Pleader that the Syke's Hydrometer test has been accepted as a reliable test to come to the conclusion whether a liquid claimed to be liquor is in fact liquor or not and, in view of the decisions of this Court, the evidence of the witness should be accepted. The witness claims to have undergone training in testing liquor. But what is the nature of that training is not testified by the witness at all. In fact, he has given no information to qualify as an expert. Another serious infirmity in the testimony of this witness is that he has given no data from which he could come to the conclusion, even by applying the Hydrometer test, that the liquid was liquor. He has not stated what was the specific gravity of the liquid which he tested, nor the temperature, nor has he disclosed the principle with reference to which he came to the conclusion that the liquid should be liquor.

The learned counsel for the State relied upon the following decisions in support of his contention that the Hydrometer test should be accepted as a safe test to find whether a particular liquid is or is not liquor:—

State v. Shantaram Gangaram Mandawkar,¹ *State v. Anubai Dinkar Raje*,²

¹ (1961) Criminal Appeal No. 1014 of 1961, decided by Tambe and Chandrachud JJ., on November 24, 1961 (Unrep.).

² (1962) Criminal Appeal No. 38 of 1962, decided by Chandrachud J., on April 16, 1962 (Unrep.).

State v. Pandu Natha Mandale,³ *State v. Davji Mahadu Nadge*,⁴ and *State v. Pira Mhatarbā Jedgule*.⁵

I have had the benefit of most of these judgments produced before me. *State v. Shantaram Gangaram* was an appeal against the order of the Sessions Judge acquitting an accused of an offence under s. 66(b) of the Bombay Prohibition Act, as the learned Sessions Judge took the view that the Hydrometer test has not been approved. The learned Sessions Judge in that case referred to some decision in this Court, but neither counsel appearing before the Division Bench were able to discover what that decision was. The learned Sessions Judge in the judgment under appeal had observed that there were many liquids which may have the same specific gravity as liquor and the Division Bench held that in coming to this conclusion the learned Sessions Judge had travelled beyond the record to which, according to the Division Bench, he should have confined himself; in other words, there was no evidence before the learned Sessions Judge in the judgment under appeal before this Division Bench to come to the conclusion that there could be many liquids which may have the same specific gravity as liquor. But I do not find, on a careful scrutiny of the judgments that the Division Bench have come to the conclusion that the Hydrometer test is a reliable test to find out whether a liquid contains alcohol or not.

In another Division Bench decision, on which reliance is placed, viz., *State v. Pandu Natha*, decided on August 12, 1957, which also was an appeal against the judgment of acquittal by the Sessions Judge, the Sessions Judge had observed in the course of his judgment that the Hydrometer test is a contrivance of determining the specific gravity, i.e., density of liquid and not for finding whether the liquid in fact contains any alcohol. It is observed:

"Now, from the body of the judgment it does not appear wherefrom the learned Judge got this conception of a Hydrometer. It is possible that he might have got it from the Smaller Oxford Dictionary. But then if we turn to Webster's New International Dictionary, it would appear that Hydrometer means a floating instrument for determining specific gravities, especially of liquids, and thence the strength of spirituous liquors, saline solutions, etc. It is, therefore, not right for the learned Judge to minimise the importance of a Hydrometer test by merely saying that a Hydrometer is an instrument for testing nothing but specific gravity. Upon the authority of Webster's Dictionary it would be clear that Hydrometer is an instrument for ascertaining the strength of spirituous liquors, saline solutions, etc., from a determination of the specific gravity of the said liquids...."

Here again it seems the Division Bench took the view that there was no material before the Sessions Judge to decide on sufficiency of Hydrometer test.

The other three decisions quoted above are Single Bench decisions which generally followed the view taken in *State v. Shantaram Gangaram*.

I felt some difficulty in accepting the evidence of the police head constable as evidence of an expert. It is not shown how he has qualified himself to be an expert in testing liquors. But even assuming that by his experience he may have attained some degree of knowledge, the reason he has given, viz., the test carried out by Hydrometer and thermometer to determine whether the liquid was liquor or not, is certainly far from satisfactory. If it is known or proved that a certain liquid is liquor or contains alcohol, then it is certainly possible, by means of Syke's Hydrometer test and by use of thermometer, to determine the percentage of alcohol from that liquid; but if the basic question that has first to be proved is whether the liquid under test does or does not contain alcohol, it does not appear that Hydrometer test alone could be sufficient to come to any conclusion. An opportunity was, therefore, given to the learned Assistant Government Pleader to call any expert in this subject who

3 (1957) Criminal Appeal No. 411 of 1957, decided by Vyās and Palnitkar JJ., on August 12, 1957 (Unrep.).

4 (1962) Criminal Appeal No. 911 of 1961, decided by Chandrachud J., on March 13,

1962 (Unrep.).

5 (1962) Criminal Appeal No. 1646 of 1961, decided by Chandrachud J., on March 5, 1962 (Unrep.).

may have the necessary knowledge and experience in the matter of testing liquor or alcohol and liquids to find out whether Syke's Hydrometer test would furnish a necessary test for determining whether a liquid does or does not contain alcohol. Accordingly, the case was adjourned for recording the evidence of such an expert and was taken up to-day, when Shri Harbhajan Singh Mahal was examined by the State as an expert. Shri Mahal entered the witness-box and has given his opinion regarding the Syke's Hydrometer test and what can be determined by applying that test to a liquid. Shri Mahal is a Director of Forensic Science Laboratory and the Chemical Analyser to the Government of this State and, by his qualifications and experience, he seems to be a scientist of sufficiently wide knowledge and experience. He seems to have made special study of estimation of alcohol in blood and contributed Papers in well-known American periodicals. He was specifically asked about the Syke's Hydrometer test and what conclusions can be drawn from such test. What he has stated, in his own words, is as follows:—

"I know what is Syke's Hydrometer test. It is a test for determining the density of liquids. The test is made with the help of an instrument called Hydrometer. The instrument is allowed to be emersed in the liquid to be tested and is allowed to float. There are calibration marks on the stem of this instrument. These marks show the density of the particular liquid. When the Hydrometer is emersed in the liquid to be tested and the level of the liquid reaches a particular mark on the stem, it will mean that the liquid is of that particular density, calibrated at the place upto which the liquid reaches the stem. There is a standard chart or table by reference to which the reading on the calibrated stem can be interpreted to find out the density of that liquid. ... If I am given a liquid and asked to test or find out its specific gravity by Hydrometer test and it is found that the specific gravity is between 1.0 and 0.7 it would not be possible to conclude from this much data alone that the liquid contains ethyl alcohol. This would be so even if readings were obtained at different temperatures."

To Court questions the witness has stated that a fairly reliable method to find out whether a liquid is ethyl alcohol or contains ethyl alcohol is by subjecting it to a chemical test and this test is known as Iodoform test.

In view of this clear and unequivocal testimony of the expert witness, whose opinion one would always prefer to the opinion of Abubakar Lalbhai, who is a police head constable, claiming to have undergone training in testing liquor by the Syke's test, it is clear that the Syke's Hydrometer test will furnish no data to determine whether a particular liquid is liquor or contains alcohol. It may be that once it is known that a particular liquid contains alcohol, the percentage of alcohol in that liquid may be found by the Hydrometer test. But when the question to be determined is the primary question, namely, whether the liquid does or does not contain alcohol, the Hydrometer test does not appear to be the proper test to come to any such determination.

The learned counsel for the respondent has relied upon certain other Single Bench decisions of this Court in which similar view has been taken. These decisions are:

State v. Uttam Bala Gaikwad,⁶ *State v. Bhagavan Daji Pawar*,⁷ *State v. Hanumanta Ramayya*,⁸ and *Ganga Piru Gaoli v. State*.⁹ This last case is reported in (1962) Nagpur Law Journal as Note No. 26.

In view of the testimony of Dr. Mahal, who is the Director of Forensic Science Laboratory in this State, there is hardly any room for canvassing that the evidence of the police head constable as to the liquid being liquor could be accepted as legal or sufficient evidence to come to the conclusion that the liquid was liquor or prohibited liquor.

6 (1962) Criminal Appeal No. 1854 of 1962, decided by Shah J., on August 26, 1962 (Unrep.).

7 (1962) Criminal Appeal No. 36 of 1962, decided by Chitale J., on July 24, 1962 (Unrep.).

8 (1963) Criminal Appeal No. 57 of 1963, decided by Shah J., on July 12, 1963 (Unrep.).

9 (1961) Criminal Revision Application No. 97 of 1961, decided by Kotval J., on February 22, 1961 (Nagpur Bench) (Unrep.).

It is, however, urged that the circumstances in which the respondent was caught, the manner and the method of carrying the liquid which was out of the ordinary, viz., in rubber tubes, and the time of the night when the respondent was seen hurrying away with these contraband articles, are all circumstances which may well be taken into consideration in determining whether the liquid was not liquor. In my opinion, all these circumstances would raise a grave suspicion about the respondent, but none of these circumstances would be useful or reliable to determine whether the particular liquid which was carried was liquor or not. Though it is true that the usual *modus operandi* of transporting liquor clandestinely is found to be carrying it through rubber tubes, that fact alone can hardly be determinative of the crucial question, viz., whether the liquid is liquor or not. As opined by Dr. Mahal, the reliable test on which the Court of law can act would be the chemical test or the Iodoform test. Therefore, if the question is put in issue, the prosecution must prove beyond doubt that the liquid which was seized was liquor or prohibited liquor. In view of this conclusion, it is not possible to interfere with the finding of the learned Magistrate.

The result is the appeal fails and is dismissed.

Appeal dismissed.

APPELLATE CIVIL.

Before Mr. Justice Patel and Mr. Justice Tulzapurkar.

GANGABAI TOKERSAY v. GOURISHANKAR CHHITARMAL.*

Civil Procedure Code (Act V of 1908), O. XLI, r. 11—Bombay Rents, Hotel and Lodging House Rates Control Act (Bom. LVII of 1947), Sec. 29—High Court Act, 1861, Sec. 15—Government of India Acts, 1915 and 1935. Sec. 107(c) and Sec. 224(b)—Constitution of India, Art. 227(b)—Court summarily rejecting appeal under s. 29 of Rent Act—Whether Court must record reasons for rejecting appeal.

The Court hearing an appeal under s. 29 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, must follow the rule of practice framed by the High Court under Civil Circular 51 of 1890, and therefore, while summarily rejecting the appeal under O. XLI, r. 11, of the Civil Procedure Code, 1908, must give reasons in short for rejecting it.

*Hanmant v. Annaji Hanmanta,*¹ *Sunderlal Manekchand Sheth v. H. H. the Maharaja Saheb of Morvi,*² *Dayanand Pandurang v. Daji Narayan,*³ *Hussain Sab v. Vighneshwar*⁴ and *Rajpati Sudama v. Taj Mohamed,*⁵ referred to.

THE facts appear in the judgment.

T. N. Valavalkar, for the petitioner.

P. G. Bhimrao, for the opponent.

PATEL J. The present application arises out of a suit filed by the petitioner against the respondent for eviction on three grounds—(1) arrears of rent for more than six months, (2) alterations in the premises without the permission of the landlord and (3) for non-payment of water charges. The case is governed by the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, to which we will refer as the Rent Act. The defendant-opponent resisted the eviction and one of his contentions was that the notice to quit was bad in law. The

*Decided, November 27, 1964. Civil Revision Application No. 953 of 1960.

¹ (1918) I.L.R. 37 Bom. 610, F.B., S.C. 15 Bom. L. R. 765.

² (1956) Civil Revision Application No. 580 of 1955, decided by J. C. Shah J., on February

1, 1956 (Unrep.).

³ (1926) I.L.R. 50 Bom. 793, s.c. 28 Bom. L.R. 1082.

⁴ [1953] Bom. 309, s.c. 54 Bom. L.R. 947.

⁵ (1963) 66 Bom. L.R. 258.

learned trial Judge dismissed the suit holding that the notice was bad in law. He also rejected the other contentions of the plaintiff. The plaintiff appealed under s. 29 of the Act. The learned Judges rejected the appeal under O. XLI, r. 11, of the Civil Procedure Code summarily without assigning any reasons whatsoever for rejecting the appeal. This revisional application comes before us against this order.

It is very regrettable that a revisional application should take almost 5 years for being heard in such a petty matter. One only wonders at the patience of the litigants who must be seriously affected by the delays of litigation. The main ground urged by Mr. Valavalkar is that, the learned Judges while rejecting his appeal summarily do not give any reasons whatsoever for the same, which they were bound to give. On the other hand, it is contended for the opponent that it is not necessary for the Appellate Bench to give reasons while rejecting an appeal. The question is of some importance and, therefore, it was ordered to be heard by a Bench.

Order XLI, r. 11, which deals with the dismissal of appeals at the stage of admission, does not require that the Appellate Court should give reasons while dismissing an appeal summarily but then this High Court has under the High Court's Act framed circulars—Civil Circular 51 of 1890 by which a subordinate Court dismissing an appeal summarily is required to give reasons for the same. The Civil Procedure Code was recast thereafter by the present Code of 1908. This Court in *Hanmant v. Annaji Hanmanta*¹ held in a Full Bench decision that the effectiveness of that civil circular was not affected in any manner by the provisions of the present Code. That has been the law for the subordinate Courts and in *Sunderlal Manekchand Sheth v. H. H. the Maharaja Saheb of Morvi*² J. C. Shah J. held that the same law applies to the Small Causes Court at Bombay, dealing with an appeal under the Rent Act.

Under s. 31 of the Act the Court has to follow the prescribed procedure i.e. the procedure prescribed by the Act or the rules framed under it. Chapter IV of the rules deals with Small Cause Courts at Bombay and r. 9 prescribes that the Court in appeals shall follow as far as may be and with necessary modifications the practice and procedure prescribed for appeals by the Code of Civil Procedure. It is true that the Code itself does not contain any provisions requiring the Appellate Court to write reasons while rejecting an appeal. It is, therefore, argued that the Appellate Court is not required to give any reasons whatsoever for rejecting an appeal. This argument cannot be accepted. The Court under the Rent Act is a special Court different from the Small Causes Court as such and it is not governed by the Presidency Small Causes Courts Act and is subordinate to the High Court. The restrictions, therefore, regarding the applicability of Orders and Circulars of the High Court to Small Causes Court in Bombay do not apply to the Bench hearing appeals under the Rent Act. As a Court subordinate to the High Court it is bound by the circular issued by the High Court since it is not functioning as a Small Causes Court as any other subordinate Court. After *Hanmant Rakhmaji's* case the decision in *Tanaji Dagde v. Shankar Sakharam*³ cannot be regarded as good law.

It is then contended that the circular had been issued under the powers vested in the High Court under the High Courts Act, 1861, and since the said Act has been repealed by the Government of India Acts, 1915 and 1935, and the Constitution of 1950 which do not contain similar provisions, it cannot be regarded as good law. Section 15 of the High Courts Act defines the powers of the High Court in relation to the subordinate Courts and it provides amongst other things that the High Court shall have powers to make and issue general rules for regulating the practice and proceedings of such Courts and the rules so made shall be observed by the said Courts. Sections 107(c) and 224(b) of the

¹ (1918) I.L.R. 37 Bom. 610, F.B., s.c. 15 February 1, 1956 (Unrep.).
Bom. L. R. 705.

² (1956) Civil Revision Application No 589 of 1955. decided by J. C. Shah J., on L.R. 1008.

³ (1911) I.L.R. 36 Bom. 116, s.c. 13 Bom.

Government of India Acts of 1915 and 1935 and art. 227(b) of the Constitution are in the term as above excepting the latter parts quoted above. That, however, cannot, in our view, make any difference since it could not have been intended that the High Court should make a rule in vain.

There is nothing inconsistent in O. XLI of the Civil Procedure Code which should render the rule invalid. The Court hearing appeals under s. 29 is bound to obey the rule of practice framed by the High Court.

It is contended on the authority of the decision in *Dayanand Pandurang v. Daji Narayan*⁴ that circulars issued by the High Court have not the same efficacy as rules framed under the rule making powers of the High Court under the Civil Procedure Code. It is, therefore, said that even if the circular is held to be applicable, the Court is not bound to follow it. There is no substance in this contention. The ratio of the case cannot apply to all circulars merely because they are included in the Civil Manual. Fawcett J. makes it clear that

“unless it is passed under some enactment, which gives it the force of law. Obviously the mere fact that a circular is issued under the authority of the High Court is not sufficient to give it that force.”

Circular 95 which is reproduced in r. 410 of the Circulars was issued by the High Court under the High Courts Act, 1861, which power still continues in the High Courts and is, therefore, binding on the subordinate Courts. A reference was made to the decision of Chagla C.J. in *Hussain Sab v. Vighneshwar*⁵ in this connection. The learned Chief Justice was considering the question as to the Court to which an application for amendment of a decree is to be made in a case where an appeal is dismissed summarily, under O. XLI, r. 11. That has nothing to do with the manner in which an appeal should be summarily dismissed.

Apart from this, matters which arise under the Rent Act are very important and often involve large claims and important rights. Even if no appeal lies under the Act to the High Court, it has got revisional jurisdiction in such matters. If no reasons are assigned for dismissal the High Court is not in a position to ascertain how the Court has dealt with the matter. The Court being without assistance from the judgment of the subordinate Court has to waste much time in investigating the matter which can hardly be justified. In order that the appeal Court should assist the High Court, it ought to record its reasons in short even when it dismisses the appeal summarily.

The effect of not requiring to give reasons can be appreciated in a case like the present. The trial Court held that the notice was bad on the ground that it was only by the notice that the permitted increases were demanded by the landlord. In the view of the trial Court, before a notice is given there must be an earlier intimation of the increase in the standard rent, which apparently is not warranted by the Rent Act. Certainly the question is a very important question and unless the Appellate Court gave its reasons why it agreed with the trial Court, the High Court would not be in a position to know how the appeal was disposed of. We may also incidentally point out that in *Rajpati Sudama v. Taj Mohamed*⁶ this Court disagreed with the Small Causes Court and held after considering the relevant provisions of the Rent Act that it is not necessary to give intimation of the permitted increases and the fact that the landlord would be charging the permitted increases before sending a formal notice or before the filing of a suit.

We, therefore, set aside the order of the Appellate Bench and direct that it will rehear the appeal and dispose of it in accordance with law.

Costs costs in the cause.

Order set aside.

⁴ (1926) I.L.R. 50 Bom. 793, s.c. 28 Bom. L.R. 1082.

⁵ [1953] Bom. 309, s.c. 54 Bom. L.R. 947.

⁶ (1963) 66 Bom. L.R. 258.

ORIGINAL CIVIL.

Before Mr. Justice Tambe and Mr. Justice Naik.

AMICHAND VALANJI v. G. B. KOTAK.*

Defence of India Rules, 1962 [Part XIIA. Gold Control], Rules 126A-126Z—Defence of India Act (51 of 1962), Secs. 3, 44—Constitution of India, Arts. 25, 26—Sea Customs Act (VIII of 1878), Sec. 123(2)—Rules 126A-126Z whether ultra vires rule making power of Central Government—Relation inter se between s. 3(1) and 3(2) of Defence of India Act—Connection between rules framed and purposes prescribed under parent Act, nature of—Expression “authority” in s. 44 whether includes Central Government—Construction of statute—Circumstances in which enactment passed whether could be considered by Court.

Rules 126A to 126Z of the Defence of India Rules, 1962, are not *ultra vires* the rule making power of the Central Government and are not a colourable piece of legislation in the sense that they have been framed for some purpose other than the prescribed purposes in s. 3(1) of the Defence of India Act, 1962.

Per Tambe J. No additional or independent rule making authority or power is conferred on the Central Government in any of the clauses of s. 3(2) of the Defence of India Act, 1962. Therefore, the limitation imposed in s. 3(1) of the Act will be equally applicable and govern the rule making power of the Central Government relating to the subjects mentioned in clauses 1 to 57 of s. 3(2) of the Act. The power of the Central Government to make rules on any of those subjects is exercisable only for securing the purposes authorised by s. 3(1), in the event the Central Government forms an opinion that it was necessary or expedient for it to do so.

King-Emperor v. Sibnath Banerji,¹ *Santosh Kumar Jain v. The State*,² *Attorney-General for Canada v. Hallet & Carey Ltd.*³ and *Makhan Singh v. State of Punjab*,⁴ referred to.

The connection that is required to be established between the rules framed and the purposes prescribed under s. 3(1) of the Defence of India Act, 1962, must be one which is real and not far-fetched, problematical, hypothetical or too remote. It need not necessarily be proximate. Therefore, rules which would, if observed, serve to promote one or more of the purposes mentioned in s. 3(1) of the Act will be within the rule making power conferred on the Central Government thereunder.

When validity of an act, rule, regulation or order made by an executive authority, to which the power has been delegated by the legislation, is challenged, then, it is open to the Court to see whether the act done by the delegated authority has any connection with securing or realization of the purposes for which the power has been conferred on the delegated authority.

Rez v. Basudeva,⁵ *The Superintendent, Central Prison, Fatehgarh v. Ram Manohar Lohia*,⁶ *Azim Khan v. Emperor*,⁷ *Lahore E. S. Co. v. Punjab Province*,⁸ *Chester v. Bateson*,⁹ *Attorney-General v. De Keyser's Royal Hotel*¹⁰ and *Ross-Clunis v. Papadopoulos*,¹¹ referred to.

In considering the degree or nature of such connection required to be established the tests laid down by the Federal Court† and the Supreme Court†† that the connection must be “real and proximate and not far-fetched or problematical” and by the Privy Council‡ that the connection should be “capable of being related to the authorised purposes”, are not of general application. The tests laid down are in the

*Decided, October 6-9, 1964. O.C.J. Miscellaneous Petition No. 135 of 1963.

1 (1945) L.R. 72 I.A. 241, s.c. 48 Bom. L.R. 1.

2 [1951] S.C.R. 303.

3 [1952] A.C. 427.

4 [1964] A.I.R. S.C. 381.

5 [1950] A.I.R. F.C. 67.

6 [1960] 2 S.C.R. 821.

7 [1945] A.I.R. Lah. 154.

8 [1943] A.I.R. Lah. 41, F.B.

9 [1920] 1 K.B. 829.

10 [1920] A.C. 508.

11 [1958] 1 W.L.R. 546.

† *Rez v. Basudeva*, [1950] A.I.R. F.C. 67.

†† *The Superintendent, Central Prison, Fatehgarh v. Ram Manohar Lohia*, [1960] 2 S.C.R. 821.

‡ *Attorney General v. Hallet & Carey Ltd.*, [1962] A.C. 427; *Ross-Clunis v. Papadopoulos*, [1958] 1 W.L.R. 546.

context of the contents of the relevant legislative power which their Lordships were considering in each case.

The circumstances in which an enactment has been passed is a relevant circumstance from which assistance could be sought by Court. Therefore, it is permissible for the Court to ascertain the conditions prevailing which caused the mischief to cure which the enactment was directed.

Pukhraj v. D. R. Kohli,¹² *Chiranjitlal Chowdhuri v. Union of India*¹³ and *A. Thangal Kunju Musaliar v. M. Venkitachalam Potti*,¹⁴ referred to.

The expression "authority" in s. 44 of the Defence of India Act, 1962, does not include the Central Government, nor does s. 44 impose any fetter on the rule making power of the Central Government, but is directive relating to administrative or executive acts performed by any person or authority in execution of the powers delegated to them by the Central Government.

*Tan Bug Taim v. Collector of Bombay*¹⁵ and *Lahore E. S. Co. v. Punjab Province*¹⁶ referred to.

Per Naik J. There is no conflict between sub-ss. (1) and (2) of s. 3 of the Defence of India Act. The clauses listed in s. 3(2) are mere elaboration of what is stated in a general way in s. 3(1). These clauses make explicit what is implicit in s. 3(1). The clauses are 'statutory definitions' and would stand by themselves, unless there is any ambiguity about any of them.

There are two rival tests, one for testing the validity of a legislation passed by a Legislature whose powers have been defined and limited under the Constitution as also a legislation which makes an encroachment or an invasion upon the fundamental rights of the citizens. In judging the validity of a legislation which encroaches upon the legislative functions of another legislative body or which invades upon the fundamental rights of the citizens, the test which must be followed is the test of direct, proximate and intimate nexus between the exercise of the powers and the authority conferred upon the Legislature. In a matter of this nature, the Court is the sole judge to decide as to whether the powers have been exceeded. Another, in the case of a delegated legislation where there is no inherent lack of jurisdiction in the parent body which delegates the power and where the delegate has been given wide discretion in choosing the topic. In the latter case, the test that will have to be invoked is whether the exercise of the legislative authority is wholly unrelated to the purpose or is not capable of being connected to the purposes for which it is meant to be exercised.

The principle that should be applied in testing the validity of the Rules framed on the authority of a section which is as widely worded as s. 3 of the Defence of India Act, 1962, is the principle enunciated by the Privy Council in *Attorney General for Canada's case* (1952 A.C. 427). When wide powers have been conferred upon the Central Government and when the Central Government has been given the right to choose the topic in respect of which legislation is to be framed, the principle that would hold good would be the principle whether the Rules framed are capable of being connected with the purposes for which they are intended. It is not the direct, proximate and intimate connection that should be insisted upon, but some connection which would correlate the Rules with the purposes mentioned in sub-s. (1) or with the matters enumerated in sub-s. (2) of s. 3 of the Defence of India Act, 1962. Therefore, the Court can set aside the Rules if on the face of them, the Rules appear to be wholly unrelated or if it is found on examination that they are not capable of being related to any of the purposes mentioned in s. 3(1) of the Act.

THE facts appear in the judgment of Tambe J.

Porus Mehra, with *S. J. Sorabjee* and *S. B. Sukthankar*, instructed by *Gagrat & Co.*, for the petitioners.

K. H. Bhabha, with *A. B. Diwan*, instructed by *P. G. Gokhale*, for the respondents.

12 (1959) 61 Bom. L.R. 1230.

13 [1960] 8 O.R. 869.

14 [1955] 2 S.C.R. 1196.

15 (1945) 47 Bom. L.R. 1010.

16 [1943] A.I.R. Lahore 41.

TAMBE J. This is a petition under art. 226 of the Constitution of India, wherein the vires of the Gold Control Rules, contained in Part XIIA of the Defence of India Rules, have been challenged. In the prayer clause of the petition, no doubt, validity of the entire rules were not challenged, but only some of them were mentioned. But the arguments advanced before us were in respect of rules in general. It would not, therefore, be necessary to consider each rule separately.

The two petitioners before us are dealers in gold. They profess and practise Jain religion. The two petitioners carry on the business in the name and style of "Messrs. Chandkumar Amichand & Co.". The principal business of the petitioners is in bullion. They buy and sell gold in course of their business. In their petition, they say that the business carried on by them is on a vast scale. Eleven persons are employed by them in the firm and the annual salary paid by the firm to their employees amounts to Rs. 20,000. The firm is also a registered dealer for the purposes of the sales-tax, and the petitioners claim that the sales-tax paid by them in S.Y. 2018 amounted to Rs. 2,56,395.72 nP.

The challenge made by the petitioners is in substance now confined to two grounds. Firstly, it is contended that the rules made are in excess of the rule making power of the Central Government, and, secondly, that, at any rate, the rules contravene the fundamental rights conferred on the petitioners under arts. 25 and 26 of the Constitution of India. The other contentions which have been raised by the petitioners in the petition were not argued before us. But Mr. Mehta, learned counsel for the petitioners, stated before us that he did not advance any arguments on those contentions, because the matter stood concluded by the recent decision of their Lordships of the Supreme Court in *Makham Singh v. State of Punjab*.¹ Mr. Mehta, however, stated that the petitioners may raise these contentions in the Supreme Court if so advised.

To appreciate the contentions raised before us, it would be necessary to refer to the incidents relating to the promulgation of these impugned rules. It is common knowledge that on September 8, 1962, Chinese troops crossed the Indian border. By October 20, 1962, the aggression by China on the Indian borders was on a large scale. On October 26, 1962, the President of India, in exercise of the powers conferred on him by art. 352 of the Constitution, declared that a grave emergency exists, whereby the security of India is threatened by external aggression. By reason of this proclamation, the provisions of art. 358 of the Constitution immediately came into play. That article provides that while a proclamation of emergency is in operation, nothing in art. 19 shall restrict the power of the State as defined in Part III to make any law or to take any executive action which the State would but for the provisions contained in that Part be competent to make or to take, but any law so made shall, to the extent of the incompetency, cease to have effect as soon as the proclamation ceases to operate, except as respects things done or omitted to be done before the law so ceases to have effect. The declaration of emergency further under art. 359 empowered the President

"to declare that the right to move any court for the enforcement of such of the rights conferred by Part III as may be mentioned in the order and all proceedings pending in any court for the enforcement of the rights so mentioned shall remain suspended for the period during which the Proclamation is in force or for such shorter period as may be specified in the order."

It is also necessary to notice two other articles, and they are arts. 250 and 353(b). Article 250 provides:

"250. (1) Notwithstanding anything in this Chapter, Parliament shall, while a Proclamation of Emergency is in operation, have power to make laws for the whole or any part of the territory of India with respect to any of the matters enumerated in the State List.

(2) A law made by Parliament which Parliament would not but for the issue of a Proclamation of Emergency have been competent to make shall, to the extent of the incompetency, cease to have effect on the expiration of a period of six months after the Proclamation has ceased to operate, except as respects things done or omitted to be done before the expiration of the said period."

Article 353, cl. (b) provides that

"while a proclamation of emergency is in operation, then—the power of Parliament to make laws with respect to any matter shall include power to make laws conferring powers and imposing duties, or authorising the conferring of powers and the imposition of duties, upon the Union or officers and authorities of the Union as respects that matter, notwithstanding that it is one which is not enumerated in the Union List."

We have already stated that the emergency was proclaimed by the President on October 26, 1962. On the same day, in exercise of the powers under art. 123, the President promulgated an Ordinance, styled as "The Defence of India Ordinance". It is not necessary for the purposes of this case to refer to the provisions of the Defence India Ordinance, for it is not in dispute that the provisions of the Defence of India Ordinance have now been incorporated in the Defence of India Act, 1962. On November 3, 1962, the President, in exercise of powers conferred on him by cl. (1) of art. 359 of the Constitution, by a Gazette Notification, declared that

"the right of any person to move any Court for the enforcement of the rights conferred by Article 21 and Article 22 of the Constitution shall remain suspended for the period during which the Proclamation of Emergency issued under clause (1) of Article 352 thereof on the 26th October 1962, is in force, if such person has been deprived of any such rights under the Defence of India Ordinance, 1962 (4 of 1962) or any rule or order made thereunder."

By a further proclamation, art. 14 also was added to this notification. The combined effect of all the aforesaid provisions was that the Parliament gained authority to legislate on subjects contained in Lists I, II and III, as it deemed proper during the emergency. The fetter on the legislative power of Parliament contained in art. 19 was removed. Further, if the fundamental rights of a citizen under arts. 14, 21 and 22 were contravened by any rule or order made by the Central Government under the Defence of India Ordinance or Act, recourse to Court for enforcement of those fundamental rights was barred during the period of emergency. The Defence of India Act enacted by Parliament came into force on December 12, 1962. The preamble of the Defence of India Act (hereinafter called "the Act") declares that it is

"An Act to provide for special measures to ensure the public safety and interest, the defence of India and civil defence and for the trial of certain offences and for matters connected therewith."

The preamble then refers to the external aggression and the declaration of emergency by the President, and thereafter, it is therein stated:

"AND WHEREAS it is necessary to provide for special measures to ensure the public safety and interest, the defence of India and civil defence and for the trial of certain offences and for matters connected therewith;

BE it, therefore, enacted by Parliament in the Thirteenth Year of the Republic of India as follows:"

Sub-section (3) of s. 1 provides that the Act

"shall remain in force during the period of operation of the Proclamation of Emergency issued on the 26th October 1962, and for a period of six months thereafter."

The clauses of sub-s. (3) provided for saving of certain things, with which we are not here concerned. Section 2 contains definitions of certain expressions. The expression "defence of India" has not been defined in s. 2, though "civil defence" has been defined. Section 3 confers power on the Central Government to make rules, and the Gold Control Rules have been framed by the Central Government in exercise of its powers under s. 3 of the Act. The Central Government promulgated the Defence of India Rules on November

5, 1962. However, there were no rules controlling or regulating dealings in gold by these rules. By a further amendment to the Defence of India Rules, Gold Control Rules were introduced in the Defence of India Rules, as Part XIIA of the Defence of India Rules. They came into force on January 10, 1963. The preamble of these rules reads:

"In exercise of the powers conferred by section 3 of the Defence of India Act, 1962 (51 of 1962), the Central Government hereby makes the following further amendment in the Defence of India Rules, 1962, namely:—"

And the short title reads: "These rules may be called the Defence of India (Amendment) Rules, 1963." The heading of Part XIIA of the Defence of India Rules is "Gold Control". It consists of rules 126A to 126Z, and these rules are generally called and known as "Gold Control Rules", and I would hereafter also refer to these Rules as the Gold Control Rules. The Rules initially framed on January 10, 1963, were further amended by two amendments to the Defence of India Rules—(1) by the 7th amendment which came into force on June 24, 1963, and (2) by the 9th amendment which came into force on September 23, 1963. It would be sufficient for the purposes of this case to refer to the provisions of the Gold Control Rules as they stand after both these amendments. It may also be stated that for the purpose of administration of these Gold Control Rules, initially an All India Board called "Gold Board" was constituted. At the time of the hearing of this petition, however, by reason of the amendment of the Gold Control Rules, the administration of Gold Control is not in the hands of the "Gold Board", but is in the hands of the Administrator, respondents Nos. 1 to 4 to this petition are members of Gold Board. No order can be passed against the Gold Board. The other two respondents are—the Collector of Central Excise, Bombay, and the Union of India.

Rule 126A is an interpretation clause. A dealer has been defined in sub-cl. (c) as

"any person who carries on, directly or otherwise, the business of—

(i) making, manufacturing, buying, selling, melting, processing or converting gold for the purpose of making or manufacturing ornaments,

(ii) buying, selling, supplying, distributing, melting, processing or converting gold for the purpose of making or manufacturing ornaments, whether for cash or for deferred payment, or for commission, remuneration or other valuable consideration."

There is inclusive clause including an undivided Hindu family, which carries on business, company, society etc., but it is not necessary for the purposes of this case to refer to these various clauses. Clause (d) defines gold:

"'gold' means gold, including its alloy, whether virgin, melted, remelted, wrought or unwrought, in any shape or form, of a purity of not less than nine carats and includes any gold coin (whether legal tender or not), any ornament and any other article of gold."

Clause (f) defines ornament:

"'ornament' means any article in a finished form, meant for personal adornment or for the adornment of any idol, deity or any other object of religious worship, made of, or manufactured from, gold, whether or not set with stones or gems, real or artificial, or with pearls, real, cultured or imitation or with all or any of them and includes parts, pendants or broken pieces of ornaments;"

Clause (g) defines

"'primary gold' as gold in any unfinished form and includes all ingots, bars, blocks, slabs, billets, shots, pellets, rods and wires."

Clause (h) defines a "refiner" as the owner or occupier of a refinery; and cl. (i) defines a "refinery" as a place where gold is melted, processed, converted or refined. Part XII-A has been sub-divided into six chapters. The first chapter, containing rules 126B, 126C and 126D relate to control of busi-

ness in gold, and these provisions are most important provisions for the purposes of this petition. Chapter 3 deals with licensing of dealers and refiners. Chapter 4 relates to returns and accounts. Chapter IV-A which has been amended by the amendment effected in September, 1963, has made certain concessions in favour of petty goldsmiths, called certified goldsmiths. Chapter V relates to declaration of gold by individuals; and Chapter VI is a miscellaneous chapter. In my opinion, it is not necessary to refer in detail to the provisions of these various rules in the six chapters, but it would be sufficient to state the combined effect of these rules, so far as it is material for the purposes of this case. The business of gold has been controlled by these rules, principally by prohibiting manufacture of articles of gold other than ornaments, by placing certain restrictions on making of ornaments, by imposing certain restrictions and prohibition in the matter of grant of loan by the bankers or the money-lenders on hypothecation of gold, and by requiring the dealers, refiners, money-lenders and persons other than the dealers or refiners, in other words, a common man, to submit certain returns periodically in certain forms. The provisions of these rules thus affect dealers, refiners, money-lenders as well as a common man. Now, the term "dealer" would include persons dealing in gold as well as persons dealing in ornaments, and also include persons who are doing the business of goldsmith. I would now proceed to summarise how these rules affect these different categories of persons.

Dealer: We first proceed with the category of a "Dealer". He cannot make or manufacture any article of gold except ornaments; but after June 24, 1963, a dealer is allowed to make articles other than ornaments, on obtaining authorization in this respect from the Administrator. He cannot accept any ornament of a purity exceeding 14 carats for polishing or repair. No dealer can make or manufacture any article of gold of a purity exceeding 14 carats. He cannot manufacture, prepare, sell or otherwise transfer, agree to sell or agree to transfer or expose or offer to sell or offer to transfer any ornament having gold of a purity exceeding 14 carats. It may, however, be stated that one month's period from the commencement of these rules was allowed to the dealers for disposal of stock of gold ornaments which was already in their possession. A dealer was required to convert the primary gold already in his possession prior to the coming into force of these rules into gold of a purity of 14 carats. He is also similarly required to convert within a week gold that might be subsequently coming into his possession. A dealer cannot carry on the business of money-lending on the same premises in which he is carrying on the business of a dealer. He cannot sell or otherwise transfer to any person any gold on hypothecation, pledging, mortgage or charge on which he has advanced any loan irrespective of the fact whether the loan was advanced before or after the commencement of the order. This additional condition has been imposed by the amendment which came into effect on June 24, 1963. He cannot deliver back the gold to the borrower even where the loan has been repaid by him, much less before, without the permission of the Administrator. A dealer, who has been registered under the Sales Tax Act, cannot any more carry on business except on obtaining the license from the Administrator. Such a dealer is required to make an application for a license. If a dealer, who is required to make an application for a license, fails to apply, or whose application has been rejected or cancelled, has to sell or otherwise transfer all the gold in his possession to another dealer or refiner licensed under the Act within the given time. A dealer who is required to make an application for license or to whom a license has been granted, has to file periodically returns relating to gold in his possession, stating therein the quantity of gold in his possession, description of gold in his possession or under his control, and to give such further particulars as may be prescribed from time to time. In the periodical returns, which he is required to submit, he has to show the additional gold coming into his possession after he has last made his return. A dealer cannot acquire

or agree to acquire or buy gold, other than ornaments or declared gold, from any person other than licensed dealer or refiner. He cannot sell gold, other than ornaments to any person, other than a person holding a permit, or a licensed dealer or refiner.

Refiner: A refiner cannot make or manufacture any article of gold other than primary gold. However, after June 24, 1963, he is allowed to make or manufacture articles other than ornaments of any purity on obtaining authorization in that respect from the Administrator. A refiner was required to convert gold in his possession of a purity exceeding 14 carats into gold of purity not exceeding 14 carats within a week of the date, or such further period as may be allowed from the date, the rules came into force. Similarly, he is required to convert the primary gold acquired by him subsequently into gold of purity not exceeding 14 carats. The Administrator, however, could authorise a refiner to keep in his custody or control any primary gold exceeding 14 carats. The primary gold manufactured or sold by a refiner after the date the rules came into force is required to be stamped by a stamp approved by the Administrator giving certain prescribed particulars including the date of manufacture, its purity and identity of the maker or manufacturer. By a subsequent notification issued on May 1, 1964, however, this rule has been relaxed and exemption has been granted in respect of articles such as foils, leaves and wires. But these articles are required to be labelled for the purposes of identification with reference to purity, date of make or manufacture, maker or manufacturer. A refiner is required to obtain a license from the Administrator in order to enable him to continue the business of a refiner. He has to make periodical returns of the gold in his possession or under his control, giving certain details as prescribed including the quantity and description thereof. He has to maintain account-books in the prescribed forms. He cannot sell or deliver gold to any person other than a dealer or a person holding a permit from the Administrator.

Common man: As regards a common man, which includes a minor, a lunatic, deity, trusts, Court of Wards, Receiver, Official Assignee, a Hindu undivided family, company, firm, wakf, institution, and an individual, he cannot place any order with any dealer, whether licensed or not, for making, manufacturing or preparation of ornaments having gold of a purity exceeding 14 carats. He has within 30 days of the date on which the rules came into force, to declare gold other than ornaments in his possession, in excess of 20 grams in the case of a minor, and 50 grams in the case of any other person. He cannot buy or otherwise acquire gold not being ornament except on succession, testamentary or otherwise, or on obtaining a permit from the Administrator. Gold so acquired has to be declared by a further declaration. Gold acquired on a permit cannot be sold without a permit. Gold not required to be declared cannot be sold without a permit. It may, however, be stated that after certain concessions having been granted to certified goldsmiths, it is possible for the common man to convert his old ornaments into new ornaments not exceeding that purity.

Concessions granted to Certified Goldsmiths: This is a concession granted to petty dealers who were not registered for the purposes of Sales Tax, and who were carrying on business of goldsmith since before the coming into force of the Gold Control Rules, on obtaining a certificate from the Administrator. They are allowed to do certain kind of business. They can accept from any person other than a dealer or a refiner, any ornament or ornaments of a purity in excess of 14 carats for the purpose of making or manufacturing new ornaments subject to the restriction that the gold contained in the new ornaments does not exceed purity and total quantity of gold contained in the ornaments accepted. He can also make or manufacture primary gold of purity exceeding 14 carats by melting or procuring or converting any ornaments subject to the restriction that he cannot have at any time primary gold in ex-

cess of 100 gms. On cancellation of his certificate, he has to sell or transfer gold to a dealer or a refiner.

These in brief are the restrictions and prohibitions imposed by the Gold Control Rules on dealers, refiners, money-lenders and other persons. It is hardly necessary to state that the effects of the Gold Control Rules are far-reaching and largely affecting these persons. The effect in short is that business in gold exceeding purity more than 14 carats has been brought practically to a standstill. It is only open to convert old ornaments into new ornaments of a purity exceeding 14 carats. The other effect is that persons in possession of gold other than ornaments, over certain very small quantity, have to declare gold in their possession; and thirdly, from the periodical returns which are required to be furnished by persons falling in the aforesaid categories, the Administrator is able to exercise control over the business of gold. It is these provisions which have been challenged before me by the petitioner who is a dealer in gold.

I have already stated the two principal contentions which have been raised on behalf of the petitioner. The arguments advanced by Mr. Mehta, learned counsel for the petitioner, in short, is that s. 3 of the Act authorises the Central Government to make rules for certain purposes mentioned in sub-s. (1) of s. 3. The rules framed have no intimate, real or proximate connection with any of those purposes. On the other hand, the rules have been framed for the purposes of bringing about a socio-economic reform with a view to changing the age-long habits of the people of India, a purpose entirely outside the scope of sub-s. (1) of s. 3 of the Act. In other words, the argument of Mr. Mehta is that the rules framed are not within the competence of the Central Government inasmuch as they are in excess of the rule making power contained in sub-s. (1) of s. 3 of the Defence of India Act, and is a colourable piece of legislation. According to Mr. Mehta, there are on the statute book various enactments relating to the control or smuggling of gold and foreign exchange in India. If really the Government wanted to control smuggling, they could easily have achieved this purpose by suitably amending those enactments; but in framing these rules, the Government has not really the motive of controlling the smuggling of gold, but, on the other hand, has the motive of effecting a socio-economic reform, with a view to make people change their habits. The other aspect of the argument of Mr. Mehta is that the rules violate the provisions of s. 44 of the Act, inasmuch as they excessively and unnecessarily interfere with the ordinary avocations of life and the enjoyment of property of persons. The other contention is violation of arts. 25 and 26 of the Constitution.

Mr. Bhabha, learned counsel for the respondents, on the other hand, argues that in construing the rules, the Court has to approach keeping in view that these rules have been placed before the Parliament as required by s. 41 of the Act. The Parliament has not thought it necessary either to modify or annul these rules. The fetter imposed on the legislative power by art. 19 stands suspended by virtue of the provisions of art. 358 of the Constitution. Enforcement of fundamental rights under arts. 14, 21 and 22 have been barred. The entire legislative power rests with the Parliament by reason of the provisions of arts. 250 and 353(b) of the Constitution. The power to make rules is not confined to sub-s. (1) of s. 3. On the other hand, the Legislature in enacting sub-s. (2) of s. 3 has declared its intention that rules made under any one or more of the clauses of sub-s. (2) would necessarily be for securing any one or more of the purposes of the Act. Therefore, where it is shown that the rules fall under any one or more of the clauses of sub-s. (2), it is no more necessary for the respondents to establish any nexus or real or proximate connection between the rules framed and the purposes mentioned in sub-s. (1). Such rules can be struck down only if it is shown by the person challenging the rules that they are totally incapable of being related to or not germane to the purposes mentioned in sub-s. (1) of s. 3 of the Act. Accord-

ing to Mr. Bhabha, the rules fall under cls. 23 and 33 of sub-s. (2) of s. 3. In the alternative, Mr. Bhabha contends that there is a real and proximate connection between the rules framed and the purposes mentioned in sub-s. (1) of s. 3 of the Act. The object of these rules is to arrest smuggling, and thereby to improve the position of the Government relating to foreign exchange. This object has a direct and proximate connection with the "defence of India" and also for maintaining the civil services essential to the life of the community. According to Mr. Bhabha, these rules serve the purpose of conservation of foreign exchange. It was also the argument of Mr. Bhabha that the expression "defence of India" is a term of wide amplitude, and would include even an economic measure found necessary by the Government to secure the purposes mentioned in sub-s. (1) of s. 3 of the Act. There is a presumption in favour of validity of exercise of the power and the burden lies heavily on the person challenging its validity. Section 44 of the Act imposes no restrictions on the rule making power of the Central Government. As regards the argument of Mr. Mehta that the Government could have achieved the object by suitably amending other enactments, Mr. Bhabha contends that it is not open to this Court to make any inquiry as to the necessity of making these rules or consider the question whether the Central Government could have achieved the object by doing something else. The powers conferred on the Central Government under s. 3 are of very wide amplitude, and the matter has been left to the discretion of the Central Government entirely. As regards the challenge under art. 25 and art. 26 of the Constitution, Mr. Bhabha contends that the respondents by their return have denied the allegations of facts made in the petition. The decision of this question thus involves the decision of disputed questions of fact, and, therefore, could not be gone into in this petition. If at all the Court feels inclined to go into these questions, the matter be remanded to the trial Court for recording evidence on this matter. We should have stated earlier that this petition has been filed on the Original Side of the High Court and has been referred to us.

The first question that arises is the construction of s. 3 of the Act. Material part of s. 3 reads:

"The Central Government may, by notification in the *Official Gazette*, make such rules as appear to it necessary or expedient for securing the defence of India and civil defence, the public safety, the maintenance of public order or the efficient conduct of military operations, or for maintaining supplies and services essential to the life of the community.

(2) Without prejudice to the generality of the powers conferred by sub-section (1), the rules may provide for, and may empower any authority to make orders providing for, all or any of the following matters, namely:—...

(23) the control of trade or industry for the purpose of regulating or increasing the supply of, and the obtaining of information with regard to articles or things of any description whatsoever which may be used in connection with the conduct of military operations or civil defence or for maintaining supplies and services essential to the life of the community;...

(33) controlling the possession, use or disposal of, or dealing in, coin, bullion, bank notes, currency notes, securities or foreign exchange;"

Turning to sub-s. (1) of s. 3, it authorises the Central Government to make rules for securing the following purposes:

- (1) the defence of India;
- (2) civil defence;
- (3) public safety;
- (4) maintenance of public order;
- (5) efficient conduct of military operations; and
- (6) maintaining supplies and services essential to the life of the community.

For securing these purposes, the Central Government is empowered to "make such rules as appear to it necessary or expedient". It would thus be seen

that the power conferred by sub-s. (1) of s. 3 is conditioned by two circumstances: The first is that the power can be exercised only for securing one or more of the authorised purposes, and the other is that the Central Government on application of its mind may find or it may appear to the Central Government necessary or expedient to exercise it for securing the prescribed purpose. This is obviously so because the rules and regulations made in times of emergency entrench on the rights and liberties of persons, and it is, therefore, that the Parliament requires the Central Government to apply its mind and consider whether it is necessary in the circumstances of the case to make such rules. It follows that merely because the rules relate to the purposes mentioned in sub-s. (1) of s. 3, by itself is not sufficient to sustain the rules. It has further to be established that not only that the rules secure the authorised purposes, but it has appeared to the Central Government that it is necessary or expedient to make those rules. Similarly, it is not sufficient to show that it appeared to the Central Government that it is necessary or expedient to make those rules, but the rules must be for securing any of the authorised purposes. In other words, there must be a connection between the rules framed and the authorised purposes mentioned in sub-s. (1) of s. 3. To the extent or nature of the connection, we will advert later.

In my view, it is a well-settled principle that when a particular legislation is impugned, the Court has to see whether the Legislature has acted within its powers, and the second thing it has to see is whether in exercising its powers it has not transgressed any of the limits imposed on it by the Constitution in Part III of the Constitution. In other words, the Court has to see whether in enacting a particular legislation the Legislature has not violated any of the fundamental rights of the citizen. These principles, in my opinion, would equally apply when the Court is called upon to consider the validity or otherwise of a delegated legislation, or a legislation made by an authority to which the Legislature had delegated powers. I have already referred to removal of certain fetters imposed on the Legislature by Part III of the Constitution, by reason of the declaration of emergency and the orders made by the President suspending the enforcement of fundamental rights in arts. 14, 21 and 22. In fact, it has not been canvassed before us that the rules contravene any of the articles other than arts. 25 and 26 of the Constitution. I have, therefore, first to consider whether the rules made fall within the rule making power of the Central Government. The ambit and extent of the power of the Central Government under sub-s. (1) I have already stated. The question which next arises is whether sub-ss. (2) and (3) confer any additional power on the Central Government to make rules. It is the contention of Mr. Bhabha that sub-s. (2) of s. 3 confers additional independent power. I find it difficult to sustain this argument of Mr. Bhabha so broadly made. It may be noticed that the word "rules" in sub-s. (2) is preceded by the prefix "the". The prefix particularises the rules, and when sub-s. (2) is read in the context of sub-s. (1), it appears to me that the rules mentioned in sub-s. (2) are the rules which are referred to in sub-s. (1) of s. 3. The rule making power conferred by sub-s. (2), therefore, is subject to the same limitations as are imposed by sub-s. (1) of s. 3. To hold otherwise would amount to conferral of uncanalised control and power on the Central Government. Could it be said that the rules falling under any of the clauses of sub-s. (2) are valid rules even though they have no relation whatsoever with any of the purposes mentioned in sub-s. (1) of s. 3 of the Act? I would illustrate: Clause (6) of sub-s. (2) empowers the Central Government to make rules "regulating the publication of news and information". Is it open to the Government to require the newspapers to publish certain news which have no connection whatsoever with any of the purposes mentioned in sub-s. (1), for instance, the births and marriages at the place of a Government servant? When I put the question to Mr. Bhabha in this form, Mr. Bhabha replied that this entry being ambiguous, it may be open to the Court to investigate the matter further. But it had been the

argument of Mr. Bhabha that cl. (33) is specific and there is no ambiguity about it. Turning to cl. (33), it, *inter alia*, authorises the Central Government to make rules "controlling the use... of bullion", and according to Mr. Bhabha, bullion includes gold ornaments. I asked Mr. Bhabha that if a rule is made by the Central Government that no person shall put on ornaments in his possession on any day including a festival day, would it be a valid rule? I did not receive a satisfactory answer. Obviously, if cl. (33) is interpreted as Mr. Bhabha wants me to interpret, the assumed rule would fall under that clause. It is obvious that such a rule can have no connection whatsoever with the purposes mentioned in sub-s. (1) of s. 3. I, therefore, find it difficult to accept Mr. Bhabha's contention so broadly stated. It appears to me that the Legislature having generally stated in sub-s. (1) of s. 3 the power conferred on the Central Government, have projected its mind into future envisaging certain subjects relating to which the Central Government may have to frame rules for securing the purposes mentioned in sub-s. (1) of s. 3, if it appears to the Central Government necessary or expedient to do so. In other words, the Legislature in enacting sub-s. (2) has given a guidance to the Central Government in the matter of what it can do for securing the aforesaid purposes in exercise of the power conferred on it by sub-s. (1) of s. 3 of the Act. Sub-section (2) does not in any manner restrict the power conferred by sub-s. (1), because sub-s. (2) in terms states that it is without prejudice to the generality of the powers conferred by sub-s. (1); nor does it confer any additional power on the Central Government in the matter of framing rules. It would, therefore, follow that when it is shown that the rules framed fall in any one or more of the clauses of sub-s. (2), the Court will presume that the rules would have a bearing on any one or more of the purposes mentioned in sub-s. (1) of s. 3. The burden of proving the contrary would lie, and would lie heavily, on the party which challenges this position. I find it difficult to take the matter any further than this. Apart from the construction of the section, there is also guidance in this respect from the decided cases relating to the provisions similar to the one with which I am concerned here.

The first is a decision of their Lordships of the Privy Council in *King-Emperor v. Sibnath Banerji*.² Sibnath Banerji and others were detained pursuant to orders made under r. 26 of the Defence of India Rules, 1940. These orders were signed by the order of the Governor. The said r. 26 was purported to have been made under s. 2(2)(x) of the Defence of India Act, 1939. It was held by the Courts in India, following the decision of the Federal Court in *Keshav Talpade v. King Emperor*³ that the rule was *ultra vires* of the rule-making power of the Government of India under s. 2(2)(x), and the detention, therefore, was bad. An appeal was taken on behalf of the King Emperor. To appreciate the decision of their Lordships, it would be convenient to reproduce the relevant provisions of the said s. 2 of the Defence of India Act, 1939:—

"2. (1) The Central Government may, by notification in the Official Gazette, make such rules as appear to it to be necessary or expedient for securing the defence of British India, the public safety, the maintenance of public order or the efficient prosecution of war, or for maintaining supplies and services essential to the life of the community.

(2) Without prejudice to the generality of the powers conferred by sub-section (1) the rules may provide for, or may empower any authority to make orders providing for, all or any of the following matters, namely:—"

If the aforesaid provisions of s. 2 of the Defence of India Act, 1939, are placed in juxtaposition with the provisions of s. 3 of the Defence of India Act, 1962, it would be seen that the provisions are identical except that certain more purposes have been added in sub-s. (1) of s. 3 of the Act. The preamble of sub-s. (2) of s. 2 of the Defence of India Act, 1939, is identical with the preamble

² (1945) L.R. 72 I.A. 241, s.c. 48 Bom. L.R. 1. ³ [1943] F.C.R. 40.

of sub-s. (2) of s. 3 of the present Act. The Federal Court in *Talpada's* case in construing r. 26 which had been framed under s. 2(2)(x), observed (p. 68):—

“...The Legislature having set out in plain and unambiguous language in paragraph (x) the scope of the rules which may be made providing for apprehension and detention in custody, it is not permissible to pray in aid the more general words in s. 2(1), in order to justify a rule which so plainly goes beyond the limits of paragraph (x); though if paragraph (x) were not in the Act at all,..... We are compelled therefore to hold that rule 26 in its present form goes beyond the rule-making powers which the Legislature has thought fit to confer upon the Central Government and is for that reason invalid.”

The line of reasoning adopted by the Federal Court was not accepted by their Lordships. Dealing with the aforesaid view, their Lordships observed at page 258 of the report:

“Their Lordships are unable to agree with the learned Chief Justice of the Federal Court on his statements of the relative positions of sub-ss. 1 and 2 of s. 2 of the Defence of India Act, and Counsel for the respondents in the present appeal was unable to support that statement, or to maintain that r. 26 was invalid. In the opinion of their Lordships, the function of sub-s. 2 is merely an illustrative one; the rule-making power is conferred by sub-s. 1, and ‘the rules’ which are referred to in the opening sentence of sub-s. 2 are the rules which are authorised by, and made under, sub-s. 1; the provisions of sub-s. 2 are not restrictive of sub-s. 1, as, indeed, is expressly stated by the words ‘without prejudice to the generality of the powers conferred by sub-s. 1’.”

From the aforesaid observations of their Lordships, it is clear that their Lordships were considering the relative positions of sub-s. (1) and sub-s. (2) of s. 2 of the Defence of India Act, 1939, and the relative positions are that the rule making power is contained in sub-s. (1), and the clauses of sub-s. (2) are merely illustrative of that power. The illustrations given are not exhaustive and do not restrict the scope of sub-s. (1), but the position of the clauses is not anything more than mere illustrations of the power contained in sub-s. (1).

The next decision is *Santosh Kumar Jain v. The State*.⁴ The provisions that were construed by their Lordships of the Supreme Court in this case are the orders made under sub-s. (2) of s. 3 of the Essential Supplies (Temporary Powers) Act, 1946. Sub-section (1) of s. 3 empowered the Central Government, so far as it appears to it to be necessary or expedient for maintaining or increasing supplies of an essential commodity, or for securing their equitable distribution and availability at fair prices, by notified order, to provide for regulating or prohibiting the production, supply and distribution thereof, and trade and commerce therein. Sub-section (2) provided that “without prejudice to the generality of the powers conferred by sub-section (1) an order made thereunder may provide...”. It would be seen that sub-s. (2) of s. 3 of the Essential Supplies (Temporary Powers) Act is not in identical terms with sub-s. (2) of s. 3 of the Defence of India Act. There is a variation. The expression used in the Defence of India Act is “the rules”, while the expression used in the Essential Supplies (Temporary Powers) Act is “an order made thereunder”. Construing these provisions, Mr. Justice Patanjali Sastri, delivering the judgment of the Court, at page 310 of the report, observed:

“It is manifest that sub-section (2) of section 3 confers no further or other powers on the Central Government than what are conferred under sub-section (1), for it is ‘an order made thereunder’ that may provide for one or the other of the matters specifically enumerated in sub-section (2), which are only illustrative, as such enumeration is ‘without prejudice to the generality of the powers conferred by sub-section (1)’. Seizure of an article being thus shown to fall within the purview of sub-section (1), it must be competent for the Central Government or its delegate, the Provincial Government, to make an order for seizure under that sub-section apart from and irrespec-

tive of the anticipated contravention of any other order as contemplated in clause (j) of sub-section (2)...

The view we have expressed above receives support from the decision of the Privy Council in *Sibnath Banerjee's case*."

It would be seen that though there is a slight variation in the language used in s. 2(2) of the Defence of India Act, 1939, and s. 3(2) of the Essential Supplies (Temporary Powers) Act, 1946, the principle governing both the decisions is the same, namely the relative position of the two sub-sections. On this aspect of the case, it is also necessary to refer to the decision of the Privy Council in *Attorney-General for Canada v. Hallot & Carey Ltd.*⁵, a decision on which very strong reliance has been placed by Mr. Bhabha not only on this aspect, but from other aspects of the case with which I am concerned. It would, therefore, be convenient to deal with this case in detail at this stage and then refer to the passages on which Mr. Bhabha has placed reliance in support of his argument on different aspects of this case. Facts giving rise to this decision in brief were: This case went to the Privy Council from Canada. During the last War, the Canadian Legislature enacted "War Measures Act". On the termination of the war, and emergency, it was found that it was necessary to continue certain provisions of the Emergency Act as well as to make certain other provisions for certain other purposes. The National Emergency Transitional Powers Act, 1945 was, therefore, enacted. Section 2(1) of the Act provided:

"The Governor-in-Council may do and authorize such acts and things, and make from time to time such orders and regulations, as he may, by reason of the continued existence of the national emergency arising out of the war against Germany and Japan, deem necessary or advisable for the purposes of... maintaining, controlling and regulating supplies and services, prices, transportation, use and occupation of property, rentals, employment, salaries and wages to ensure economic stability and an orderly transition to conditions of peace."

In exercise of the aforesaid powers conferred by sub-s. (1) of s. 2, an Order-in-Council was made on April 3, 1947, which by cl. 22 provided that

"all oats and barley in commercial positions in Canada with certain specified exceptions are hereby vested in the Canadian Wheat Board."

The respondent, who held a large stock of barley, about 40,000 bushels, was affected by the order. The validity of this Order-in-Council was challenged by the respondent. One of the arguments was that Government was not empowered to expropriate wheat or barley under s. 2(1) of the Act. As against that the claim of Government was that expropriation was allowed under sub-s. (1) of s. 2 of the Act. The argument on behalf of the respondent was that expropriation was in terms allowed by a clause of sub-s. (2) of the War Measures Act. In express terms such power was not conferred by s. 2(1) on the Governor in Council by the National Emergency Transitional Powers Act. It had, therefore, been argued that the Governor had no such power. On the other hand, the argument advanced on behalf of the Government was that there was no curtailment of the Governor's powers under the National Emergency Transitional Powers Act. The powers were identical with the powers under the War Measures Act though the power exercisable under sub-s. (1) of s. 2 of the Transitional Powers Act was limited to certain other purposes only. It may be noticed that between sub-s. (1) of s. 3 of the War Measures Act and sub-s. (1) of s. 2, there was not much material difference except as to the purposes. The contentions raised on behalf of the respondent, which were based on the aforesaid difference in the two Acts—the War Measures Act and the National Emergency Transitional Powers Act—were not accepted by the Privy Council. Dealing with the relative position of sub-s. (2) and sub-s. (1) of s. 3 of the War Measures Act, their Lordships observed (pp. 448-449):

"...So to hold would threaten the very basis of the Act. Their Lordships think

that there is not by now any room for doubt as to the function performed by the list of permitted subjects in section 3 of the War Measures Act. The form adopted is plainly borrowed from section 91 of the British North America Act, 1867. They do not extend the purposes already defined, for they are directed to explaining *what can be done*, not the object for which things may be done: they do not extend any more than they limit its powers, for all that they permit is already permitted by the general words that precede them.... What they do is to state explicitly certain things that *are to be treated as falling within the range* of the general powers already conferred. In that sense alone they extend, because they amplify, those powers."

Mr. Bhabha has laid emphasis on the clauses "what can be done", "are to be treated as falling within the range", "they extend, because they amplify those powers", and it is his argument that this decision is an authority for the proposition that sub-s. (2) of s. 3 of the Act confers independent and additional power on the Central Government. In my opinion, the argument is not well founded. It is true that the clauses on which emphasis has been laid by Mr. Bhabha, if read in isolation of its context, may give an impression that sub-s. (2) confers power to make rules on the subjects mentioned in its clauses in addition to and independently of the provisions of sub-s. (1). But reading those clauses in isolation would not be a permissible way. All the connected observations have to be read as a whole and when so read, it is abundantly clear that sub-s. (2) does not confer any independent rule-making power, but only amplifies or illustrates what is contained in sub-s. (1). In these observations, their Lordships have pointed out that the function performed by the list of permitted subjects is not to extend the purpose already defined sub-s. (1). They are only directed to explaining what can be done in exercise of power under sub-s. (1). The rule making power on the subjects mentioned in sub-s. (2) has to be exercised only when it is required for securing the purposes mentioned in sub-s. (1). Their Lordships pointed out:

"They do not extend the purposes already defined, for they are directed to explaining what can be done, and not the object for which things may be done: they do not extend any more than they limit its powers."

It is in the context of this statement of law that the other observations of their Lordships have to be understood.

Mr. Bhabha also has referred us to a passage from the judgment of the Supreme Court in *Makhan Singh v. State of Punjab*.⁶ The observations on which he placed reliance are contained in para. 38 of their Lordships' judgment (p. 401):—

"...In the present cases, one has merely to read section 3(1) and the detailed provisions contained in the several clauses of section 3(2) to be satisfied that the attack against the validity of the said section on the ground of excessive delegation is patently unsustainable. Not only is the legislative policy broadly indicated in the preamble to the Act, but the relevant provisions of the impugned section itself give such detailed and specific guidance to the rule-making authority that it would be idle to contend that the Act has delegated essentially legislative function to the rule-making authority."

Now these observations have been made in repelling the contention that s. 3 of the Act, with which I am here concerned, suffered from the vice of excessive delegation of legislative powers. These observations, in my opinion, do not assist the contention of Mr. Bhabha that an additional or independent rule making power has been conferred by sub-s. (2) of s. 3 of the Act. These are all the authorities to which counsel for the parties have drawn our attention. In my opinion, therefore, no additional or independent rule making authority or power has been conferred on the Central Government in any of the clauses of sub-s. (2) of s. 3 of the Act. It, therefore, follows that the limitation imposed in sub-s. (1) of s. 3 would equally be applicable to and govern the rule making power of the Central Government relating to the subjects mentioned in cls. 1 to 57 of sub-s. (2) of s. 3 of the Act. In other words, the power

of the Central Government to make rules on any of those subjects is exercisable only for securing the purposes authorised by sub-s. (1) of s. 3, in the event the Central Government forms an opinion that it was necessary or expedient for it to do so. A challenge to the validity of the rules made under any of the clauses of sub-s. (2) or under sub-s. (1) on either or both these grounds would, in my opinion, therefore, be a justiciable issue.

I would, however, assume that sub-s. (2) confers an independent and additional rule making power on the Central Government and proceed to examine whether the Gold Control Rules fall either under cl. (23) or (33) of sub-s. (2) of s. 3 of the Act. I have already reproduced these clauses. The argument of Mr. Bhabha relating to cl. (23) is that this clause authorises the Central Government to control trade or industry in respect of the articles or things of any description. The expression "articles or things of any description" is wide enough to include gold; Gold Control Rules have been made for the control of trade in gold; these rules, therefore, fairly fall under cl. (23) of sub-s. (2) of s. 3 of the Act. It is indeed true that cl. (23) permits the Central Government to make rules to control trade or industry in respect of articles or things of any description but on that power, the clause itself has placed certain limitations. The limitation is that the rules could be made only for the purposes of regulating or increasing the supply of such articles which may be used in connection with the conduct of military operations or civil defence or for maintaining the supplies or services essential to the life of the community. The rule making power conferred under this clause is to enable the Government to obtain an adequate supply of articles required for securing the aforesaid purposes. I have already stated that the effect of the rule is that for all practical purposes dealings in gold of a purity in excess of 14 carats have been brought to a stand still. New ornaments of gold of purity in excess of 14 carats is prohibited save and except converting old ornaments into new ones. In the circumstances, I fail to see how these rules could be said to be made for the purposes of "regulating or increasing supply of gold." In fact, it is the case of the respondents in their return that the object of the rules is to stop smuggling of gold. If that be so, I again fail to see how it could be said that gold is an article which is required in connection with the conduct of military operations or civil defence or for maintaining supplies and services essential to the life of the community. I may also further state that in the return, it is nowhere stated that the rules made either fall under cl. (23) of sub-s. (2) of s. 3 of the Act, or that the rules have been framed in exercise of the powers conferred by the said clause. In my opinion, therefore, the rules do not fall under the said cl. (23).

Turning to cl. (33), which confers power on the Central Government to make rules for controlling the possession, use or disposal of, or dealing in, certain articles including bullion, it is the contention of Mr. Bhabha that the word "bullion" is wide enough to cover gold ornaments and articles of gold, which is the subject-matter of Gold Control Rules. On the other hand, Mr. Mehta contends that the word "bullion" is not wide enough to include ornaments or articles of gold. The word only means mass of gold. The first question, therefore, that arises is what meaning is attributable to the word "bullion". Counsel for both the sides have referred us to the ordinary meaning of the expression "bullion" as contained in various dictionaries. Mr. Bhabha referred us to the meaning of "bullion" as given by Jowitt in the Dictionary of English Law, Webster's Dictionary, and in the new Encyclopaedia Britannica, Vol. 4. Mr. Mehta, on the other hand, referred us to the meaning of the expression in Murray's Dictionary. Jowitt defines "bullion" as

"uncoined gold and silver in the mass. These metals are called so, either when smelted from the native ore and not perfectly refined, or when they are perfectly refined, but melted down into bars or ingots, or into any unwrought body, of any degree of fineness."

Webster defines bullion as

"gold or silver considered merely as so much metal without regard to any value imparted to it by its form... uncoined gold or silver in the shape of bars, ingots, or comparable masses; an ornamental metal boss used on harness, jewellery, or other objects."

In the Encyclopaedia, the meaning given is:

"the name given to gold and silver considered solely as merchandise. When coin and specie are treated as bullion it is their weight and fineness which are reckoned, not their face value. Bullion thus means the gold and silver of the mines brought to a standard of purity."

Murray gives the meaning as

"Precious metal in the mass. Gold or silver in the lump, as distinguished from coin or manufactured articles; also applied to coined or manufactured gold or silver when considered simply with reference to its value as raw material."

It would be seen that in these books, "bullion" has been described as mass of gold, not converted into any articles or ornaments. It would be clear that the rules which regulate the preparation of ornaments and also regulate the borrowing of money on the hypothecation of gold or gold ornaments, can hardly be said to be falling under cl. (33) of sub-s. (2) of s. 3 of the Act. It is, however, the argument of Mr. Bhabha that cl. (33) empowers the Central Government to make rules controlling possession, use or disposal or dealing in bullion. It would necessarily follow that the Central Government would also have implied powers to make rules in order to enable it to exercise power which is conferred on it. According to Mr. Bhabha, rules relating to controlling possession, use or disposal or dealing in ornaments as well as dealings in ornaments and gold by hypothecation would fall within the exercise of this implied power. Now, the principle of implied power is well-settled and the principle is that they are such powers without the exercise of which the power expressly conferred cannot be exercised. The power expressly conferred is of "controlling the possession, use or disposal of or dealing in... bullion." It has to be shown that for the exercise of this power it was absolutely essential or necessary to control the possession, use or disposal of or dealing in ornaments. We do not find anything stated in the affidavit of the respondents showing how the exercise of the claimed implied power was necessary for the exercise of the power expressly granted under cl. (33) of sub-s. (2) of s. 3 of the Act. In absence of any material placed before us, it is difficult to accept this contention of Mr. Bhabha. In *Bidi Leaves etc. Assoc. v. The State*,⁷ their Lordships of the Supreme Court after considering certain authorities, and after citing the observations of Pollock relating to the doctrine of implied power, observed (p. 384):—

"...In other words, the doctrine of implied power can be legitimately invoked when it is found that a duty has been imposed or a power conferred on an authority by a statute and it is further found that the duty cannot be discharged or the power cannot be exercised at all unless some auxiliary or incidental power is assumed to exist. In such a case, in the absence of an implied power the statute itself would become impossible of compliance. The impossibility in question must be of a general nature so that the performance of duty or the exercise of power is rendered impossible in all cases. It really means that the statutory provision would become a dead letter and cannot be enforced unless subsidiary power is implied."

It has not been made out either in the affidavit filed by the respondents or in the course of the arguments that such a position exists, nor has it been shown that it was impossible for the Central Government to exercise the power under the said cl. (33) of sub-s. (2) of s. 3 without making rules relating to preparation of ornaments or hypothecation of ornaments. I, therefore, find it difficult to accept this aspect of the argument of Mr. Bhabha. Mr. Bhabha has also referred us to the definitions of "bullion" and "gold" given in the

different Acts, viz., the Foreign Exchange Regulation Act, the Reserve Bank of India Act, Public Debts Act. I do not consider it necessary to deal in detail with these definitions as, in my opinion, these definitions can hardly be of any useful assistance in construing the meaning of the word "bullion" in cl. (33). I may also state that in the notification bringing in force the Gold Control Rules, it has not been mentioned that the rules have been made in exercise of the power conferred on the Central Government under s. 3(2)(33). On the other hand, it has been stated that the rules have been framed in exercise of the powers under s. 3. It is true that the omission to mention that the rules have been made under s. 3(2)(33) would not be fatal to the argument advanced by Mr. Bhabha, if it could have been shown that the rules made were referable to the said clause. I have already stated that, in my opinion, the rules framed do not squarely fall under the said cl. (33).

This brings me to the consideration of the question whether the rules framed fall within sub-s. (1) of s. 3 of the Act. It is, therefore, necessary to see whether the rules have been made for securing any one or more of the authorised purposes mentioned in sub-s. (1), and it has also to be ascertained whether opinion has been formed by the Government that it was necessary or expedient for securing the authorised purposes. As regards the first aspect, there has been considerable arguments at the bar. On the question as to what should be the nature of the connection between the object sought to be achieved by the rules and the purposes mentioned in sub-s. (1) of s. 3 of the Act, the contention of Mr. Mehta had been that the connection must be real and proximate and not hypothetical and remote. On the other hand, the contention of Mr. Bhabha had been that if it is shown that the objects sought to be achieved by the rules are capable of being related to the purposes mentioned in sub-s. (1) of s. 3, that is sufficient for the purposes of sustaining the rules. A number of authorities have been cited by counsel on both the sides. It has been the argument of Mr. Mehta that the connection between the objects sought to be achieved by these rules and the purposes is too remote. Rules have been made with the object of changing the habits of the people of India of making gold ornaments or hoarding gold. It is expected that if these habits are changed, then the demand for gold would be reduced. If the demand for gold is reduced, prices of gold would fall, and if prices of gold fall, smuggling will be reduced. If smuggling is reduced, more foreign exchange would be available to the Central Government. According to Mr. Mehta, the connection between the object of the rules and the securing of the purposes is very remote and problematic. It has also been the argument of Mr. Mehta that by these rules smuggling will never stop; people will never cease to buy or prepare gold ornaments. Counsel for parties have cited considerable number of authorities in support of their respective contentions, and it would be convenient at this stage, in my view, to refer to these authorities.

Mr. Mehta has referred me to the decisions reported in *Rex v. Basudeva*,⁸ *The Superintendent, Central Prison, Fatehgarh v. Ram Manohar Lohia*,⁹ *Azim Khan v. Emperor*,¹⁰ *Lahore E. S. Co. v. Punjab Province*,¹¹ *Chester v. Bateson*,¹² and *Attorney-General v. De Keyser's Royal Hotel*.¹³

Mr. Bhabha has referred me to certain observations in the decision in *Attorney General for Canada v. Hallet & Carey Ltd.*, and *Ross-Chunis v. Papadopoulos*.¹⁴

Rex v. Basudeva: Respondent, Basudeva, was a dealer in kerosene oil, which was an essential commodity as defined in the U.P. Prevention of Black-Marketing (Temporary Powers) Act. On the allegation that the Provincial Government was satisfied that the respondent habitually indulged in black marketing, he was arrested and ordered to be detained in exercise of the power.

8 [1950] A.I.R. F.C. 67.

9 [1960] 2 S.C.R. 821.

10 [1945] A.I.R. Lah. 154.

11 [1943] A.I.R. Lah. 41, F.B.

12 [1920] 1 K.B. 829.

13 [1920] A.O. 508.

14 [1958] 1 W.L.R. 546.

conferred by s. 3(1)(i) of the Act. The contention raised on behalf of Basudeva was that his detention was unlawful as the provisions were void and inoperative as being *ultra vires* of the Provincial Legislature. The claim made on behalf of the Provincial Government was that the Legislature was competent to enact an Act in exercise of its legislative power conferred on it by Entry I, List II, Schedule VII of the Government of India Act, 1935, read together with s. 100 of the Act. The entry read: "Preventive detention for reasons connected with the maintenance of public order". The question that arose before their Lordships was whether the preventive detention provided in s. 3(1)(i) was the preventive detention for reasons connected with maintenance of public order. In other words, the question was whether the preventive detention on the ground of habitual indulgence in black-marketing was a preventive detention connected with the maintenance of public order. The contention raised on behalf of the Government had not been accepted by the Courts below. The matter was, therefore, taken to the Federal Court at the instance of the Government. The Advocate General appearing for the Government contended before the Federal Court that habitual black marketing in essential commodity was bound sooner or later to cause dislocation of the machinery of control and distribution, which in turn might lead to breach of peace, and that, therefore, detention with a view to prevent such black marketing was covered by the entry. This argument was repelled by their Lordships. Mr. Justice Patanjali Sastri, as he then was, delivering the judgment of the Court, observed (p. 68):

"...It is true that black-marketing in essential commodities may at times lead to a disturbance of public order, but so may, for example, the rash driving of an automobile or the sale of adulterated food stuffs. Activities such as these are so remote in the chain of relation to the maintenance of public order that preventive detention on account of them cannot, in our opinion, fall within the purview of Entry 1 of List II... The connection contemplated must, in our view, be real and proximate, not far-fetched or problematical."

The Superintendent, Central Prison, Fatehgarh v. Ram Manohar Lohia: The decision in *Basudeva's* case has been approved by their Lordships of the Supreme Court in *Lohia's* case. The question that arose there related to the validity of s. 3 of the U.P. Special Powers Act, 1932. That section provided:

"Whoever, by word, either spoken or written, or by signs or by visible representations, or otherwise, instigates, expressly or by implication, any person or class of persons not to pay or to defer payment of any liability, and whoever does any act, with intent or knowing it to be likely that any words, signs or visible representations containing such instigation shall thereby be communicated directly or indirectly to any person or class of persons, in any manner whatsoever, shall be punishable with imprisonment which may extend to six months, or with fine, extending to Rs. 250, or with both."

R. M. Lohia was prosecuted under this section for delivering certain speeches instigating cultivators not to pay enhanced irrigation rates to the Government. He applied to the High Court for a writ of *habeas corpus*, *inter alia*, on the ground that the said section was inconsistent with art. 19(1)(a) of the Constitution, which conferred on the citizen a fundamental right of freedom of speech. The claim made on behalf of the State was that the restriction imposed fell within the permissible limits stated in cl. (2) of art. 19 of the Constitution. Clause (2) of art. 19 empowered the Legislature to impose reasonable restrictions on the exercise of the fundamental right of freedom of speech in the interest of security of the State, friendly relations with foreign States, public order, decency, morality, or in relation to contempt of Court, defamation or incitement to an offence. The claim made on behalf of the State was that the restrictions imposed were in the interest of public order. The contention was negatived by the High Court and the matter went to the Supreme Court at the instance of the State Government. Their Lordships dismissed the appeal of the State, and it was held that in order to sustain the

Act claiming to impose restrictions, under cl. (2) of art. 19, it is necessary to establish that the connection between the Act and the public order sought to be maintained by the Act, is intimate. Their Lordships apart from the aforesaid conclusion further considered another limitation contained in the clause itself, viz. that the restriction must be reasonable. At page 835 of the report, their Lordships observed:

"...The restriction made 'in the interests of public order' must also have reasonable relation to the object to be achieved, i.e., the public order. If the restriction has no proximate relationship to the achievement of public order, it cannot be said that the restriction is a reasonable restriction within the meaning of the said clause."

Their Lordships also cited with approval the aforesaid decision in *Basudeva's* case, and observed that the decision contained some observations which gave considerable assistance in construction of the words.

The decision in *Azim Khan v. Emperor* does not relate to the consideration of the question of validity of the legislation in relation to its legislative powers, but, on the other hand, only deals with the question as to whether a particular act fell within the provisions of the Act. In other words, the question considered was whether the particular conduct on the part of the person constituted an offence within the meaning of the Act. It is, therefore, not necessary to consider this case.

Similar also is the case in *Lahore E. S. Co. v. Punjab Province*, which relates to the validity of an administrative act done in exercise of the power conferred on the Government under the statute.

The question that arose in *Chester v. Bateson*, related to the validity of Regulation No. 2A(2) of the Defence of the Realm Regulations. That regulation provided that

"No person shall, without the consent of the Minister of Munitions take... any proceedings for the purpose of obtaining an order or decree for the recovery of possession of, or for the ejectment of a tenant of, any dwelling-house in which a munition worker is living, and which is situate in an area declared by order of the Minister of Munitions to be a 'special area'."

The said regulation was framed in exercise of the power conferred on the Government by sub-s. (1) of s. 1 of the Defence of the Realm Consolidation Act, 1914, and on behalf of the executive Government it was claimed that the regulation was valid because it had been framed for securing public safety and defence of the Realm, and sub-s. (1) of s. 1 of the Defence of the Realm Consolidation Act, 1914, empowered His Majesty in Council to issue regulations for securing this purpose. It was held that the regulation was *ultra vires* of the regulation making power conferred on His Majesty in Council by sub-s. (1) of s. 1 of the Act. The question posed by Darling J. has been expressed in following terms (p. 833):

"...and I ask myself whether it is a necessary, or even reasonable, way to aid in securing the public safety and the defence of the realm to give power to a Minister to forbid any person to institute any proceedings to recover possession of a house so long as a war worker is living in it."

And it was held that it cannot be said to be a reasonable way of aiding in securing the public safety and the defence of the realm. Similar view also has been taken by the other Judges.

The question considered in *Attorney-General v. De Keyser's Royal Hotel* related to the validity of the regulation 2 of the Defence of the Realm Regulations, issued under the Defence of the Realm Consolidation Act, 1914. Certain piece of land was sought to be acquired without paying any compensation in the manner provided by an earlier Act. The question arose related to the validity of the power claimed under the regulation. As already stated, the regulation was issued in exercise of the power conferred on His Majesty in Council under the Defence of the Realm Consolidation Act, which enabled His Majesty in Council to make regulations *inter alia* for the safety of the realm.

It was held that the claim made for acquisition of property without payment of compensation under the regulation was invalid inasmuch as though taking of the property may be necessary for the defence of the realm, non-payment of compensation was not. These are all the cases which have been referred to by Mr. Mehta.

Turning to the decisions on which reliance has been placed by Mr. Bhabha, I have already referred to the facts in the *Attorney-General v. Hallet & Carey Ltd.* The observations on which reliance has been placed by Mr. Bhabha are at page 450. They are:

"...That does not allow him (Governor in Council) to do whatever he may feel inclined, for what he does must be capable of being related to one of the prescribed purposes, and the court is entitled to read the Act in this way."

I may as well reproduce the sentence immediately following the observations on which Mr. Bhabha has placed reliance:

"But then, expropriation is altogether capable of being so related."

These observations were made in considering the arguments advanced on the basis of the general principle that the statutes which encroached upon the right of the subject, whether as regards person or property, are subject to the strict construction. Their Lordships explained that the general principle means no more than that where the import of some enactment is inclusive or ambiguous, the Court may properly lean in favour of the interpretation that leaves private rights undisturbed. But this principle would have no application when a statute in express terms permits interference with those rights. It appears that an argument was advanced that Parliament had chosen to say explicitly that the Governor-in-Council shall do "whatever things he may deem necessary or advisable". The expropriation, therefore, was within the powers of the Governor. The claim so broadly made was not accepted by their Lordships, and it was pointed out that that does not mean that the statute allowed the Governor-in-Council to do whatever he may be inclined, but, on the other hand, what he does must be capable of being related to one of the prescribed purposes. Their Lordships then examined the provisions relating to expropriation and came to the conclusion that expropriation was altogether capable of being related to the prescribed purposes. It would thus be seen that even on this authority, on which reliance has been placed by Mr. Bhabha, it is open to the Court to see whether there is a connection between the impugned rules and the prescribed purposes for securing which the rule making power has been conferred on the Central Government. The argument of Mr. Bhabha, however, is that the nature of connection which need be established is not "proximate" or "real" one, but it is sufficient to show that the rules made are "capable of being related" in some manner with the prescribed purposes.

The other decision, on which reliance has been placed, *Ross-Clunis v. Papadopoulos*, related to the validity of Regulation No. 3 made under sub-s. (1) of s. 3 of the Emergency Powers Order in Council, 1939, which empowered the Governor to make regulations as appeared to him to be necessary or expedient for securing public safety, maintenance of public order, etc. Regulation No. 3 empowered the Commissioner with the approval of the Governor to order that a fine be levied collectively on the assessable inhabitants of the area in circumstances mentioned in the said regulation No. 3. The circumstances mentioned were:

"where the Commissioner has reason to believe that all or any of the inhabitants of the certain area have... failed to take reasonable steps to prevent the commission of the offence; or to render all the assistance in their power to discover the offender or offenders."

Offence had been defined in the Regulation as

"an offence, commission of which were prejudicial to the internal security of the colony or maintenance of public order in the colony".

The Commissioner with the previous approval of the Governor had imposed a collective fine on the inhabitants in certain area on being satisfied that in his opinion offences were committed by the inhabitants of a particular area commission of which was prejudicial to the internal security of the colony. The question arose about the validity of this order. It may be noticed that the power conferred to make those orders was for securing the public safety or maintenance of the public order. Their Lordships held the regulation authorising imposing of collective fine to be a valid regulation. Their Lordships after quoting the observations in *Attorney General for Canada v. Hallet & Carey Ltd.* (which we have also reproduced) have held:

"In Their Lordships' opinion, Regulation 3 is clearly related to the purposes prescribed in s. 6(1) of the Order-in-Council. There can be no doubt as to the purpose of imposing a collective fine in a case where crimes have been committed in a particular area, and some or all of the inhabitants of the area have failed to take reasonable steps to prevent the commission of the offence."

It would again be seen that here also the Privy Council has considered whether the regulation made by the Commissioner in exercise of the power conferred by s. 6 was related to the purposes prescribed in s. 6, and they came to the conclusion that the regulation clearly related to the purposes mentioned in s. 6.

Considering all these authorities together, one thing is clear that when validity of an act, rule, regulation or order made by an executive authority, to which the power has been delegated by the legislation, is challenged, then, it is open to the Court to see whether the act done by the delegated authority has any connection with securing or realization of the purposes for which the power has been conferred on the delegated authority. The question next arises is as to what is the degree or nature of connection that is required to be established in the instant case. *Basudeva's* case has expressed the connection to be "real and proximate and not far-fetched or problematical". The Supreme Court in *Lohia's* case has recorded its approval of the view taken in *Basudeva's* case. The test is laid down at page 836 of the report:

"...The decision (in *Basudeva's* case), in our view, lays down the correct test. The limitation imposed in the interests of public order to be a reasonable restriction, should be one which has a proximate connection or nexus with public order, but not one far-fetched, hypothetical or problematical or too remote in the chain of its relation with the public order."

Their Lordships of the Privy Council in the two appeals—one from Canada and the other from Cyprus—have, in the context of the provisions it was considering, characterised the connection as "capable of being related to the authorised purposes".

The question to be considered is which of these two tests would be the appropriate one. And that, in its turn, raises a question whether there is any difference in principle in the tests laid down by the Federal Court and the Supreme Court on the one hand and the Privy Council on the other. The other question that arises is whether the tests laid down in these different decisions are tests of general application. In my opinion, there is some difference in one of the positive tests laid down by the Federal Court and approved by the Supreme Court on one hand, and that by the Privy Council on the other. For a thing to be capable of being related to another, the relation need not necessarily be proximate. A reasonable nexus or connection between the two would be sufficient to show that one is capable of being related to another. That which serves to promote a particular purpose can be said to be capable of being related to that purpose; and that is the test laid down by the Privy Council. Mr. Mehta, however, contends that there may be some difference in the tests laid down by the Supreme Court and the Federal Court on one hand and the Privy Council on the other, but the test which ought to govern the decision of this case is the test laid down by the Federal Court and the Supreme

Court. That would indeed have been the position had I come to the conclusion that the tests laid down in those cases were of general application. But I find it difficult to take such a view. In my view, the tests laid down are in the context of the contents of the relevant legislative power which their Lordships were considering in each case. The legislative power in the context of which the Federal Court has laid down the test is one contained in Entry No. I, of List II of Schedule VII, read with s. 100 of the Government of India Act, 1935, and that entry among other things related to "preventive detention for reasons connected with maintenance of public order". Their Lordships were considering the connection that is required to be established between the preventive detention and the maintenance of public order. It would be noticed that there was no latitude in the matter left to the Legislature, and it is in this context that the test has been laid down. Similarly, the test laid down by the Supreme Court in *Lohia's* case was in the context of the legislative power conferred by cl. (2) of art. 19 to restrict exercise of certain fundamental rights conferred on the citizen under that article. The clause considered by their Lordships was "reasonable restriction on the exercise of right in the interest of... public order", and it is in this context that the test has been laid down. It would be seen that there is also no latitude left to the Legislature for exercise of this power. In the context of the legislative power it is not sufficient to show that legislative authority has thought it necessary to impose those restrictions in the interest of public order, but it has to be established that it is necessary to impose those restrictions in the interest of public order. The test laid down by the Privy Council is in the context of the legislative power contained in sub-s. (1) of s. 2 of the National Emergency Transitional Powers Act, 1945. The power conferred is in following terms:

"The Governor in Council may do and authorise such acts and things, and make from time to time such orders and regulations, as he may by reason of the continued existence of the national emergency arising out of the war with Germany and Japan, deem necessary or advisable for the purpose of..."

It is in the context of exercise of this power that the test has been laid down by the Privy Council in both these cases. It would be seen that the ambit of the power conferred is wider leaving considerable latitude to the Governor-in-Council. The context in which we have to consider the scope and ambit of the legislative power in this case is contained in s. 3(1) of the Act. The power is similar to the one contained in sub-s. (1) of s. 2 of the aforesaid National Emergency Transitional Powers Act. It in express terms authorises the Central Government to make such rules as appear to it necessary or expedient for securing the aforesaid six authorised purposes. That being the position, in my opinion, the aforesaid test laid down by the Privy Council would be the apposite test, and not the test laid down by the Federal Court and the Supreme Court. The other positive test which has been laid down by the Federal Court and approved by the Supreme Court is that the connection must be real. There is hardly any difference in respect of this aspect of the test. A connection which is not a real connection can hardly be said to be one which is capable of being related. Similar also would be the position in relation to the negative test, which has been laid down by the Federal Court and the Supreme Court. A connection which is far-fetched, problematical or hypothetical or too remote also can hardly be said to be one capable of being related. Thus, the connection that is required to be established between the rules framed and the purposes prescribed under s. 3(1) of the Defence of India Act, must be one which is real and not far-fetched, problematical, hypothetical or too remote. It need not necessarily be proximate. In my opinion, therefore, Rules which would, if observed, serve to promote one or more of the purposes mentioned in sub-s. (1) of s. 3 of the Act would be within the rule making power conferred on the Central Government thereunder.

The question which next arises is whether any such connection has been

established between the object sought to be achieved by the rules framed and the purposes authorised in sub-s. (1) of s. 3 of the Act. I have already stated that it has been the respondents' case in the return that the rules were framed with a view to put restrictions on smuggling and on the use of gold already smuggled into India. According to the respondents, smuggling of gold was causing a drain on the foreign exchange, and preventing smuggling would result in increasing the foreign exchange reserves of the Central Government, which was very necessary for the purposes of defence of India as well as maintenance of supplies and civil services essential to the life of the community. According to the respondents, the rules serve the purpose of conservation of foreign exchange. It is the argument of Mr. Mehta that the rules *ex facie* nowhere say that they have been framed to secure the aforesaid purposes. There is no preamble to the rules stating that it has appeared to the Central Government necessary or expedient to frame these rules for the aforesaid purposes. According to Mr. Mehta, the case now put forward is not the correct position, and the real purpose for which these rules have been framed is to effect a socio-economic reform. The rules have been framed for the purpose of curing the alleged habits of the people of India of using gold ornaments and hoarding gold. Mr. Mehta in support of his contention has invited my attention to the speeches of the then Finance Minister in the Lok Sabha made on March 6, 1963, when the Gold Control Rules were being discussed in the Parliament. He also invited our attention to the statement made by the Finance Minister in Parliament on September 21, 1963, on Gold Control. He also invited our attention to the speech made by Mr. Bhagat, Minister for Planning, in the Parliament on June 4, 1964, at the time of introduction of the Gold Control Bill, and the statement of objects and reasons. He also invited our attention to cl. (2) of Rule 126-J. Mr. Bhabha, on the other hand, referred us to Finance Minister's broadcast made on the eve of promulgating these rules on January 9, 1963. A copy of the broadcast has been annexed to the return as exh. 4 filed by the respondents in Special Civil Application No. 830 of 1963, in which also challenge to the Gold Control Rules has been raised. In the return filed in this case, in para. 14, the respondents have placed reliance on this broadcast in support of their case. Mr. Bhabha argued that the only relevant material to which I can refer is the aforesaid broadcast and the other pieces of evidence or the documents to which Mr. Mehta referred are not relevant and, therefore, inadmissible.

It is indeed true that there is no preamble to these rules indicating that the Central Government has framed these rules because it was of the opinion that it was necessary or expedient to frame them for securing the aforesaid purposes. It is also true that reading the rules by themselves, it does not become clear that the rules are directed for the purposes of arresting or restricting smuggling of gold. It would, therefore, be necessary to refer to certain other material in order to appreciate the case put forward by the respondents. I would state the case put forward by the respondents in brief: The import of gold into India has been stopped from the year 1939. There is very little production of gold in India. Gold available in the internal markets in India is gold which has been brought from countries other than India. People of India have the habit of preparing ornaments and articles of gold as well as of hoarding gold. The prices of gold in India are, therefore, necessarily very high and lucrative as compared with prices of gold in other countries, and that is an incentive and inducement to people to smuggle gold. If gold is to be made available to people in sufficient quantity at prices prevailing in other countries to meet the demands, the Central Government would have to expend about 50 to 60 crores of rupees per year. That would result in expending foreign exchange to that extent for the purchase of gold. The various legislations made have not been sufficiently effective to check smuggling of gold. Smuggling of gold is adversely affecting to a great extent India's foreign exchange reserves. For arresting these mischiefs, it was necessary to control the internal market and business in gold for the purpose of conservation of foreign exchange which was very essential in the times

of emergency, for the defence of India as well for maintenance of essential commodities and services, and it is for this reason and to achieve these objects that the Gold Control Rules have been promulgated. In other words, the said rules which, *inter alia*, drastically restrict dealings in gold have been framed to arrest the root cause that has made gold smuggling such a lucrative business and thereby conserve foreign exchange which is so essential for the defence of India. It has been well settled that the circumstances in which an enactment has been passed is a revelant circumstance from which assistance could be sought by Court. At page 119 (Fifth ed.) Craies on Statute Law, four circumstances, from which a Court can legitimately seek assistance, have been stated:

- (1) What was the Common Law before the making of the Act?
- (2) What was the mischief and defect for which the Common Law did not provide?
- (3) What remedy the Parliament hath resolved and appointed to cure the disease of the Common Law; and
- (4) The true reason of the remedy."

It is clear that it is permissible for the Court to ascertain the conditions prevailing which caused the mischief to cure which the enactment was directed. The conditions prevailing relating to smuggling of gold have been noticed by their Lordships of the Supreme Court in considering the vires of s. 178-A of the Sea Customs Act. Their Lordships referred to the factual position prevailing at the time of the amendment of that section, and for that purpose, reproduced the following passage from the Taxation Enquiry Commission's Report 1953-54, which pointed out the factual position relating to existence of wide-spread smuggling in certain commodities including gold. The position has been so stated (*Collector of Customs v. Sampathu Chetty*)¹⁵:—

"Smuggling now constitutes not only a loophole for escaping duties but also a threat to the effective fulfilment of the objectives of foreign trade control. The existence of foreign pockets in the country accentuates the danger. The extent of the leakage of revenue that takes place through this process cannot be estimated even roughly, but, we understand, it is not unlikely that it is substantial. Apart from its deleterious effect on legitimate trade, it also entails the outlay of an appreciable amount of public funds on patrol vessels along the sea coast and permanent works along the land border, and watch and ward staff on a generous scale. It is, therefore, necessary, in our opinion, that stringent measures, both legal and administrative, should be adopted with a view to minimising the scope of this evil."

After reproducing the aforesaid passage, their Lordships concurring with the opinion expressed by the Enquiry Commission, observed: "The deleterious effects of smuggling as pointed out in the extract from the Report, are real..." The position prevailing has also been similarly described in detail by Mr. Justice K. T. Desai in *M. G. Abrol v. Amichand*.¹⁶ Now, gold is such a commodity that it is easy to smuggle and pass it on in the internal market in the country. The original identity of the smuggled gold can easily be effaced; when it comes into the internal market, it passes on as genuine gold; it is not possible for bona fide honest customers to ascertain or find out that it is smuggled gold. This facility and the high prices prevailing in India is a great inducement to people to smuggle gold into India. It can hardly be disputed that the problem is a vast and real one. As pointed out by the Supreme Court, it has a deleterious effect on the national economy, adversely affecting India's position relating to foreign exchange. It is not in dispute that these circumstances were prevailing at the time of declaration of emergency. The question is, is it to remedy this mischief that these rules have been framed?

And this brings me to the admissibility of the different pieces of material on which reliance has been placed by counsel. A Division Bench of this Court in *Pukhraj v. D. R. Kohli*,¹⁷ has held that

"speech made in Parliament by the sponsor of a Bill may be referred to by the

15 [1962] A.I.R. S.C. 316, at p. 333.

17 (1959) 61 Bom. L.R. 1230.

16 (1960) 62 Bom. L.R. 1043.

Court for the limited purpose of ascertaining the conditions prevailing at the time which actuated the sponsor of the Bill to introduce it and the extent and urgency of the evil which he sought to remedy."

The speech of the Minister of Industry was also referred to by Mr. Justice Fazl Ali in *Chiranjitlal Chowdhuri v. The Union of India*.¹⁸ From the observations of Bhagwati J. at page 1237 in *A. Thangal Kunju Musaliar v. M. Venkatachalam Potti*,¹⁹ it is clear that such a course is permissible for the limited purpose of ascertaining the condition prevailing at the time which necessitated the making of the law. I am here concerned with the rules promulgated by the Central Government. Necessarily, therefore, there is no speech by the sponsor in the Parliament at the time of introduction as such, but the broadcast of the Finance Minister on the eve of the promulgation of these rules can as well be equated with the speech of the sponsor at the introduction of the Bill, explaining the position prevailing which necessitated the Bill. Similar would also be the case of the speech made by the Finance Minister on March 6, 1963. Section 41 of the Defence of India Act requires rules made by the Central Government under the Act to be laid on the table of the Parliament. These rules have been so laid before the Parliament on February 20 1963, and were discussed in Parliament on March 5 and 6, 1963. The Finance Minister made a speech in the debate on March 6, 1963, giving his reasons for this measure. This speech, in my opinion, would also have relevance to the explaining of the prevailing situation and the reasons that actuated the promulgation of these rules. As regards the other materials, to which our attention was drawn by Mr. Mehta, the material is not relevant and it would not be permissible to refer to it. The statement made by the Finance Minister on September 21, 1963, is not for the purpose of giving reasons for framing rules, but is a statement on the working of the scheme of gold control. That hardly, in my opinion, has any relevance for the purpose of understanding the situation at the time of the bringing these rules into force. Similar also is the position of the objects and reasons of the Gold Control Bill and the speech of Mr. Bhagat. In my opinion, the only material on which reliance could be placed is the broadcast of the Finance Minister made on January 9, 1963, and the speech of March 6, 1963. The very opening sentence in the broadcast indicates that the reason for promulgation of these rules is to arrest smuggling which is costing large sums for foreign exchange to India which are so urgently needed for the defence and development of India. This is what the Finance Minister stated in the opening paragraph:

"Early in November, I spoke to you at some length on the subject of gold. On that occasion I tried to explain how the habit of buying gold in our country has led to extensive smuggling of gold from abroad in recent years. This smuggling has cost us large sums in foreign exchange which we need so urgently for our defence and development.

It was in this context that I announced that the Government proposed to take measures in the near future to reduce smuggling and to bring about a progressive reduction in the demand for gold. These measures have now been finalised and will be brought into force tomorrow in the form of Gold Control Rules under the Defence of India Act; and it is about these measures that I wish to speak to you tonight."

The Finance Minister has then in his broadcast explained the position which had brought into existence this evil, and had shown how it has affected the economy of India and having deleterious effect on the economy of India. He also appealed that people should give up their attachment to gold. In his appeal he says:

"It is my earnest hope that every teacher in the country, every social worker and leader of public opinion would make it his or her business to explain to the young and the old, the rich and the poor what the attachment to gold and gold ornaments means in terms of the strain it puts on the resources we need for defence and development.

Let all young boys and girls growing up in the country be made to realise that they can help build a safe and prosperous India by insisting that no gold be bought at the time of their marriages."

In his broadcast, the Finance Minister has also brought to the notice of the nation the magnitude on the drain of the country's resources which smuggling has caused. The broadcast hardly leaves any doubt that the rules have been brought into force with a view to arrest smuggling, and thereby saving foreign exchange which was so essential for the purposes of defence as well as development. In his speech made on March 6, 1963, for the purpose of expressing his views and the reasons for bringing into force these Gold Control Rules, the Finance Minister has again pointed out why he has brought into force these rules. This is what he says:

"Let us examine why this has been done. That is a question which has been asked of me. It is primarily brought in to remove smuggling of gold which is hitting this country economically in a very bad way and for several years past, and it is growing. As prosperity grows, the lure for gold increases, and more and more gold goes and it is being smuggled and more and more foreign exchange is getting lost."

The Finance Minister then has in his speech explained the problems in detail, and has observed:

"Therefore this measure has been brought to remove this foreign exchange drain and that can be done only if the lure of gold disappears. If the lure of gold remains, it can go on happening."

Reading the broadcast and the speech as a whole, I have little doubt that the primary reason why these rules which control the internal market have been framed is for the purpose of arresting smuggling which has been costing a heavy drain on the foreign exchange, which at this particular time of emergency was required for the purpose of defence of India. Laying emphasis on certain paragraphs of the speech, Mr. Mehta argued that that is not the real reason, but the real reason is to bring about a social reform. He referred to the following passage from the speech at column 2636:

"We are at a very critical stage in our country when we have to defend our freedom, when we have to defend our integrity. I do not say that if I get all the gold, I will defend my country better than without that. Even if I do not get any gold, I will certainly defend my country and with success. That is not the stake at issue. What is at issue is to prevent the drain on the economic life of this country through the drain of foreign exchange and the senseless sinking of all surpluses and saving into gold which remains locked up in their houses."

Laying emphasis on this part of the speech, Mr. Mehta argues that the Finance Minister has clearly admitted that he does not require gold for defence. It is purely an economical measure. In my opinion, reading this passage in isolation would not be a permissible procedure for understanding what really actuated the Central Government to bring into force these rules. I have already pointed out the passages which clearly indicate that the reason for bringing into force these rules was to arrest smuggling with a view to secure foreign exchange for the purpose of defence as well as development. It is indeed true that in this passage the Finance Minister says that he does not want gold for the defence of India. But it must be understood that this speech was in reply to the debate, and one of the responsibilities of the Finance Minister was to keep the morale of the country high in times of emergency. The speech has to be read as a whole for the purpose of understanding the real reason for the promulgation of these rules. Mr. Mehta also referred us to certain other passages which refer to the habit of people purchasing gold and sinking their moneys in purchase of gold affecting production. He also referred us to certain paragraphs of the Finance Minister's speech where he has referred to the abolition of Sati, abolition of the evil custom of debarring daughters from inheriting their father's property, introduction of the law of monogamy and divorce, and has argued that by introducing these rules, the

Finance Minister has also aimed at a similar social reform of breaking the people of their gold habits. Again, in my opinion, for reasons already stated, it will not be a permissible procedure for understanding the real reason which has actuated the Finance Minister in introduction of this Bill. Mr. Mehta also referred us to the observations of the Finance Minister about his thinking of introducing similar measure for about 8 months prior to its promulgation. It is his contention that at that time there was no emergency. The Finance Minister must have realised that if such a measure was passed, it would not stand the test of constitutional validity. The Finance Minister has only taken advantage of the emergency and suspension of the exercise of certain fundamental rights, and has introduced these rules. It is true that the Finance Minister has stated that he had come to the conclusion about eight months prior to the date of introduction of these rules that a measure similar to the rules would be required to be introduced in Parliament. But it is also to be noticed that he has made it clear that since then he has been thinking and considering the problem in its various aspects in framing the rules. It can hardly be doubted that by reason of the emergency the problem became more acute. Conservation of foreign exchange, which in peace time, was essential for the purpose of development of the national economy, also became necessary for the purpose of defence of India, and it is these reasons which the Finance Minister says have actuated him in bringing into force these rules. There is hardly any reason to doubt this statement of the Finance Minister, and to hold that the real reason for bringing into force these rules was to bring about only a socio-economic reform, and that the rules have no concern whatsoever with the defence of India or maintenance of supplies and civil services essential to the life of the community. I have already discussed that the object sought to be achieved was to arrest smuggling by controlling dealings in gold so as not to make it possible for people in India to legitimately buy or freely deal in gold in open market. It can hardly be said that the aforesaid objective of arresting smuggling is not capable of being related to the purpose, namely, the defence of India. It also cannot be said that the rules if observed would not go to achieve the objective. I have already stated that the arresting of smuggling according to the view taken by the Central Government would result in conservation of foreign exchange which is so essential for the purpose of the defence of India. The object sought to be achieved by these rules clearly serves to promote the purpose of defence. In my opinion, therefore, the connection between the rules and the prescribed purposes is a real one. Considering the two speeches of the Finance Minister, it is also equally clear that the Central Government had brought into force these rules because it was in its opinion necessary or expedient to bring them into force. These two requisite conditions having been established, challenge to the validity of these rules cannot be sustained on the ground that the rules framed are in excess of the rule making power of the Central Government or that the rules are a colourable piece of legislation in the sense that the rules have been framed for some purpose other than the prescribed purposes in sub-s. (1) of s. 3 of the Act.

Mr. Mehta in support of his aforesaid argument also has drawn our attention in this connection to the provisions of cl. (2) of rule 126-J, which imposes a duty that

"It shall be the duty of the Administrator by such measures as he may think fit,

- (a) to discourage the use and consumption of gold;
- (b) to bring about conditions tending to reduce the demand for gold; and
- (c) to advise the Central Government on all matters relating to gold."

Relying on these provisions Mr. Mehta argues that the real object of the Central Government in framing these rules was to bring about this effect. The discussion above will show that the duty imposed on the Administrator is aimed at removal of the root cause that has been making smuggling a lucrative business. The root cause as would be seen is the habit of the people using gold ornaments and hoarding gold which has induced the smugglers to smuggle gold

in large quantities. It has also been argued that the object sought could easily have been achieved by suitably amending the Customs Act and the Foreign Exchange Act. He brought to our notice that a Bill introducing the new Customs Act was introduced in the Parliament on June 8, 1962, introducing certain stringent measures. It was passed into an Act in December 1962 and was brought into force on February 1, 1963. He has also brought to our notice certain portions therein which has conferred on the officials concerned very extensive powers of arrest, powers of search, provisions relating to raising of presumptions, enhanced punishments, etc. According to Mr. Mehta, these stringent provisions would have effectively controlled smuggling. Now, in my opinion, it will hardly be permissible for this Court to embark on such an inquiry whether the objective sought to be achieved by these rules could have been achieved by some other way, inasmuch as in sub-s. (1) of s. 3, the Legislature has left it to the exclusive discretion of the Central Government. By enacting that sub-section, the Legislature has authorised the Central Government to make such rules as appear to it necessary or expedient for securing the authorised purposes. That being the position, it is clear that it would not be open to inquire whether the Central Government could have achieved the same object by some other measures. Similar argument was advanced before the Supreme Court when a challenge to the validity of rules made under cl. (15) of sub-s. (2) of s. 3 of the Defence of India Act, was made. It was argued that since the Preventive Detention Act, IV of 1950, was already on the statute book, it was hardly necessary for the Legislature to have passed this part of the impugned Act. Repelling this argument, their Lordships observed in *Makhan Singh Tarsikka v. The State of Punjab* (p. 401):—

“...It is hardly necessary to emphasise that a plea that an Act passed by a Legislature competent to pass it is a colourable piece of legislation, cannot succeed on such flimsy grounds. Whether or not it was wise that this part of the Act should have been passed, is a matter which is wholly irrelevant in dealing with plea that the Act is a colourable piece of legislation.”

Another argument was also advanced that if really the object was to arrest smuggling which affects foreign exchange, the rules would have also provided for controlling the market and commodities other than gold which affect the foreign exchange of India. He brought to our notice the provisions of s. 123, sub-s. (2) of the Sea Customs Act, 1962. It is not possible for me to accept this argument of Mr. Mehta also. It is true that sub-s. (2) of s. 123 of the Sea Customs Act enacts that apart from gold, the rule of evidence has been made applicable to diamonds and watches etc., but from that it does not follow that smuggling of these articles affects adversely India's foreign exchange to the same extent as smuggling of gold does. The matter has been left to the discretion of the Central Government, and it is for the Central Government to decide what measures it would bring into force in exercise of its powers under sub-s. (1) of s. 3. Therefore, it is difficult to infer that omission of controlling business in diamonds and watches necessarily leads to the inference that the true object of the Central Government in framing these rules was not to control smuggling of gold.

It is next to be seen whether the rules contravene the provisions of s. 44 of the Act. Section 44 reads:

“Any authority or person acting in pursuance of this Act shall interfere with the ordinary avocation of life and the enjoyment of property as little as may be consonant with the purpose of ensuring the public safety and interest and the defence of India and civil defence.”

It is the argument of Mr. Mehta that these rules interfere with the ordinary avocation of life and enjoyment of property of the people beyond measure. They can hardly be said to be for securing the purposes mentioned in the section. Mr. Mehta also has argued that the provisions of this section are mandatory and in support of his contention has referred us to the decision of

this Court in *Tan Bug Taim v. Collector of Bombay*.²⁰ Mr. Bhabha, on the other hand, contends that this section has no application or is not a fetter on the rule making power of the Central Government. In the alternative, he argues that even assuming that it is a fetter on the rule making power of the Central Government, the provisions of this section are not mandatory but directory. He referred to the Full Bench decision of the Lahore High Court reported in *Lahore E. S. Co. v. Punjab Province*. The first question to be considered, therefore, is whether s. 44 is a fetter on the rule making power of the Central Government conferred on it by s. 3(1) of the Act. Now, on a plain reading of the section, the restrictions imposed by this section are on an authority or a person. It is not in dispute that the Central Government is not a person. Now, the question is whether the expression "any authority" could be said to include the Central Government. In my opinion, the expression "any authority" in s. 44 does not include the Central Government. Section 44 appears in Chapter VII of the Act, which relates to supplemental provisions. The provisions of s. 44 have to be read in the context to understand the true import of the expression "any authority". Section 40 deals with the powers of the Central Government to delegate its powers or its duty of making certain orders to any officer or authority subordinate to the Central Government, and it is in this context that the directions have been given to the authority or person under s. 44 of the Act. The Act itself has used the expressions "Central Government", "authority" in contra-distinction with one another. In my opinion, therefore, the expression "authority" does not include the Central Government, nor has s. 44 imposed any fetter on the rule making power of the Central Government, but is directive relating to administrative or executive acts performed by any person or authority in execution of the powers delegated to them by the Central Government. In this view of the matter, it is not necessary to consider whether the directions contained in s. 44 are mandatory or directory. Suffice it to say that the view taken by the Lahore High Court in respect of the provisions of s. 15 of the earlier Defence of India Act, 1939, is contrary to the view taken by Bhagwati J. in *Tan Bug Taim v. Collector of Bombay*, of the same section. Mr. Justice Bhagwati has held that s. 15 is mandatory. The view taken by the Full Bench of the Lahore High Court is not the same. The provisions of s. 15 of the earlier Act are similar to s. 44 of the present Act. But it is worth noticing that in both these cases, what was challenged was an administrative act of the officers in exercise of the power and duty conferred on them by the orders of the Central Government. For the reasons stated above, the first contention as regards the vires of these rules should fail. Before proceeding to the next point, I may state that in dealing with the first point, I have not discussed such decisions which were cited before me which, in my opinion, were in respect of well established principles of law and which were only repetitive of the principles laid down by their Lordships of the Supreme Court, Federal Court and the Privy Council.

And this brings me to the second contention. As already stated, the second contention is that the rules violate exercise of the fundamental rights of the petitioners granted to them under arts. 25 and 26 of the Constitution. Material part of art. 25 is to the following effect:—

"25.(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion."

It is not necessary to reproduce the provisions of cl. (2) or the explanations to this article. It is the case of the petitioners that they profess and practise the Jain religion and observe customs, tenets and practices of the Jain religion. According to them there is an ancient and well accepted religious belief, custom and/or practice of the Jain community that persons belonging to the Jain community have to perform certain religious ceremonies like *pūja*. Such

puja ceremonies are performed *inter alia* on occasions like births, marriages and deaths. In the course of such *puja* ceremonies performed as aforesaid, *varakh*, *badla* ornaments and articles of pure gold such as “mugut” (head gear for the idol), *kundale* (ear ornaments for the idol), necklace, armlets, etc. are offered to the deity. The petitioners further pleaded that they have been performing the aforesaid ceremonies and have been offering the *varakh* (pure gold leaf), *badla* (silver offerings gilded with pure gold) and other ornaments and articles of pure gold to the deity as an essential part of their religious belief, custom and/or practice. The petitioners have further pleaded that according to the religious belief, custom and/or practice of the petitioners, it is derogatory to the deity to be offered impure gold or ornaments and articles of impure gold in the performance of the aforesaid ceremonies and it is enjoined that offerings to the deity should be in the purest form. According to the petitioners, offering of gold ornaments *varakh* or *badla* in the purest form, has been their practice from time immemorial, and they have been granted this freedom to continue religious practice uninterrupted under art. 25 of the Constitution. It can hardly be said that this right freely to profess and practise religion is in any way not in conformity with the maintenance of public order, morality and health. Gold Control Rules prohibit purchase or preparation of ornaments or articles of a purity in excess of 14 carats; and therefore, they are violative of the provisions of art. 25 of the Constitution and, therefore, unconstitutional. The respondents in para. 10 of the affidavit, have denied the existence of the alleged custom. The argument of Mr. Mehta has been founded on the form of denial, and it is therefore necessary to reproduce the averments made by the respondents in para. 10 of their affidavit in reply. The Collector, Central Excise, Bombay, respondent No. 5 hereto, has made this affidavit. In para. 10 he says:—

“I do not know and am not in a position to admit whether the petitioners profess and practise Jain Religion and observe the customs, tenets and practices of that Religion and put the petitioners to strict proof thereof. As regards the religious ceremonies and the performance thereof as alleged and referred to in the said paragraph, I do not admit the same and put the petitioners to the strict proof thereof. I however deny that for the performance of such religious ceremonies as are referred to therein, ornaments and articles only of pure gold are necessarily offered to the deity or are required to be offered to the deity. Assuming without admitting that either the petitioners or other members of the said community have been in the past offering to the deity articles of pure gold or other articles gilded with pure gold and ornaments as alleged, I deny that there is any religious sanction or custom for offering articles only of pure gold and nothing else. I deny that according to the religious belief, custom and practice of the said community, it is derogatory to the deity to offer impure gold or ornaments or articles of impure gold in the performance of the said ceremonies, and I deny that it is enjoined that the offerings to the deity should be in the purest form. In any event, and without prejudice to the said contentions, I submit that it may be at the most a practice or custom amongst the said community to offer articles of pure gold, but I submit that such practice or custom is not part of the Jain religion as such. I say that this involves disputed questions of fact not appropriate to be tried in these proceedings and should not be tried as such in these proceedings.”

It is the argument of Mr. Mehta that in the first instance, it is not a denial at all, because respondent No. 5 has stated that he does not know and, therefore, is not in a position to admit, and in the second instance, there is no denial that there is a custom of offering ornaments and articles of gold to the deity. The denial only is in respect of the alleged custom of offering ornaments and articles of pure gold. It is the argument of Mr. Mehta that if the custom of offering ornaments and articles of gold to the deity is admitted, it necessarily follows that the ornaments or articles offered to the deity according to the custom must be of pure gold. I am unable to agree with the submission of Mr. Mehta relating to the averments contained in para. 10 of the respondents’

affidavit. It is indeed true that respondent No. 5 has stated that he has no knowledge and he is not in a position to admit. That position is only limited to the allegation of the petitioners that they practise Jain religion and observe customs, tenets and practices of the Jain religion. As regards the alleged custom, the denial is not in any manner qualified. It is true that the denial is of the alleged custom of making offerings of ornaments and articles of pure gold to the deity. But these denials have to be read in the context of the pleas raised by the petitioners in para. 4 of the petition. The denial is in respect of these pleas. The denial is in the form in which the plea has been raised. I am unable to read in the averments of the respondents any admission as such of a custom of offering gold ornaments to the deity. In view of these averments contained in para. 10 of the affidavit in reply clearly issues on these disputed questions of fact arise. A decision in respect of this controversy on questions of fact also cannot be easily arrived at by merely referring to affidavits. The dispute relates to the existence of custom. By its very nature, it involves a detailed investigation of facts. It cannot appropriately and satisfactorily be done in these proceedings. There is also another difficulty in the way of the petitioners in this matter. The plea raised by the petitioners is that the custom is to make these offerings to a deity. But then there is a judicial pronouncement of their Lordships of the Supreme Court that in Jain religion there is no deity. In *The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*,²¹ their Lordships observed (p. 1023) :

"...Religion is certainly a matter of faith with individuals or communities and it is not necessarily theistic. There are well known religions in India like Buddhism and Jainism which do not believe in God or in any Intelligent First Cause. A religion undoubtedly has its basis in a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well being, but it would not be correct to say that religion is nothing else but a doctrine or belief."

From these observations, it is clear that Jain religion does not believe in God. If that be the position, there can hardly be a custom of making offerings to a deity as such. The issue that arises is a fundamental one. It is true that the issue in this form has not been raised by the respondents in their affidavit. But, I think, it would be permissible for me to take notice of this judicial pronouncement of their Lordships of the Supreme Court. These observations of their Lordships were brought to the notice of Mr. Mehta, and Mr. Mehta stated that what was meant was only an idol and not a deity. The question again arises that if the alleged custom be in respect of making offerings to an idol, then whose idol. The matter remains vague on the pleadings raised. In these circumstances, I do not think it is possible for me to proceed to consider this ground of challenge to the validity of the rules. The matter will have to be left to be decided in a regular suit if the petitioners desire to agitate this question there. I do not, therefore, proceed to decide this question. On account of the aforesaid view taken by me, Mr. Mehta has advanced no argument on behalf of the petitioners in respect of their contention that the rules are violative of art. 26 of the Constitution. The petitioners would be free to agitate the matter in a suit if so advised.

For the reasons stated above, in my opinion, the petition is liable to be dismissed, and I would, therefore, discharge the rule.

NAIK J. I agree with the conclusion reached by my learned brother. Since, however, I am approaching some of the questions raised in this case from a slightly different angle of vision, it would be meet and proper to indicate the line of my thinking. The Gold Control Rules, whose validity has been impugned in this petition, have been framed by the Central Government in exercise of the powers delegated to it under s. 3 of the Defence of India Act. These

Rules are a species of the genus which is known, in accepted legal parlance, as delegated legislation. The grounds of attack against a delegated legislation have a tendency to get themselves mixed up and, as a matter of fact, in this petition some of them have mixed up, and even in the course of the arguments the line of demarcation has sometimes been blurred. It would not, therefore, be out of place to indicate, in a general way, the broad categories under which delegated legislation is liable to be challenged. These categories are, (1) The Rules suffer from the vice of excessive delegation. This attack is more directed against the statute under which the powers are delegated than the Rules themselves. If the instrument under which the powers have been delegated does not lay down the legislative policy in clear terms, or it does not afford a proper guidance for the framing of the Rules, then it is open to challenge on the ground of excessive delegation. (2) That the delegated legislation is in excess of the powers of delegation. Side by side with the attack of exceeding the powers delegated, the legislation may also be impugned on the ground of mala fide exercise of those powers, for no authority can be regarded as having been authorised to act in bad faith, and (3) What is known as colourable exercise of the powers of legislation. In substance, this charge is analogous to the charge of excess of powers, the only difference being that here, the excess of powers masquerades under some guise so as to make it appear that it is a legitimate exercise of powers. By way of comparison and contrast, I may also indicate, again in a general way, the ground on which an ordinary legislation, as distinguished from delegated legislation, is liable to be challenged. The first ground that may be raised for impugning an ordinary legislation is that it is in violation of the fundamental rights enshrined in Part III of the Constitution of India. The second is that the Legislature has transgressed the limits of the legislative powers assigned to it under the Constitution and the third is that the legislation is colourable.

In this background, I will now proceed to analyse the grounds that have been urged in the present petition, and thereafter I will indicate the grounds which are pressed into service in the course of the arguments. The grounds have been summarised in para. 10 of the petition. Clause (a) of the said paragraph relates to the main charge viz., excessive exercise of the powers conferred by the Parliament under s. 3(1) of the Defence of India Act. Clause (b) refers in particular to s. 3(2)(33) and says that cl. (33) would not empower the Central Government to enact the Rules which have prohibited and have also imposed other restrictions upon the use, disposal of or dealing in gold. At best, it would empower the Central Government to frame rules for the purpose of controlling the possession, use or disposal of, or dealing in, 'bullion'. Clause (c) relates to the operation of art. 358 of the Constitution and its effect upon the fundamental rights enshrined under art. 19. This point has been given up in view of the decision of the Supreme Court in *Makhan Singh v. State of Punjab*.¹ Clause (d) asserts that although the avowed and oft-publicized object of the Government in framing the Rules was to check smuggling and to discourage the use and consumption of gold and to bring about conditions tending to reduce the demand for gold, its real object was to discourage people from making uneconomic investment in gold. Reference is then made to the Sea Customs Act of 1878 and also to the new Customs Bill of 1962, which was then on the anvil of the Parliament, and it is pointed out that the object of both these legislations was to prevent smuggling. It is, therefore, suggested that if the object of the Government was to prevent smuggling, then that object could have been achieved either by the old Sea Customs Act or by enacting the Bill, which was on the anvil of the Parliament at the time when the Rules were framed. It is then alleged that the Government has enacted the Gold Control Rules deliberately under the Defence of India Act and with a view to circumvent the constitutional prohibi-

tion imposed by arts. 14 and 19(1) (f) and (g) of the Constitution. It is finally asserted that the entire object, motive and intention of the Government in framing the said Rules was to take undue and improper advantage of the proclamation of emergency and under its guise and cover frame the said Rules and deprive the petitioners and other citizens of India of their fundamental rights under arts. 14 and 19(1) (f) and (g) of the Constitution. It is on this ground that it was suggested that these Rules amount to colourable and fraudulent exercise of the delegated powers. Clause (e) of the same paragraph again refers to the restrictions and curtailment of the fundamental rights under art. 19(1) (f) and (g) of the Constitution and in that connection explains the detailed provisions of the Rules. Clause (l) relates to the so-called fundamental rights of the petitioners of offering and gifting pure gold and ornaments and articles of pure gold to their deity under arts. 25 and 26 of the Constitution which, according to them, have been seriously brought into jeopardy.

It will be at once clear that the charge of excessive delegation has not been levelled, nor is it suggested that there has been any abuse of powers or mala fide exercise of powers. All that is suggested is that the exercise of the powers must be regarded as colourable in view of the fact that, firstly, the petitioners and the other citizens have been deprived of the fundamental rights and further in view of the fact that under the guise of promoting the purpose of defence, the Rules are really meant for promoting a socio-economic goal.

Before proceeding further, it may be pointed out that in view of the proclamation of emergency made by the President of India and in view of the provisions of art. 250 of the Constitution, one of the fetters imposed upon the Parliament not to legislate any law in regard to the subjects falling within List II of the Seventh Schedule of the Constitution, has been removed. The ground of attack, therefore, viz., that the Parliament has transgressed the limits of its legislative powers, is no longer open for consideration. In the same way, art. 358 of the Constitution suspends the operation of art. 19 thereof during the period of emergency. Again, the President has issued notifications under art. 339 by which he has suspended the operation of arts. 14, 21 and 22 of the Constitution. The result of the suspension of arts. 14, 19, 21 and 22 is that the Defence of India Act as also the Rules framed thereunder have become immune from challenge in so far as that challenge is based under arts. 14, 19, 21 and 22 of the Constitution, during the period the proclamation of emergency is in operation.

It will thus be clear that the ground of attack to the validity of the Gold Control Rules narrows down to a very small compass viz., whether these Rules are in excess of the powers delegated to the Central Government under s. 3 of the Defence of India Act and whether they amount to colourable exercise of the powers vested in it.

In support of his argument that the Rules are in excess of the powers conferred upon the Central Government, by s. 3 of the Defence of India Act, Mr. Mehta contended that the provisions, which conferred powers on the Central Government, are contained in sub-s. (1) of s. 3 of the Defence of India Act. According to him, the clauses which range from (1) to (57) under sub-s. (2) of s. 3 do not and are not intended to confer any power as such upon the Central Government to frame the Rules. According to his argument, everyone of these clauses under sub-s. (2) must be examined and on examination it must be found to have relation to one of the five purposes mentioned in sub-s. (1) of s. 3 of the Defence of India Act. On the other hand, Mr. Bhabha contended that the Gold Control Rules fairly and squarely fall under cl. (33) of sub-s. (2) of s. 3 of the Defence of India Act, and once that position is accepted, it is not necessary for the Court to consider as to whether these Rules again have a relation to any of the five purposes mentioned in sub-s. (1) of s. 3. I may hasten to add that Mr. Bhabha also contended that if the Rules do not fall within the purview of cl. (33), they would, of course,

be justified under the general purposes mentioned in sub-s. (1) of s. 3 of the Defence of India Act. The question raised by Mr. Mehta involves consideration of the relative positions of sub-ss. (1) and (2) of s. 3 *inter se*. If the argument advanced by Mr. Mehta is correct, then it must follow that the various clauses mentioned in sub-s. (2) are mere surplusages and appendages and that for justifying the Rules framed by the Central Government each time we must fall back upon the general purposes mentioned in sub-s. (1) of s. 3 of the Defence of India Act. It must be remembered that sub-s. (2) also forms part of s. 3 and *prima facie*, it will be somewhat surprising if the validity of one sub-section is required to be tested on the touch-stone of another sub-section of the same section. Mr. Mehta's argument appears to have been based on certain observations made by the Privy Council in *King-Emperor v. Sibnath Banerji*² as also those made by the Supreme Court in *Santosh Kumar Jain v. The State*.³ I do not propose to deal with the facts of those cases nor for that matter of some of the other cases to which I would have occasion to refer in the course of the judgment, because the facts of most of these cases have been set out by my learned brother in his judgment. In *Keshav Talpade v. King Emperor*⁴ the order detaining Talpade was made under clause (x) of sub-s. (2) of s. 2 of the Defence of India Act of 1939. Sub-section (1) of s. 2 of that Act sets out the general purposes for which rules may be framed, and the purposes are more or less the same as the purposes set out in sub-s. (1) of s. 3 of the Defence of India Act of 1962. Sub-section (2) of s. 2 of the Act of 1939 sets out the various matters in respect of which the Central Government was authorised to make rules. Clause (x) in substance provides that a person who is reasonably suspected of having committed or likely to commit a prejudicial act could be kept detained. Rule 26, which was purported to have been framed under cl. (x), however, stated that the Government could pass an order of detention against a person indulging in prejudicial activities provided it was satisfied in that respect. The Federal Court held that the order of detention was bad, because it went beyond the powers conferred by cl. (x) of sub-s. (2) of s. 2 of the Defence of India Act of 1939, and inasmuch as r. 26 purported to have been framed under a definite item viz., cl. (x), it was not open to the Government to fall back upon the general purposes enumerated in sub-s. (1) of s. 2 of the Act of 1939. In effect, the Federal Court held that the rule, if it could not be sustained under which it was purported to be framed, would not be sustained at all under any of the other clauses or even under the general purposes mentioned in sub-s. (1). An identical question came up before the Privy Council in *Sibnath Banerji's* case. The interpretation of the relative position of sub-ss. (1) and (2) of s. 2 of the Defence of India Act of 1939 came up for consideration and the Privy Council disapproving of the view taken by the Federal Court came to the conclusion that r. 26 could be justified on the general purposes mentioned in sub-s. (1) of s. 2 of that Act. It pointed out that the purposes mentioned in sub-s. (2) are illustrative and could not be restrictive of sub-s. (1). At page 258, the Privy Council observed:

"Their Lordships are unable to agree with the learned Chief Justice of the Federal Court on his statement of the relative positions of sub-ss. 1 and 2 of s. 2 of the Defence of India Act, and counsel for the respondents in the present appeal was unable to support that statement, or to maintain that r. 26 was invalid. In the opinion of their Lordships, the function of sub-s. 2 is merely an illustrative one; the rule-making power is conferred by sub-s. 1, and 'the rules' which are referred to in the opening sentence of sub-s. 2 are the rules which are authorized by, and made under, sub-s. 1; the provisions of sub-s. 2 are not restrictive of sub-s. 1, as, indeed, is expressly stated by the words 'without prejudice to the generality of the powers conferred by sub-s. 1'".

It would at once be evident that these observations were made to repel the

² (1945) L.R. 72 I.A. 241, s.c. 48 Bom. L.R. 1.

³ [1951] S.C.R. 303.

⁴ [1943] F.C.R. 40.

argument that the powers conferred by sub-s. (2) are restrictive of the powers conferred by sub-s. (1) and that if the rules purported to have been made under any of the powers specified in sub-s. (2) could not be sustained under those powers, the rules were automatically invalid. The observations made by the Privy Council have been approved by the Supreme Court in *Santosh Kumar Jain's* case. In that case, the validity of an order of seizure of the stock of five thousand maunds of sugar which purported to have been made under cl. (j) of sub-s. (2) of s. 3 of the Essential Supplies (Temporary Powers) Act, 1946, was called in question. Sub-section (1) of s. 3 of that Act mentioned the general purposes for which the Central Government is authorised to make rules, and in effect stated:

"The Central Government, so far as it appears to it to be necessary or expedient for maintaining or increasing supplies of an essential commodity, or for securing their equitable distribution and availability at fair prices, may by notified order, provide for regulating or prohibiting the production, supply and distribution thereof, and trade and commerce therein".

Sub-section (2) opens with the words "without prejudice to the generality of the powers conferred by sub-section (1) an order made thereunder may provide...". Clause (j) was one of the clauses, which provided:

"for any incidental and supplementary matters,...the seizure by a person authorised to make such search of any articles in respect of which such person has reason to believe that a contravention of the order has been, is being, or is about to be committed,...".

It was in exercise of the powers conferred by sub-s. (2)(j) of s. 3 of that Act that the order of seizure was made. Patanjali Sastri J. (as he then was) examined the relative positions of sub-ss. (1) and (2) of s. 3 and observed (p. 310):—

"It is manifest that sub-section (2) of section 3 confers no further or other powers on the Central Government than what are conferred under sub-section (1), for it is 'an order made thereunder' that may provide for one or the other of the matters specifically enumerated in sub-section (2) which are only illustrative, as such enumeration is 'without prejudice to the generality of the powers conferred by sub-section (1)'".

At page 311, his Lordship referred to the decision of the Privy Council in *Sibnath Banerjee's* case and stated:

"The view we have expressed above receives support from the decision of the Privy Council in *Sibnath Banerjee's* case: Section 2(1) of the Defence of India Act, 1939, as amended by section 2 of the Defence of India (Amendment) Act, 1940, empowered the Central Government to make rules for securing the defence of British India, the public safety, the maintenance of public order, etc., and sub-section (2) enacted 'without prejudice to the generality of the powers conferred by sub-s. (1), the rules may provide for all or any of the following matters...' Among such matters was the detention of any person 'reasonably suspected' of having acted etc. in a manner prejudicial to the public safety etc. [Clause (x)]. Rule 26 of the Rules made under the section, however, authorised the Government to detain a person 'if it is satisfied' that it was necessary to detain him with a view to prevent him from acting prejudicially.... The Federal Court held that this rule was *ultra vires* as it went beyond the scope of clause (x) in that it left it to the satisfaction of the Government to decide whether or not it was necessary to detain a person. The decision was reversed and Lord Thankerton, delivering the judgment of the Board, observed:

'In the opinion of their Lordships, the function of sub-section (2) is merely an illustrative one; the rule making power is conferred by sub-section (1), and 'the rules' which are referred to in the opening sentence of sub-section (2) are the rules which are authorised by, and made under, sub-section (1); the provisions of sub-section (2) are not restrictive of sub-section (1), as, indeed is expressly stated by the words 'without prejudice to the generality of the powers conferred by sub-section (1)'. There can be no doubt—as the learned Judge himself appears to have thought—that the general language of sub-section (1) amply justifies the terms of rule 26, and avoids any of the criticisms which the learned Judge expressed in relation to sub-section (2)'.

This accords with our view of the effect of sub-sections (1) and (2) of section 3 of the Act".

It is necessary to note that his Lordship laid emphasis upon the expression 'an order made thereunder', which clearly subordinated the matters enumerated in sub-s. (2) to the general purposes stated in sub-s. (1) of s. 3 of that Act.

In *Attorney-General for Canada v. Hallet & Carey Ltd.*⁵ a question of similar nature arose in the following circumstances: The National Emergency Transitional Powers Act, 1945, of Canada, provided by section 2(1): 'The Governor in Council may do and authorize such acts and things, and make from time to time such orders and regulations, as he may, by reason of the continued existence of the national emergency arising out of the war... for the purpose of... (c) maintaining, controlling and regulating supplies and services, prices, transportation, use and occupation of property, rentals, employment, salaries and wages to ensure economic stability and an orderly transition to conditions of peace;...'

In ostensible exercise of the powers conferred by s. 2(1) of the Act of 1945, an Order in Council... was made on April 3, 1947, which provided by s. 22 that 'all oats and barley in commercial positions in Canada' with certain specified exceptions, 'are hereby vested in the Canadian Wheat Board'. The respondent, who held barley stored in various Canadian elevators, challenged the validity of the compulsory acquisition provision of the Order in Council.

It may be noted that the order of expropriation was passed in virtue of the general powers conferred by s. 2(1) of the said Act. It was pointed out that in the War Measures Act, 1914, there was a specific power conferred upon the Governor General for passing an order for confiscation in certain circumstances, in the list of subjects, enumerated in sub-s. (2) of s. 3. Sub-section (1) mentioned the general purposes which are similar to those mentioned in sub-s. (1) of s. 3 of the Defence of India Act. It was contended that since there was no similar power conferred upon the Governor General under s. 2(1) of the Act of 1945, it must be held that there was a curtailment of the powers of the Governor General and it was not open to him to pass the order of confiscation under his authority of the general powers vested by sub-s. (1). It was with reference to this argument that their Lordships instituted a comparison between the provisions of sub-ss. (1) and (2) of s. 3 of the War Measures Act. At pages 448 and 449 their Lordships observed:

"...Their Lordships think that there is not by now any room for doubt as to the function performed by the list of permitted subjects in section 3 of the War Measures Act. The form adopted is plainly borrowed from section 91 of the British North America Act, 1867. They do not extend the purposes already defined, for they are directed to explaining what can be done, not the object for which things may be done; they do not extend any more than they limit its powers, for all that they permit is already permitted by the general words that precede them...What they do is to state explicitly certain things that are to be treated as falling within the range of the general powers already conferred. In that sense alone they extend, because they amplify, those powers. But the Act of 1945 makes no such declaration and offers no such list. It leaves the general powers that it confers unexplained by statutory definition. It is not as if it made some new declaration and offered some new list, the form of which might appropriately be compared with the form adopted by its predecessor. In such a case changes might indeed be significant. But where, as here, one term of the comparison is lacking altogether there is no firm ground for the inferences that have been drawn as to the intention of the later Act.

In their Lordships' view there is no better way of approaching the interpretation of this Act than to endeavour to appreciate the general object that it serves and to give its words their natural meaning in the light of that object..."

In effect, their Lordships decided that although there was no specific item in

the list under which the action of confiscation could be justified, still that action was referable to the general powers mentioned in sub-s. (1) of s. 2 of the National Emergency Transitional Powers Act of 1945. The specific question of the comparison of the powers under sub-ss. (1) and (2) of s. 3 of the War Measures Act, 1914, had not arisen before the Privy Council. It arose by way of comparison of the provisions of the War Measures Act and those of the National Emergency Transitional Powers Act and it was in that context that their Lordships pointed out that after all, the object of enumeration in sub-s. (2) was to elaborate what was contained in sub-s. (1) and that sub-s. (2) did not extend the powers mentioned in sub-s. (1) nor could it restrict those powers.

The case which we are considering is somewhat different from all the three cases referred to above. In the present case, the Rules do not purport to have been framed under any of the items mentioned in sub-s. (2) of s. 3 of the Defence of India Act, 1962. The Rules purport to have been framed generally in exercise of the powers under s. 3 of the Defence of India Act. The specific problem, therefore, which arose for consideration in the above cases, does not arise in the present case. At the same time, it is noteworthy that the Privy Council, in the Canada case, has characterised the entries listed in sub-s. (2) as 'so many statutory definitions'. In my view, in the present case, there is no, and there cannot be any, conflict between sub-ss. (1) and (2) of s. 3 of the Defence of India Act. According to the Parliament, the clauses listed in sub-s. (2) are mere elaboration of what is stated in a general way in sub-s. (1). These clauses make explicit what is implicit in sub-s. (1). If the clauses in sub-s. (2) are 'statutory definitions', evidently, the clauses would stand by themselves, unless there is any ambiguity about any of them. It is not correct to contend that none of these clauses though explicitly and unambiguously worded can stand on their own and must always relate to the general purposes. Mr. Mehta's argument pushed to its logical corollary amounts to this that, in each case it must be demonstrably established that the clauses, which are pressed in service, are related to or referable to one or more of the general purposes mentioned in sub-s. (1) of s. 3. It is clear that the Parliament while enacting those clauses had no doubt in its mind that these clauses fall within the ambit of the general powers. The expression of the parliamentary intent if clear cannot be called into question by inviting the Courts to embark upon an inquiry for seeing as to whether there is a clear connection between the clauses mentioned in sub-s. (2) and one of the purposes mentioned in sub-s. (1). Of course, it is open to the petitioners to contend that the Gold Control Rules must be referable to one of the items, if not to the general purposes. I do not think that it is open to the petitioners to contend that the clauses in sub-s. (2) should themselves be put to the test laid down in sub-s. (1). The rule of harmonious construction must be adopted, and if that is adopted, there can hardly be any occasion for envisaging any conflict between sub-ss. (1) and (2) of s. 3 of the Defence of India Act of 1962. The argument advanced by Mr. Mehta was mainly based on cl. (6) of sub-s. (2) of s. 3 which runs thus:

"requiring the publication of news and information".

Mr. Mehta contended that the clause is very widely worded and, therefore, unless the publication of news and information is shown to be connected with any of the purposes mentioned in sub-s. (1), an order requiring the publication of news and information would be invalid. The argument is correct, because the clause to which reference is made is vague and ambiguous. When the wording of a clause is vague and ambiguous, it is open to the Court, nay it would be necessary for the Court, to make an inquiry as to whether an order purporting to have been passed thereunder could be justifiable on the basis of the existence of any of the general powers mentioned in sub-s. (1). But to argue that even when there is no ambiguity about the wording of a clause the

connection between the clause with any of the general purposes must still be established to the satisfaction of the Court would, in my opinion, be to pit one part of the section against the other—a procedure which is not permissible on any canons of construction.

It may be pointed out that the clauses enumerated in sub-s. (2) serve and are intended to serve yet another useful purpose and it is this that, in the absence of such an enumeration the delegating legislation may become liable to be charged with the vice of excessive delegation. Enumeration of the various purposes, which, according to the Parliament, form part of the general purposes or follow from the general purposes, gives guidance to the delegate to frame rules and once that is done, the rules cannot be attacked on the ground of excessive delegation. The observations made by the Supreme Court in *Makhan Singh's* case at page 400 may be usefully cited in this connection. In discussing the argument on behalf of the detenu that the Rule (30A) authorising detention which was framed under s. 3(2)(15)(i) of the Defence of India Act of 1962, suffered from the vice of excessive delegation, Gajendra-gadkar J. (as he then was) referred to sub-s. (1) of s. 3 of the Defence of India Act and the specific clause viz., (15)(i) of sub-s. (2) of s. 3 thereof, and observed (p. 400):

“...Section 3(2) provides that without prejudice to the generality of the powers conferred by sub-section (1) the rules may provide for, and may empower any authority to make orders providing for, all or any of the following matters; then follow clauses (1) to (57), including several sub-clauses which provide for the matters that may be covered by the Rules. Amongst them is clause (15)(i)...”

His Lordship then sets out the clause and proceeds to observe:

“The argument is that in conferring power on the Central Government to make rules, the legislature has abdicated its essentially legislative function in favour of the Central Government. In our opinion, this argument is wholly untenable...In the present cases, one has merely to read section 3(1) and the detailed provisions contained in several clauses of section 3(2) to be satisfied that the attack against the validity of the said section on the ground of excessive delegation is patently unsustainable. Not only is the legislative policy broadly indicated in the preamble to the Act, but the relevant provisions of the impugned section itself give such detailed and specific guidance to the rule-making authority that it would be idle to contend that the Act has delegated essentially legislative function to the rule-making authority.” (pp. 400-401).

In *Hamdard Dawakhana v. Union of India*⁶ their Lordships were considering the effect of s. 3 of the Drugs and Magic Remedies (Objectionable Advertisement) Act, 1954. Section 3 provided (page 567):—

“Subject to the provisions of this Act, no person shall take any part in the publication of any advertisement referring to any drug in terms which suggest or are calculated to lead to the use of that drug for...

(d) the diagnosis, cure, mitigation, treatment or prevention of any venereal disease or any other diseases or condition which may be specified in rules made under this Act. Power to make rules is laid down in S. 16 which is as follows:—

S. 16(1). The Central Government may by notification in the official gazette make rules for carrying out the purposes of this Act.”

The opening words of sub-s. (2) are:

“In particular and without prejudice to the generality of the foregoing power, such rules may—

(a) specify any disease or condition to which the provisions of section 3 shall apply.” The first part of s. 16 of the Act authorised the making of the rules to carry out the purposes of the Act and cl. (a) of sub-s. (2) provided that the rules may specify any disease or condition to which the provisions of s. 3 shall apply. Their Lordships observed (p. 567):—

“...It is the first sub-section of S. 16 which confers the general rule making power

i.e., it delegates to the administrative authority the power to frame rules and regulations to subserve the objective and purpose of the Act. Clause (a) of the second sub-section is merely illustrative of the power given under the first sub-section; *Emperor v. Sibnath Banerjee*... Therefore sub-section 2(a) also has the same object as sub-section (1) i.e., to carry out the purposes of the Act. Consequently when the rule making authority specifies conditions and diseases in the schedule it exercises the same delegated authority as it does when it exercises powers under sub-section (1) and makes other rules and therefore it is delegated legislation. The question for decision then is, is the delegation constitutional in that the administrative authority has been supplied with proper guidance. In our view the words impugned are vague. Parliament has established no criteria, no standards and has not prescribed any principle on which a particular disease or condition is to be specified in the Schedule. It is not stated what facts or circumstances are to be taken into consideration to include a particular condition or disease. The power of specifying diseases and conditions as given in S. 3(d) must therefore be held to be going beyond permissible boundaries of valid delegation..."

My object in referring to the above decision is to point out that the enumeration contained in sub-s. (2) of s. 3 of the Defence of India Act, 1962, is not just an act of super-arrogation but serves a necessary and useful purpose. In my view, if the Gold Control Rules could be justified by cl. (33) of sub-s. (2) of s. 3 of the Defence of India Act, 1962, since the wording of that clause is unambiguous, it is not necessary still to seek to establish connection between the Gold Control Rules and one of the general purposes mentioned in sub-s. (1) thereof, for to do so would be to question the 'statutory definition' made by the Parliament itself.

That takes me to the consideration of the principal argument advanced by Mr. Mehta viz., that the Rules would become *ultra vires* unless a direct, proximate or intimate connection is established between the Rules framed and the general purposes stated in sub-s. (1) of s. 3 of the Defence of India Act, 1962. It was also pointed out that the Gold Control Rules contain no preamble and no recital to the effect that it appeared to the Central Government necessary or expedient for securing the purposes set out in s. 3 of the Act of 1962. It was contended by Mr. Mehta that the effect of the absence of the recital as above would be to leave the question about the connection between the Rules and the general purposes at large. I will consider this aspect of the matter at a subsequent stage of the discussion. For the time being, I will concentrate my attention upon the principal argument viz., whether it is necessary to establish a direct, proximate or intimate connection between the Rules framed and the general purposes set out in s. 3(1) of the Defence of India Act, 1962. The edifice of Mr. Mehta's argument in this respect is reared on the basis of the two decisions, one in *Rex v. Basudeva*⁷ and the other in *The Superintendent, Central Prison, Fatehgarh v. Ram Manohar Lohia*.⁸

In *Rex v. Basudeva* the respondent (Basudeva) was a dealer in kerosene oil and the charge was that he habitually indulged in black-marketing. He was arrested by an order of detention passed in exercise of the powers conferred by s. 3(1)(i) of the U.P. Prevention of Black-Marketing (Temporary Powers) Act, 1947. That Act was passed by the U.P. Legislature by virtue of s. 100 read with Entry 1 of List II, Schedule VII of the Government of India Act, 1935. Section 100 of the Government of India Act, 1935, in effect provided that the Dominion Legislature had power to make laws in respect of various matters enumerated in List I of the Seventh Schedule and the Provincial Legislature had power to legislate in respect of any of the matters enumerated in List II of the Seventh Schedule. Entry 1 of List II of the Seventh Schedule read (relevant portion quoted) :—

"...preventive detention for reasons connected with the maintenance of public order". The question for consideration before the Federal Court was whether the legislation, viz., the U.P. Prevention of Black-Marketing (Temporary Powers)

Act, 1947, could be validly passed by the U.P. Legislature in exercise of the legislative powers conferred upon it under entry 1 of List II of Schedule VII. It was contended for the detenu that the detention was unlawful as the provision aforesaid was void and inoperative as being *ultra vires* the Provincial Legislature. Patanjali Sastri J. (as he then was), who delivered the judgment of the Court, posed the question, whether the impugned provision falls within the ambit of the legislative power conferred upon the Provincial Legislature by s. 100 read with Entry 1 of List II, Schedule VII of the Government of India Act, 1935. It was contended by the learned Advocate General in that case that habitual black-marketing in essential commodities was bound sooner or later to cause a dislocation of the machinery of controlled distribution, which, in turn, might lead to breaches of the peace and that, therefore, detention with a view to prevent such black-marketing was covered by the entry. His Lordship in repelling this argument referred to the possibility of the rash driving of an automobile or the sale of adulterated foodstuffs leading to the disturbance of public order. At the same time, the consequence was so remote that it could not be 'connected with the maintenance of public order'. At page 69, his Lordship observed:

"...Preventive detention is a serious invasion of personal liberty, and the power to make laws with respect to it is, in the case of Provincial Legislatures, strictly limited by the condition that such detention must be for reasons connected with the maintenance of public order. The connection contemplated must, in our view, be real and proximate, not far-fetched or problematical".

In appreciating the decision of the Federal Court, it is necessary to note that in a federal constitution, there is a meticulous division of powers between the federal union and the federal States. The line of demarcation between the fields of legislation must be fairly clear so that one legislative body could not transgress or trespass upon the field allocated to the other. It is also necessary to note that it is for the judiciary to decide as to whether the Legislature has exceeded the limits of its legislative competence. Judiciary is the sole judge in that respect and it is for the judiciary to jealously safeguard the delicate balance of the distribution of powers between the two legislative organs. The principle enunciated in *Basudeva's* case was followed by the Supreme Court in *The Superintendent, Central Prison, Fatehgarh v. Ram Manohar Lohia*. In that case, s. 3 of the U.P. Special Powers Act, 1932, made instigation not to pay or defer payment of any liability an offence punishable with imprisonment which may extend to six months, or with fine, extending to Rs. 250, or with both. Ram Manohar Lohia was prosecuted under the said section for delivering speeches instigating cultivators not to pay enhanced irrigation rates to the Government. He applied to the High Court for a writ of *habeas corpus* on the ground, amongst others, that the said section was inconsistent with art. 19(1)(a) of the Constitution and as such void. The High Court decided in favour of the appellant (Lohia) and he was released. The State appealed to the Supreme Court and the question for determination was whether the impugned section embodied reasonable restrictions in the interests of public order and was thus protected by art. 19(2) of the Constitution. Subbarao J., who delivered the judgment of the Court, put the issue neatly by saying "We shall now proceed to consider the constitutional validity of this section" (page 828). His Lordship pointed out that to sustain any law made by the State under cl. (2) of art. 19 of the Constitution, two conditions must be complied with, viz., (1) the restrictions imposed must be reasonable; and (2) they should be in the interests of public order. His Lordship observed (p. 835):—

"...The restriction made 'in the interests of public order' must also have reasonable relation to the object to be achieved...If the restriction has no proximate relationship to achievement of public order, it cannot be said that the restriction is a reasonable restriction within the meaning of the said clause..."

Reference was then made to the decision of the Federal Court in *Basudeva's* case and the relevant passage at p. 69 of that judgment was cited with approval. His Lordship then proceeded to add (p. 836):

"...The decision, in our view, lays down the correct test. The limitation imposed in the interests of public order to be a reasonable restriction, should be one which has a proximate connection or nexus with public order, but not one far-fetched, hypothetical or problematical or too remote in the chain of its relation with the public order".

Just as in the case of *Rex v. Basudeva* the point involved was whether the Provincial Legislature had transgressed the limits of its power, in *Ram Manohar Lohia's* case the question was, whether the Legislature had passed a legislation in violation of the fundamental rights. Subbarao J. emphasised that the fundamental rights cannot be restricted on hypothetical or problematical considerations.

The question for consideration is whether the principle of proximate or intimate connection can be extended in determining the validity of a delegated legislation framed under the Defence of India Act where large powers have been conferred by the Parliament on the delegate coupled with wide discretion for selecting the topics for legislation. I have already pointed out that the Gold Control Rules have not been challenged on the ground of excessive delegation. I have also pointed out that there is no challenge and there could not be any to the powers of the Parliament to frame laws for the purposes mentioned in s. 3 of the Defence of India Act either on the ground of violation of the fundamental rights under art. 19, which has been suspended under art. 358 or of the fundamental rights under arts. 21 and 22, which have been suspended by a Presidential proclamation. Nor could there be a challenge to the powers of the Parliament on the ground that the Parliament has transgressed the limits of its legislative functions, because the relevant fetters in that regard have been removed by art. 250 of the Constitution. In other words, there is no inherent want of jurisdiction in the Parliament in making laws mentioned in s. 3(1), at any rate, during the period of emergency. There is such an inherent want of jurisdiction in a Legislature with limited powers because of the meticulous division of powers and also because of the existence of fundamental rights. The only question, therefore, that remains to be considered is whether the Parliament, which has plenary powers in making a legislation, has in fact delegated these powers which would sustain the Gold Control Rules. In other words, the question is only of the extent of delegation. Evidently, the delegation is of an extensive character, not merely because of the general purposes mentioned in sub-s. (1) of s. 3 of the Defence of India Act but also because discretion has been given to the Central Government to choose the topics. The words "The Central Government may make such rules as appear to it necessary or expedient for securing... etc." in s. 3(1) of the Defence of India Act are extremely important. In this connection, it may be pointed out that when we are considering the question as to whether the Legislature has transgressed the limits of its legislative powers, the choice made by the Legislature is neither here nor there. It is clear that when the Legislature proceeds to legislate on a topic, it proceeds on the footing that the topic falls within the purview of its jurisdiction. In this connection, I may refer to a very significant sentence in the judgment of *Basudeva's* case at p. 69. It was urged before the Federal Court that if the Legislature thought that prevention of a particular activity was expedient in the interest of maintenance of public order, it was not for the Court to canvass the degree of connection between the two, as that was a matter of policy and not of vires. In repelling this argument, their Lordships observed:

"...We cannot accept this wide proposition. Whilst a statement in the preamble of a statute as to its ultimate objective may be useful as throwing light on the nature of the matter legislated upon and must undoubtedly be taken into consideration, it cannot be conclusive on a question of vires, where the Legislature concerned has powers to legislate

on certain specified matters only. The Court must still see, in such cases, whether the subject-matter of the impugned legislation is really within those powers”.

The effect of the observations of the Supreme Court at page 836 in *Ram Manohar Lohia's* case is identical:

“...We can only say that fundamental rights cannot be controlled on such hypothetical and imaginary considerations...”.

As pointed out above, under s. 3 of the Defence of India Act, 1962, it is the Central Government, which has been constituted the authority to decide upon the topics on which it could legislate in its capacity as a delegate of the Parliament. I may usefully refer to a passage in the judgment of the High Court of Australia in *Reid v. Sinderberry: Reid v. McGrath*⁹ for reinforcing the argument advanced above. I will be referring to this case and also some of the other Australian cases cited before us in the course of the arguments on both sides at a later stage of this judgment. At this stage, it is sufficient to note that the question for consideration in *Reid's* case was, whether in making a regulation providing for conscription, the Governor General was over-stepping the limits of the legislative powers of the Commonwealth Parliament conferred under s. 15(vi) of the Commonwealth Constitution to make laws with respect to naval and military defence. Latham C.J. observed (p. 511):

“...When the powers of a legislative authority are limited by law the opinion of the authority that a particular exercise of its powers is within the law cannot be decisive of the question of the validity of a provision enacted by the authority, unless, indeed, the power was conferred by the law creating the power (in this case the Constitution of the Commonwealth) in terms which provided that the opinion of the authority should be so decisive. But there is no such provision relating to defence in the Constitution. The power of the Commonwealth Parliament is a power to make laws with respect to naval and military defence—see Constitution, s. 51(vi)—not a power to make laws with respect to any matter which, in the opinion of the Parliament, or of an authority to which Parliament may confide a power of subordinate legislation, is naval or military defence.”

On these general considerations, therefore, I am inclined to the view that the test laid down in the two cases relied upon by Mr. Mehta viz., that the connection between the legislation and the powers of the Legislature must be proximate, direct and intimate, cannot possibly be extended to the case of delegated legislation, which is framed by virtue of the wide powers conferred by s. 3 of the Defence of India Act. The test in judging the validity of the Gold Control Rules in a case like this would have to be more flexible than the rigid test of real, proximate and intimate connection. Such a test has been laid down by the Privy Council in *Attorney-General for Canada's* case. In that case, their Lordships were discussing the effect of an order of confiscation, which was made by virtue of the general powers invested in the Governor in Council by s. 2 of the National Emergency Transitional Powers Act, 1945. After referring to the general arguments relating to the real purpose of the powers, their Lordships observed (p. 445):

“If, then, the expropriation which the Order in Council prescribes is to be held invalid in law it must be attacked by showing that the Act of 1945, truly interpreted, did not give the Governor the power to carry out what he has purported to achieve. No other line of attack is open...”

A little later, their Lordships observed (p. 446):

“...Plainly, within the scope of its wide range of purposes, the Act is conceived in the most fluid and general terms, conferring deliberately the most extensive discretion. To import into such a measure a precise limitation (if so vague a phrase can itself be said to be precise) that no action can be taken that ‘extends’ a particular control of a particular commodity is, in their Lordships’ view, a radical misunderstanding of the true nature of such legislation”.

Again, at page 449 their Lordships remarked:

"In their Lordships' view there is no better way of approaching the interpretation of this Act than to endeavour to appreciate the general object that it serves and to give its words their natural meaning in the light of that object. There are many so-called rules of construction that courts of law have resorted to in their interpretation of statutes, but the paramount rule remains that every statute is to be expounded according to its manifest or expressed intention. If the Act of 1945 is approached in this way, it is very difficult to see what warrant there is for introducing into it by way of interpretation an implied exclusion of any power in any circumstances to acquire compulsorily any piece of property. For, unless compulsory acquisition is absolutely excluded from the range of things that the Governor may do, any particular exercise of the power is a matter for his discretion and cannot come within the control of the Court".

Again, the observations at page 450 have an important bearing on the question under discussion:

"...And the power of the Executive to pursue these purposes, while the national emergency continues, is conferred by Parliament without express reservation and in the amplest terms that statutory language can employ... Most statutes can be shown to achieve such an encroachment (upon the rights of the subject) in some form or another and the general principle means no more than that, where the import of some enactment is inconclusive or ambiguous, the court may properly lean in favour of an interpretation that leaves private rights undisturbed. But in a case such as the present the weight of that principle is too slight to counterbalance the considerations that have already been noticed. For here the words that invest the Governor with power are neither vague nor ambiguous: Parliament has chosen to say explicitly that he shall do whatever things he may deem necessary or advisable. That does not allow him to do whatever he may feel inclined, for what he does must be capable of being related to one of the prescribed purposes, and the Court is entitled to read the Act in this way. But then, expropriation is altogether capable of being so related".

In my opinion, the principle that should be applied in testing the validity of the Rules framed on the authority of a section which is as widely worded as s. 3 of the Defence of India Act, 1962, is the principle enunciated by the Privy Council in *Attorney-General for Canada's* case. When wide powers have been conferred upon the Central Government and when the Central Government has been given the right to choose the topic in respect of which legislation is to be framed, the principle that would hold good would be the principle whether the Rules framed are capable of being connected with the purposes for which they are intended. In other words, it is not the direct, proximate and intimate connection that should be insisted upon, but some connection which would correlate the Rules with the purposes mentioned in sub-s. (1) or with the matters enumerated in sub-s. (2) of s. 3 of the Defence of India Act, 1962. It may also be pointed out that the principle laid down by the Privy Council in *Attorney-General for Canada's* case has been followed by the same authority in a subsequent case in *Ross-Clunis v. Papadopoulos*.¹⁰ In that case, s. 6 of the Emergency Powers Order in Council, 1939, empowered the Governor to make such regulations as appeared to him to be necessary or expedient for securing the public safety, the maintenance of public order etc. By virtue of this power the Governor issued the Cyprus Emergency Powers (Collective Punishment) Regulations, 1955. The Commissioner passed an order under the said Regulations levying a collective fine of £35,000 after holding an inquiry into the matter as stipulated by the Regulations. In upholding the order, their Lordships referred to the *Attorney-General for Canada's* case and stated that the test laid down there was the correct one to apply. Mr. Mehta tried to distinguish this case by pointing out that the Regulations defined the word 'offence' to mean an offence the commission of which is, in the opinion of the Commissioner, prejudicial to the internal security of the Colony or to the

maintenance of public order in the Colony. He contended that in view of this definition, the Court had no other alternative but to hold that the act of levying collective fine was justified. This argument ignores the circumstance that it was the Regulations which defined the word 'offence' and not the original Emergency Powers Order in Council, 1939. Mr. Mehta tried to distinguish this case also by suggesting that, as a matter of fact, the Privy Council in *Ross-Clunis's* case did come to the conclusion that the Regulations were clearly related to the purposes described in s. 6 of the Order of 1939. It is necessary to note that this observation was made after citing with approval the passage in *Attorney-General for Canada's* case. That means that, according to their Lordships, the Regulations were clearly related to the purposes described in s. 6 of the Order of 1939, because they stood the test laid down in the aforesaid case.

According to me, there are two rival tests, one for testing the validity of a legislation passed by a Legislature whose powers have been defined and limited under the Constitution as also a legislation which makes an encroachment or an invasion upon the fundamental rights of the citizens. In judging the validity of a legislation which encroaches upon the legislative functions of another legislative body or which invades upon the fundamental rights of the citizens, the test which must be followed is the test of direct, proximate and intimate nexus between the exercise of the powers and the authority conferred upon the Legislature. In a matter of this nature, the Court is the sole judge to decide as to whether the powers have been exceeded. Another, in the case of a delegated legislation where there is no inherent lack of jurisdiction in the parent body which delegates the power and where the delegate has been given wide discretion in choosing the topic. In the latter case, the test that will have to be invoked is whether the exercise of the legislative authority is wholly unrelated to the purposes or is not capable of being connected to the purposes for which it is meant to be exercised.

Mr. Mehta contended that the decision given in the case of *Attorney-General for Canada* is of no avail to the Central Government in the present case, because there is no recital in the Rules to show that it appeared to the Central Government either necessary or expedient to proclaim these Rules for securing the various purposes mentioned in cl. 3(1) of the Defence of India Act, 1962. He emphasized that some of the passages in the judgment of the Privy Council in *Attorney-General for Canada's* case indicate that the decision proceeded on the basis of the presence of the recital to the effect that the Governor in Council deemed it necessary or expedient or both to pass the order in question. It is, therefore, necessary to consider the effect of the absence of the recital to the effect that the Central Government deemed it necessary or expedient to frame the Gold Control Rules for any of the purposes mentioned in s. 3(1) of the Defence of India Act, 1962. In this connection, reference may be made to a passage at page 74 of the Halsbury's Laws of England, 3rd edn., Vol. 39, which runs thus:

"It is not open to the court to investigate the necessity or expediency of any defence regulation, and it is bound to assume that an order made under a defence regulation was necessary..."

One of the cases cited in support of the above proposition is *Rex v. Comptroller General of Patents: Bayer Products Ltd., Ex parte*.¹¹ In that case, certain orders were passed by the Comptroller General of Patents regulating the rights of using an enemy-owned patent. Regulation 60E of the Defence (General) Regulations, 1939, was framed under sub-s (1) of s. 1 of the Emergency Powers (Defence) Act, 1939, which set out the purposes for which His Majesty may make regulations. The purposes were:

"...securing the public safety, the defence of the realm, the maintenance of public order and the efficient prosecution of any war in which His Majesty may be engaged, and for maintaining supplies and services essential to the life of the community".

The validity of Regulation 60E was impugned on the ground that it had no relation whatsoever with the object of prosecuting the war. After observing, "...we might have been entitled to say that the purposes stated in the sub-section were wide enough to include the framing of this regulation", Scott L.J. proceeded to say (p. 311):

"Be that as it may, in my opinion, the effect of the words 'as appear to him to be necessary or expedient' is to give to His Majesty in Council a complete discretion to decide what regulations are necessary for the purposes named in the sub-section. That being so, it is not open to His Majesty's courts to investigate the question whether or not the making of any particular regulation was in fact necessary or expedient for the specified purposes. The principle on which delegated legislation must rest under our constitution is that legislative discretion which is left in plain language by Parliament is to be final and not subject to control by the courts. In my view, the sub-section clearly conferred on His Majesty in Council that ultimate discretion..."

In repelling the argument based on the absence of express recital, his Lordship observed on the same page (p. 312) as follows:

"...The Order in Council introducing reg. 60 E of necessity records by implication the fact that His Majesty in Council thought it either necessary or expedient, or both, to extend the powers of the Comptroller under the Patents (Emergency) Act, 1939, s. 3, in the manner stated in the regulation..."

Clauson L.J. has dealt with this question in some detail at page 314:

"...The Order in Council does not contain an express recital that it appears to His Majesty to be necessary or expedient for the purposes mentioned to make this particular regulation, but, as a matter of construction of the order, I am clear (and I do not think that anyone in the course of these proceedings has thrown any doubt on the proposition) that it shows plainly that it did appear to His Majesty to be necessary or expedient to make this regulation".

Again, at p. 315 his Lordship observed:

"...this application for prohibition can succeed only if it is within the power of this court to investigate the action of His Majesty when he stated, as I conceive that His Majesty did in making the Order in Council, that 'this regulation appeared to him to be necessary or expedient for the named purpose. In my view, this court has no jurisdiction to investigate the reasons or the advice which moved His Majesty to reach the conclusion that it was necessary or expedient to make the regulation. The legislature has left the matter to His Majesty and this court has no control over it. I know of no authority which would justify the court in questioning the decision which His Majesty must be taken to have stated that he has come to, namely, that this regulation is necessary or expedient for the specified purposes. If His Majesty once reaches that conclusion with regard to a regulation, that regulation, when made, is the law of the land, subject to the provision in the Act that, if either House of Parliament takes a view differing from that on which His Majesty has acted, the order can be annulled".

Again, a little later his Lordship stated:

"...His Majesty formed the view that it was necessary or expedient, for the purposes mentioned, to make the regulation, and, so far as this Court is concerned, there is an end of the matter..."

It would thus be clear that no importance can be attached to the absence of a specific recital as a preamble to the Rules framed.

I should not be supposed to hold that in no case it is open to the Court to hold a judicial scrutiny in the matters on which the Rules have been framed. The Privy Council in *Attorney-General for Canada's* case at p. 450 has indicated that when the instrument impugned is ambiguous it will make room for judicial inquiry. Their Lordships have observed at page 450 as follows:

"It is fair to say that there is a well-known general principle that statutes which encroach upon the rights of the subject, whether as regards person or property, are subject to a 'strict' construction. Most statutes can be shown to achieve such an encroachment in some form or another, and the general principle means no more than that, where

the import of some enactment is inconclusive or ambiguous, the court may properly lean in favour of an interpretation that leaves private rights undisturbed. But in a case such as the present the weight of that principle is too slight to counterbalance the considerations that have already been noticed. For here the words that invest the Governor with power are neither vague nor ambiguous: Parliament has chosen to say explicitly that he shall do whatever things he may deem necessary or advisable. That does not allow him to do whatever he may feel inclined, for what he does must be capable of being related to one of the prescribed purposes, and the Court is entitled to read the Act in this way".

It is, however, necessary to consider the scope of the judicial scrutiny in a matter like this, because this will also throw light upon the question of the proper test to be applied in judging the validity of delegated piece of legislation. It has been repeatedly stressed that a wide discretion has been conferred on the Central Government to make a choice of the topics in respect of which it considered it necessary or expedient to make the Rules for the stated purposes. I have also laid emphasis upon the wide range of the purposes mentioned in s. 3(1) of the Defence of India Act, 1962. I have also pointed out that when such a discretion has been given to the Central Government and when such wide powers have been conferred upon it, the test for judging the validity of the Rules framed would be of a flexible character viz., to consider whether the Rules are wholly unrelated or are not capable of being related to the purposes mentioned in sub-s. (1) of s. 3 of the Defence of India Act, 1962. If the Court comes to the conclusion that the measure is wholly unrelated or was not capable of being connected with any of the purposes mentioned in sub-s. (1) of s. 3, the Court has jurisdiction to strike it down as invalid. But, the Court cannot strike it down merely because it thinks that the measure is not directly connected with the purposes as interpreted by it. It would, therefore, be interesting to review some of the cases that were cited by Mr. Mehta as also by Mr. Bhabha, which will give us a fairly clear idea about the limits of the scope of the inquiry and also incidentally throw light upon the question of the proper test to be applied. In *Chester v. Bateson*¹² Regulation 2A(2) of the Defence of the Realm Regulations, which was framed under s. 2(1) of the Defence of Realm Consolidation Act, 1914, in effect provided that no proceedings for the recovery of possession of a dwelling house in which a munition worker is living and which is situate in a declared area, could be taken without the consent of the Minister of Munitions. The case came up before the King's Bench Division as a case stated by Justices for Lancashire. It was held that the action taken could not possibly have any connection for securing the public safety. It was also pointed out that shutting out all access of approach to the Court was a grave invasion and so grave an invasion could not have been intended to be accomplished by a delegated legislation. Darling J. raised the question at page 833:

"...and I ask myself whether it is a necessary, or even reasonable, way to aid in securing the public safety and the defence of the realm to give power to a Minister to forbid any person to institute any proceedings to recover possession of a house so long as a war worker is living in it".

At page 835, Avory J. observed:

"...This depends upon whether it can be said, on any reasonable construction of the statute, to be a regulation for securing the public safety and the defence of the realm, and, particularly under s. 1, sub-s. 1(e), whether it can be said to be a regulation to prevent the successful prosecution of the war being endangered;..."

He further indicated that a regulation providing that no order for ejection should be made except under the conditions prescribed would probably be held *intra vires* the statute; but the objection which was made to the regulation was that it deprived the King's subjects of their right of access to the Courts of justice. In *Attorney-General v. De Keyser's Royal Hotel*¹³ the Crown took

12 [1920] 1 K.B. 829.

13 [1920] A.C. 508.

possession of a hotel for the purpose of housing the headquarters personnel of the Royal Flying Corps, and denied the legal right of the owners to compensation. It was not disputed that the Act of taking was legal. The only question was whether the denial of the right to compensation could be said to be conducive to any of the purposes mentioned in s. 1(2) of the Defence of the Realm Consolidation Act, 1914. Lord Dunedin at page 523 posed the question in the following way:

"...The question in the case is therefore narrowed to one point and one point only: the Crown having legally taken, is it bound to pay compensation *ex lege*, or is the offer to pay compensation *ex gratia*, as that compensation may be fixed by the Losses Commission, a sufficient offer and an answer to all demands?"

Lord Dunedin held (p. 529):

"...It is clear that under these sub-sections the taking possession of De Keyser's Hotel was warranted, but there was no necessity for the public safety or the defence of the realm that payment should not be made, such payment being, on the hypothesis that the views above expressed as to the Act of 1842 were sound, a necessary concomitant to taking."

It was on that short ground that the action of eviction was held to be *ultra vires*. Both these decisions were relied upon by Mr. Mehta. But, in my opinion, instead of supporting the point of view which he was advancing, these cases show that it is only in cases where the Court feels that the action taken had no connection whatsoever to the purposes of the defence or the safety of the realm, that the action can be declared as *ultra vires*. Mr. Mehta also referred to a decision in *The King v. Commonwealth Court of Conciliation and Arbitration*; *Ex parte Victoria: Victoria v. The Commonwealth*.¹⁴ In that case, sub-regulations 8, 9 and 10 of regulation 29 of the National Security (Supplementary) Regulations, purported to control the holidays and remuneration of members of the public service of the State of Victoria, although they were not engaged in work associated with the prosecution of the war. It was held that the sub-regulations were not within the ambit of the defence power of the Commonwealth. In the leading case *Farey v. Burvett*,¹⁵ to which reference will be made hereafter, the High Court of Australia had held that s. 51(vi) of the Constitution, which related to naval and military defence of the Commonwealth, must be more liberal in times of war than during times of peace. The question that arose in *The King v. Commonwealth Court of Conciliation and Arbitration* was, whether the sub-regulations were justified on the basis of the extended definition of defence. At page 506, Latham C.J. observed:

"...But the most complete recognition of the power and responsibility of Parliament and of the Government in relation to defence does not involve the conclusion that the defence power is without any limits whatever. The existence of the defence power in the Commonwealth Parliament and the exercise of that power do not mean that all governmental power in Australia may, by the action of the Commonwealth Parliament, be concentrated in Commonwealth authorities. The Constitution cannot be made to disappear because a particular power conferred by the Constitution upon the Commonwealth Parliament is exercised by that Parliament."

The learned Chief Justice then proceeded to observe (p. 507):

"But such a result cannot follow if the defence power is regarded as enabling the Commonwealth Parliament to make such laws only as have a real connection with defence."

After citing the passage from the judgment of Isaacs J. in *Farey's* case where the learned Judge used words as 'conceivably' and 'incidentally', Latham C.J. observed (p. 507):

"...In spite of the use of the word 'conceivably', I do not regard the statement of Isaacs J. which I have quoted as meaning more than this, except that, recognizing the great scope and profound national importance of the defence power, it emphasizes the

necessity for care and caution before deciding that a particular measure, put forward as appertaining to defence, in truth and in substance has nothing to do with defence..." At page 509, the learned Chief Justice observed:

"...the defence power should not, in my opinion, be construed as an unlimited legislative power. It should be interpreted upon the same principle as that which is applied to other constitutional powers. If the alleged connection between a particular power of legislation and the subject of defence is either non-existent or so attenuated as to be practically non-existent, the legislation cannot be supported under that power..."

Although Mr. Mehta relied upon this case, the observations set out above do not support the proposition he was trying to establish before us, viz., that the connection must be proximate and direct. In *Victorian Chamber of Manufacturers v. The Commonwealth (Industrial Lighting Regulations)*,¹⁶ regulations known as the National Security (Industrial Lighting) Regulations were passed by virtue of the powers conferred by the National Security Act, 1939-40, under which the Minister was given complete control of the interior artificial lighting standards in the industrial premises. It was argued that good lighting was conducive to industrial efficiency and industrial efficiency was important for the effective prosecution of the war and, therefore, the regulations were valid. In repelling this argument, Latham C.J. observed (p. 417):

"...But the same thing might be said of any prescription of standards in factory conditions, or in almost any other conditions affecting human life and well-being. For example, the provision of food, clothing, housing and recreation for workers is required for full industrial efficiency. But, in my opinion, the existence of war does not result in handing over to the Commonwealth general control of these subjects. The existence of war enables the Commonwealth, in my opinion, to deal with war problems and with war-created problems, but it does not produce the result that the Commonwealth Parliament is empowered to legislate upon all subjects whatever."

Starke J. at page 421 stated:

"...The question does not depend upon the vividness of our imaginations or conceptions, but upon the law or the regulation being in substance a law or regulation with respect to the public safety and the defence of the Commonwealth."

At page 422 the learned Judge remarked:

"In the present case the Regulations are wholly unrelated to and unconnected with the public safety and the defence of the Commonwealth... The Regulations in terms go far beyond any purpose of defence and necessarily operate as a general regulation of industrial lighting conditions beyond the power of the Commonwealth."

Williams J. at page 428 stated:

"...I am unable to conceive that the Regulations are required even incidentally for the defence of the Commonwealth. Their whole substance and purpose is to legislate upon a social subject which does not present any features in time of war not present in normal times."

In *Reid v. Sinderberry's* case the respondents were convicted of an offence under the National Security Act, 1939-1943, in that they failed to comply with a direction given under regulation 15 of the National Security (Man Power) Regulations—Statutory Rules 1942 No. 34 as amended. The validity of the Regulation was challenged. I have already cited a passage at page 511 in another connection. At page 514, Rich J. referred to his own observation made in an earlier case to the effect that the powers conferred by the regulation are capable of being used for necessary purposes incidental to the defence of the Commonwealth. At page 515, Starke J. stated:

"...It must have some real connection with defence, afford some reasonable and substantial basis for the conclusion that the law is one with respect to defence..."

In *Wertheim v. The Commonwealth*¹⁷ the Fly and Insect Sprays Order, which was purported to be made under regulation 59 of the National Security (General)

Regulations, declared that the objects of the Order were

"by regulating the manufacture and putting up of fly and insect sprays, to ensure that essential materials, in particular kerosene and thanite, are not wasted through being used in the production of ineffective fly and insect sprays"; it provided that

"a person shall not manufacture or put up any fly spray except under the authority of and in accordance with a licence granted"

pursuant to the Order, and it prohibited the disposal or acquisition of

"any fly spray manufactured or put up in contravention of this Order".

It was held that the Order was not authorised by regulation 59 of the National Security (General) Regulations and was invalid. Williams J. at page 611 stated:

"...That is not a purpose which, on its face, appears to me to have any connection with the defence of the Commonwealth or the effectual prosecution of the war or the maintenance of supplies and services essential to the life of the community..."

Again, at a later stage on the same page, the learned Judge observed:

"...Legislation upon a social subject which does not present any features in time of war not present in normal times is legislation that lies within the legislative province of the States and cannot be enacted by the Commonwealth under the defence power or any delegation of that power".

It may again be pointed out that these cases were relied upon by Mr. Mehta, but none of them assists him in the theory of proximate and direct connection between the delegated legislation and the purposes for which the powers have been conferred on the delegate. Before concluding the review of the Australian cases, reference may be made to a decision in *Miller v. The Commonwealth*¹⁸ which was relied upon by Mr. Bhabha, in support of his proposition that the nexus need not be direct or proximate but that it is sufficient if the legislation is capable of being related to the general purposes. In *Miller's* case, Regulation 7(7) of the National Security (Economic Organisation) Regulations provided that

"the Treasurer may, after consultation with the Committee of the Associated Stock Exchanges of Australia, by order, determine the maximum and minimum prices at which any shares, stock or debentures of a company may be sold".

It was held:

"...that this sub-regulation, when made, was within the defence power (s. 51(vi) of the Constitution) as having a direct relation to the organization of the community for the prosecution of a modern war, and that it was still within that power even after the termination of hostilities".

It was argued that the purposes for which the Regulation was passed could never have had any sufficient bearing on the prosecution of the war or the defence of the Commonwealth. In repelling these contentions, Dixon J. observed (p. 202):

"I am unable to accept these contentions. In my opinion, at the time when these regulations were adopted, a rigid control of dealings in marketable securities might reasonably have been considered essential to the financial and economic organization of the country to sustain its part in the war. It is not for us to pronounce upon matters of finance and economics. When the connection between a challenged provision and the defence power is financial or economic in character, our province is to say whether the Executive Government in which the responsibility is reposed of adopting by regulation measures required for the prosecution of the war, might reasonably consider that the conduct of the war would be likely to suffer if the challenged provisions were not made.

I do not see how we can say that it might not reasonably be considered that, in the financial or economic exigencies of the war, it was necessary to avoid the inflation or deflation of marketable securities and to control transactions, dealings, or operations

which might lead to booms and slumps, or which might form a factor in absorbing funds otherwise available for government loans or other purposes...

On a question of *ultra vires*, when the end is found to be relevant to the power and the means not inappropriate to achieve it, the inquiry stops. Whether less than was done might have been enough, whether more drastic provisions were made than the occasion demanded, whether the financial and economic conceptions inspiring the measure were theoretically sound, these are questions that are not in point. They are matters going to the manner of the exercise of the power, not to its ambit or extent. The principles deducible from a review of the cases referred to above are that the scope of judicial inquiry is limited and that the Court can set aside the Rules if on the face of them, the Rules appear to be wholly unrelated or if it is found on examination that they are not capable of being related to any of the purposes mentioned in s. 3(1) of the Defence of India Act, 1962.

That takes me to the question as to whether the Gold Control Rules would fall either firstly under cl. (33) of sub-s. (2) of s. 3 of the Defence of India Act, 1962, or secondly, under the general purposes mentioned in sub-s. (1) of s. 3 of the said Act. The first purpose in sub-s. (1) of s. 3 of the Act is "securing the defence of India and civil defence". Entry No. 1 of List I, Seventh Schedule, of the Constitution of India, is in the following terms:

"Defence of India and every part thereof including preparation for defence and all such acts as may be conducive in times of war to its prosecution and after its termination to effective demobilisation".

It may be interesting to refer to sub-s. (vi) of s. 51 of the Australian Constitution which relates to the power of the Commonwealth Parliament to legislate on matters of defence:

"(vi) The naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth".

The scope and ambit of this sub-section came up for consideration in *Farey v. Burvett* wherein the validity of the War Precautions Act No. 10 of 1914 as amended by Act III of 1916 was impeached. The Act No. III of 1916 purported to authorise the Governor General to make such regulations as he thinks desirable for the more effectual prosecution of the war, or the more effectual defence of the Commonwealth etc. In dealing with the question as to whether the expression "defence power" has the same meaning at all times whether in peace or in war, Barton J. observed as follows (p. 449):

"...Subjects which before that battle seemed only indirectly or remotely connected with defence as the means of winning the war may after the battle be seen quite clearly to be within it. It may be, as Sir William Irvine urged, that the power does not change. If that is so it is because of the perspective of affairs: because the power looks narrower in peace, when it is not in the foreground of our view than it does as a means of present war when war brings us into close contact with it—when its exercise becomes the most vital of our activities. It may be that the power does not become enlarged in war, but that when seen closely we know how large it is in relation to existing war. Then at least we are able to envisage the reach of its long arm. If the thing be capable, during war, of aiding our arms by land or sea, here or elsewhere, we are to say so, but we say no more. It may be wholly beside the mark in peace, and, if it be so, we are to say so upon due occasion. But the necessity is not for us, when facts of which we take judicial notice establish that the thing is capable of aiding directly the execution of the power. If it is thus capable, then the question of the necessity, or the wisdom or expediency, of invoking such aid, is for Parliament or its duly delegated authority". It is significant to note that the action fixing the highest price for bread within the limits of a certain locality was held to be *intra vires* the powers of the Commonwealth Parliament conferred by s. 51(vi) of the Australian Constitution as interpreted by the learned Judges. Now, entry No. 1 in List I of the Seventh Schedule of our Constitution is more widely worded. Not only it relates to the defence of India but also includes

"preparation for defence and all such acts as may be conducive in times of war to its prosecution and after its termination to effective demobilization".

We have to examine the Gold Control Rules in the light of the wider language of the entry relating to the defence of India. The observations of the High Court of Australia in *Farey v. Burvett* will apply with greater force in interpreting the words "the defence of India" in view of the wider definition of that expression in entry No. 1 of List I of the Seventh Schedule.

In my view, the Gold Control Rules are clearly referable to cl. (33) of sub-s. (2) of s. 3 of the Defence of India Act, 1962. Clause (33) runs thus:

"controlling the possession, use or disposal of, or dealing in, coin, bullion, bank notes, currency notes, securities or foreign exchange".

Reference was made to the dictionary meaning of the word 'bullion' as that word has not been defined in the Defence of India Act, 1962. In general, by bullion is meant 'gold or silver in mass or in lump'. Mr. Mehta's argument was that, since the clause speaks of 'bullion' it would not be logical to hold that the Gold Control Rules, which are meant for imposing prohibitions and restrictions upon the making of ornaments and also on the sale and exchange of ornaments, would fall within the ambit of cl. (33). In the first place, it is necessary to remember that several matters have been brought together under cl. (33). These are coin, bullion, bank notes, currency notes, securities and foreign exchange. The object appears to be that the Central Government should have powers to make rules relating to all matters which affect the economic and financial stability of the country during the period of emergency. Clause (32) of sub-s. (2) of s. 3 of the said Act prohibits the import or export of goods or articles of any description including coin, bullion, bank notes, currency notes, securities and foreign exchange. It is thus clear that the object of the matters mentioned in cl. (33) was to regulate the possession, use or disposal of coin, bullion etc. in the internal market of the country. Although the expression 'gold bullion', by itself, may not include gold ornaments, still it is necessary to note that the word 'bullion' is preceded by such words as 'controlling the possession, use or disposal of, or dealing in'. It is not merely the possession of the bullion, not merely the disposal of or dealing in the bullion in respect of which rules may be framed, but it is also in respect of the use of the bullion. Mr. Mehta suggested that the object underlying cl. (33) was to control dealings in bullion or the transfer or possession of bullion from one hand to other. If that were the only object of cl. (33), it was wholly unnecessary to add the word 'use' in that clause. To my mind, the use of gold bullion would include the turning of gold in mass or in lump into ornaments. In the absence of power to control the use of bullion by placing restrictions in respect of turning the bullion into gold ornaments, the power conferred by cl. (33) would have been wholly inconsequential and would not have served any useful purpose. In my view, therefore, full meaning must be given to the expression 'controlling the possession, use or disposal of, or dealing in, coin, bullion' etc., so that all these activities can be controlled by framing adequate rules in respect thereof. Financial or economic stability is one of the important considerations so far as defence of the country is concerned and without adequate control on the use of the bullion, it would be difficult to maintain such stability, because gold is a commodity of international exchange and importance.

Assuming that the Gold Control Rules do not fall within the purview of cl. (33) of sub-s. (2) of s. 3, then they can fall within the general purposes mentioned in sub-s. (1) of s. 3 of the said Act, and I am entirely in agreement with the view expressed by my learned brother in that respect. There is no substance in the argument advanced by Mr. Mehta to the effect that under the guise of advancing the purpose of the defence of the country, what is attempted is to introduce a socio-economic measure. It is undisputed that smuggling of gold involves a heavy drain on the foreign exchange resources of India. Smuggling, therefore, has to be checked. The measures undertaken under the Sea

Customs Act and the Foreign Exchange Regulations have not achieved the purpose of checking smuggling. Once gold is successfully smuggled into this country, it is very easy for the same to find a place in the internal market. It can be easily turned into ornaments and once transformed in the shape of ornaments, it is impossible to recognise that the ornaments have been prepared out of the smuggled gold. The ornaments thus prepared can easily pass off as having been made out of the existing stock or out of indigenous gold. This capacity for quick transformation into ornaments is the principal difficulty in the way of preventing smuggling. Smuggling will continue notwithstanding the enactment of stringent measures so long as it is profitable to smuggle. The trade of smuggling will continue to be profitable so long as people have a hankering or a lure for gold. The best method of preventing smuggling, therefore, is to bring about a shrinkage in the demand for gold. It is for that purpose that the control and restriction on the manufacture and sale of gold ornaments appears to have been devised. It is true that the fondness for gold, or to use the words often used by Morarji Desai, the then Finance Minister, the lure for gold is deep-seated in the habits of the Indian people and would not be removed overnight or within a short period. In that sense, it is undoubtedly a long term measure i.e., making people to change their age-old habits. In the same sense, it can be styled as a measure of social reform. But the mere fact that it is also a measure of social reform and the further fact that it is a long term measure do not by themselves turn what is essentially a measure for bringing about economic and financial stability, into a social measure. Mr. Mehta contended that in trying to correlate the Gold Control Rules to one of the purposes viz., defence of India, we have to take recourse to a chain of long and circuitous causation. He argued that if one link in the chain snaps, then the entire chain breaks down. According to him, the success of the measure is also problematical. He went so far as to say that the measure has failed to achieve the desired effect. He then went on to suggest alternative measures if the object was to promote the defence of the country. According to him, instead of imposing restrictions upon the manufacture and sale of gold ornaments, it would be more worthwhile if gold had been expropriated by the Government and utilised for war purposes. I do not think that the chain of causations is in any way circuitous or tortious as suggested by Mr. Mehta. There is a direct link between the objective viz., to prevent smuggling and thus reducing the drain on foreign exchange, and imposing the restrictions that have been imposed under the Gold Control Rules. Nor are we concerned with the question of alternative ways of achieving the desired effect. We are not concerned with the effects of the gold control policy, nor with the soundness of that policy, because that is a matter for the Parliament to decide. Incidentally, I may refer to the provisions of s. 41 of the Defence of India Act, 1962, which requires that the rules made by the Central Government must be placed on the table of each House of Parliament. Section 41 empowers the Parliament either to cancel or modify the rules. As a matter of fact, the Gold Control Rules were placed before the Parliament and they have neither been cancelled nor in any way been modified by the Parliament. That means that the policy underlying these Rules has not been rejected by the Parliament. Mr. Mehta's argument viz., that the framing of the Gold Control Rules amounts to a colourable exercise of the powers because there were already other measures which could have been pressed into service for preventing smuggling or because the new Customs Bill was on the anvil of the Parliament, is without substance. It was contended before the Supreme Court in *Makhan Singh's* case that in view of the existence of the Preventive Detention Act under which orders for detention could be made, Rule 30 made by virtue of the powers conferred upon the Central Government under s. 3 of the Defence of India Act amounts to a colourable piece of legislation. The argument relating to a colourable piece of legislation is essentially an argument about

the competency of the Legislature. The Supreme Court in rejecting the argument observed (p. 401):—

"...If the legislature thought that having regard to the grave threat to the security of India posed by the Chinese aggression, it was necessary to pass the impugned Act notwithstanding the fact that another Act had already been passed in that behalf, it would be difficult to hold that the legislature had acted *mala fide* and that the Act must, therefore, be struck down as a colourable exercise of legislative power. It is hardly necessary to emphasise that a plea that an Act passed by a Legislature competent to pass it is a colourable piece of legislation, cannot succeed on such flimsy grounds..." I agree with my learned brother in the ruling that he has given viz., that the two speeches of Morarji Desai, the then Finance Minister, one on the All-India Radio on the eve of the proclamation of the Gold Control Rules and the other made in the Parliament when the Gold Control Rules were placed on the Table under s. 41 of the Defence of India Act, are relevant. I also agree with the view taken by him that neither the speech made by the Deputy Minister on the floor of the Parliament while introducing the new Customs Bill nor the speech made by T. T. Krishnamachari, the present Finance Minister while discussing the working of the Gold Control Rules, has any relevance to the question under consideration. I also agree with the view taken by my learned brother viz., that the petitioners cannot impugn the Gold Control Rules as violative of the fundamental rights under arts. 25 and 26 of the Constitution on the state of the averments contained in the petition.

P. C. The rule is, therefore, discharged. Having regard to the fact that a large number of dealers, small and big, have been affected by the Gold Control Rules and having regard to the importance of the matter, there will be no order as to costs.

Rule discharged.

APPELLATE CIVIL.

Before the Hon'ble Mr. H. K. Chinnani, Chief Justice, and Mr. Justice Gokhale.

KISAN SUPDU INGALE

v.

THE BHUSAWAL BOROUGH MUNICIPALITY.*

Bombay Municipal Boroughs Act (Bom. XVIII of 1925), Sec. 73—Constitution of India, Arts. 246(3), 276, 14; Seventh Schedule. List II. Entries 60, 5—Municipality whether can levy tax on service—"Employments" in entry 60, List II, Sch. VII whether includes service—Delegation of power to municipalities to impose tax on professions, trades, callings and employments whether constitutional.

A municipality which is governed by the Bombay Municipal Boroughs Act, 1925, is competent to levy a tax on service in which a person is employed to work for another under s. 73 of the Act.

The word "employments" in entry 60 in List II, in Schedule VII to the Constitution of India includes service or occupation in which a person works for another and in which there is a relationship of employer and employee.

Walati Ram v. Rupar Municipality,¹ referred to.

The delegation of the power to the municipalities governed by the Bombay Municipal Boroughs Act, 1925, to impose a tax on professions, trades, callings and employments, is not unconstitutional.

Western India Theatres v. M'pal Corpn., Poona,² applied.

Calcutta Corporation v. Sarat Chandra,³ observations of Bachawat J. at p. 714 in, agreed with.

Shanmugha Oil Mill v. Market Committee,⁴ dissented from.

Hirabhai Ashabhai v. State of Bombay,⁵ referred to.

*Decided, January 6, 1965. Special Civil Application No. 677 of 1963.

¹ [1960] A.I.R. Punj. 689.

² (1955) 61 Bom. L.R. 954, S.C.

³ [1959] A.I.R. Cal. 704.

⁴ [1960] A.I.R. Mad. 160.

⁵ (1954) 56 Bom. L.R. 1035.

THE facts appear in the judgment.

M. S. Ramamurthy and *T. Godiwala*, for the petitioner.

S. B. Bhasme, for opponent No. 1.

T. R. Andhyarujina, instructed by *Little & Co.*, for opponent No. 2.

CHAINANI C. J. The petitioner is employed in the Carriage and Wagon Depot of the Central Railway at Bhusawal. This Railway Depot is situated within the limits of the Bhusawal Borough Municipality. This Municipality is governed by the Bombay Municipal Boroughs Act, 1925. Section 73 of this Act specifies the taxes, which a municipality may impose. Sub-section (1) of this section states that subject to any general or special order, which the State Government may make in this behalf, and to the provisions of ss. 75 and 76, a municipality may impose for the purposes of this Act any of the following taxes, namely:—...

(xiv) any other tax which under the Constitution the State Legislature has power to impose in the State.

Section 75 lays down the procedure which a municipality has to follow before imposing a tax. One of the taxes which the State Legislature has power to impose is a tax on professions, trades, callings and employments under entry No. 60 in List II in the Seventh Schedule to the Constitution. In 1959 the Bhusawal Municipality decided to impose this tax. It framed rules and by-laws for levying this tax. These rules and by-laws were sanctioned by the State Government on June 22, 1960. Clause (c) in r. 3 of the Bhusawal Trade, Professions, Callings and Employments Taxes Rules, states that

"every person who holds any office of profit under any Government or any body or authority either private or public or under any individual within the local area for not less than four months in any year shall pay the tax every year on employment at the rate specified in Schedule A; provided that the total amount payable in respect of any company or person to the Municipality by way of the tax shall not exceed Rs. 250 per annum." The rates of tax are specified in Schedule A to the Rules. Except in the case of owners of cotton ginning and pressing factories, in whose case the maximum tax payable is Rs. 100, the maximum tax which any other person is liable to pay under these rules is Rs. 10 per year. On October 17, 1962, the petitioner was called upon by the Chief Officer of the Municipality to pay Rs. 6, being the amount of the tax for the year 1962-63 due from him. The petitioner did not pay this tax. A Union of the railway employees made representations against this tax to the Municipality, but it did not succeed. The petitioner then filed the present special civil application, in which he has challenged the validity of the tax as well as of the notice issued to him by the Chief Officer calling upon him to pay the tax.

Mr. Ramamurthy on behalf of the petitioner has first urged that the Municipality was not competent to levy a tax on any employment in the nature of service, in which a person is employed to work for another. He has contended that the word "employments" should be construed *ejusdem generis* with the other words mentioned in entry 60 in List II in Schedule VII to the Constitution, professions, trades and callings and that it means "such employments which are akin to or in the nature of professions, trades and callings." We have carefully considered this argument, but we do not think that there is much merit in it. If entry 60 was intended to include every occupation other than service, it is difficult to see why the word "employments" was used at all. The words are used in an entry in the Constitution. Every word must, therefore, be deemed to have been used with some object and no word can be held to be redundant. The words "profession, trade and calling" are also general words, which according to the dictionary have wide meanings. "Profession" as defined in the Oxford English Dictionary means

"a business or profession that one publicly avows; the occupation which one professes to be skilled in and to follow; a vocation in which a professed knowledge of some

department of learning or science is used in its application to the affairs of others or in the practice of art founded upon it; in a wider sense: any calling or occupation by which a person habitually earns his living."

"Trade" according to the same dictionary means

"the practice of some occupation, business, or profession habitually carried on, especially when practised as a means of livelihood or gain; a calling; now usually applied to mercantile occupation and to a skilled handicraft, as distinct from a profession, and especially restricted to a skilled handicraft as distinguished from a professional or mercantile occupation on the one hand, and from unskilled labour on the other."

"Calling" is defined in the same dictionary as meaning

"position, estate, or station in life; rank; ordinary occupation, means by which livelihood is earned; business, trade."

Any occupation by which livelihood is earned would, therefore, fall within the words "professions, trades and callings." Consequently, even if we were to accept the argument that the word "employments" must be construed *ejusdem generis* and that it draws its meaning from these words, it will be difficult to hold that service, in which a person is employed to work for another, would not be employment within the meaning of entry 60 in List II in Schedule VII to the Constitution.

In this connection I may refer to the decision of the Punjab High Court in *Waliat Ram v. Rupal Municipality*.¹ Section 61 of the Punjab Municipal Act empowered a municipal committee to levy a tax on persons practising any profession or art or carrying on any trade or calling in the municipal area. The section in terms did not empower a municipal committee to impose a tax on employments. The question which arose for consideration by the Punjab High Court was whether a person employed in private employment of a Bus Syndicate could be said to be carrying on a profession or calling and whether he was consequently liable to the tax imposed under s. 61 of the Act. It was argued that "employment" was not covered by the other three expressions used in the section, profession, trade or calling. This argument was negatived and it was held that as the words were used in an entry in the Constitution, they must be construed in their widest amplitude and that consequently the person employed by the Bus Syndicate must be held to have been carrying on a profession or calling. At page 672 it was observed:

"...It is very difficult to hold that the framers of the Constitution while using these words were using them as terms of art. The object of the entry is to enable the State Legislature to tax persons, who are carrying on any 'professions', 'trades', 'callings' and 'employments'... These four words do not seem to be used in a mutually exclusive sense. These words overlap one another and appear to have been used by way of abundant caution in order to make these provisions broadbased and comprehensive... the object of putting them all together is to ensure that no particular category of persons is being eliminated."

"Employment", according to the same Oxford English Dictionary means

"the service (of a person); a person's regular occupation or business; a trade or profession."

Another meaning of this word given in the Dictionary is "an official position in the public service."

In Webster's dictionary some of the meanings of the word "employment" given are:

"Activity in which one engages and employs his time and energies; work (as customary trade, craft, service or vocation) in which one's labour or services are paid for by an employer; the state of being employed."

Employment therefore is also a word of wide import and the object of including this word also in the relevant entry in the Constitution evidently was to bring within the scope of this entry every activity or occupation, in which a

person engages in order to earn a livelihood, whether it be trade, business, profession or service. In any case the word "employments" would include service or occupation, in which a person works for another and in which there is a relationship of employer and employee. A tax on service, in which the petitioner is employed, could, therefore, be imposed under entry 60 referred to above.

The next ground of attack is that there has been excessive delegation by the State Legislature, inasmuch as while authorising the municipalities to levy this tax, the Legislature has not laid down any policy or rules of guidance which a municipality should follow in levying the tax. It has been argued that the power conferred on municipalities is not regulated or controlled in any manner, that it has been left to the municipalities to levy the tax at any rate they deem proper and that, consequently, s. 73 of the Act, in so far as it empowers a municipality to levy this tax, is unconstitutional. Entry 5 in List II of the Seventh Schedule to the Constitution, in so far as it is relevant, reads:

"Local Government, that is to say, the constitution and powers of municipal corporations... for the purposes of local self-government..."

This entry is very wide in its terms and art. 246(3) of the Constitution read with this entry empowers a State Legislature to make laws in regard to any subject of local government, including the constitution and powers of municipalities. The powers which a State Legislature may confer on municipalities can only be those powers which it possesses. A law made by a State Legislature may, therefore, empower municipalities to levy one or more of the taxes specified in List II in the Seventh Schedule to the Constitution. Article 276 of the Constitution also contemplates that a tax on professions, trades, callings and employments may be levied by a municipality.

The rate at which this tax may be levied under s. 73 of the Municipal Boroughs Act has been left to each municipality to decide. Mr. Ramamurthy has, therefore, contended that cl. (xiv) in s. 73 of the Act is invalid. He has relied on *Shanmugha Oil Mill v. Market Committee*,² in which it has been held that the rate of tax is an essential part of a taxing provision and where power is vested in the executive to fix such rate as it pleases, the taxing provision would be invalid. Since, however, the power to levy taxes is conferred on a Municipality for carrying on the local government, it seems to us doubtful whether merely because the Legislature has left to each municipality to determine the rate at which it should levy the tax, it can be said that the Legislature has made excessive delegation of the powers vested in it. Moreover the power given to the Municipality to levy a tax on professions, trades callings and employments is not absolute or uncontrolled, as has been argued. The maximum rate at which the tax can be levied is determined by art. 276 of the Constitution and it cannot exceed Rs. 250 per annum. The tax can be levied only for purposes of the Act, that is, in order to enable the Municipality to discharge the obligations imposed upon it by the Act. It must, therefore, have some relation to the needs and requirements of the Municipality. The circumstances and conditions of municipalities vary. In fixing the rate of tax the capacity of those on whom the liability will fall to bear the burden has to be taken into consideration. A rate of tax which residents of a large and prosperous city may be able to bear may be too heavy for people residing in a small town. Every town and city is also growing and as the duties and responsibilities of a municipality increase the need for additional taxation will arise. It is probably on account of these and other similar considerations that it has been left to each municipality to decide the rate at which it should levy the tax. Since, however, the rate of tax is to be determined having regard to the resources required by a municipality for performing its statutory duties, it cannot be said that the power given to a municipality to fix the rate is entirely unfettered or uncontrolled.

In *Hirabhai Ashabhai v. State of Bombay*,³ the challenge was to s. 169 of the Bombay Municipal Corporation Act, which empowers the Municipal Commissioner to charge for water according to measurement at such rate as shall from time to time be prescribed by the Standing Committee in this behalf. Whereas in the case of some other taxes such as the general tax and the halalkhor tax, the Act has specified the maximum rate at which the tax can be levied, no limit has been prescribed in regard to the water rate. It was, therefore, contended that s. 169 was invalid as "the Legislature had given no indication of its policy as to the ceiling of the rate which can be charged for the supply of water" and as "it was left entirely to the absolute and unfettered discretion" of the Corporation. This argument was not accepted, as it was held that the Legislature intended that there should be relationship between the rate charged and the cost of providing a water supply.

It may also be pointed out that before a municipality imposes any tax, it has to follow the procedure laid down in s. 75. It has to invite objections from the inhabitants of the Municipal Borough to the levy of the tax. It is required to take into consideration any objection which any inhabitant of the Municipal Borough may raise to the imposition of the tax or to the amount or rate proposed or to the classes of persons or property to be made liable there-to or to any exemptions proposed and unless it decides to abandon the proposed tax, it has to submit such objections with its opinion thereof and any modifications proposed in accordance therewith to the State Government. No tax can also be imposed without the sanction of the State Government. Limitations have, therefore, been placed on the powers of a municipality and it does not enjoy absolute powers in this behalf.

Mr. Ramamurthy has relied on the decision of a single Judge of the Calcutta High Court in *Sarat Chandra v. Calcutta Corpn.*,⁴ that s. 229 of the Calcutta Municipal Act, which empowers the Municipal Corporation to levy a license fee on certain classes of advertisements "at such rate and in such manner and subject to such exemptions as the Corporation may prescribe by rules with the approval of the State Government," was invalid. There was an appeal against this decision. The appeal was heard by a Division Bench of the High Court, see *Calcutta Corporation v. Sarat Chandra*.⁵ The two learned Judges who heard the appeal differed on the question whether the delegation made by s. 229 of the Calcutta Municipal Act was constitutionally permissible. Das Gupta C.J. held that the legislation in so far as it left the determination of the rate of the tax to the Corporation with the approval of the State Government was beyond the limits of permissible delegation and was invalid. Bachawat J. took a different view and held that the legislation was valid. At p. 714 Bachawat J. observed:

"The Calcutta Municipal Act...is a law with regard to Local Self Government. It provides for the municipal affairs of Calcutta including levy and collection of taxes by the Corporation of Calcutta...It empowers the Corporation of Calcutta to prescribe the rate of taxation by rules with the approval of the State Government. Subject to such approval the Corporation may fix such rate as it thinks fit. The object of the section is to increase the resources of the Corporation. The Legislature intended that the rate would be so fixed as would best serve that purpose. The Corporation is expected to impose such taxation as may be necessary or expedient for the fulfilment of the several duties imposed on it by the Act. The power of taxation is given for purposes of Local Self Government. Such a delegation is permissible in law."

With respect, we agree with these observations.

Any doubt on the question of the tax being *ultra vires* on the ground of excessive delegation by the State Legislature of its powers is removed by the decision of the Supreme Court in *Western India Theatres v. M'pal Corp., Poona*.⁶ In that case the Supreme Court had to consider the validity of

3 (1954) 56 Bom. L.R. 1035.

4 [1959] A.I.R. Cal. 36.

5 [1959] A.I.R. Cal. 704.

6 (1959) 61 Bom. L.R. 954, S.C.

cl. (xi) in sub-s. (1) of s. 59 of the Bombay District Municipal Act. This clause empowered a Municipality to levy any other tax, to the nature and object of which the approval of the Governor in Council shall have been obtained prior to the selection contemplated in sub-cl. (i) of cl. (a) of s. 60. The Supreme Court held that the delegation of power to impose the tax could not be struck down as being in excess of the permissible limits of delegation of legislative functions. The Supreme Court has given three reasons for arriving at this conclusion. The first is that the municipality could not impose any tax which the Provincial Legislature could not itself impose. Secondly, s. 59 authorised the Municipality to impose the taxes therein mentioned for the purposes of the Act and the Municipality could therefore levy taxes only for implementing those purposes and for no other purpose. The tax to be imposed must, therefore, have some reasonable relation to the duties cast on the Municipality by the Act. Thirdly, the taxing power of the Municipality was subject to the approval of the Governor in Council.

For similar reasons, we must hold that the delegation of the power to the municipalities governed by the Bombay Municipal Boroughs Act to impose a tax on professions, trades, callings and employments, is not unconstitutional.

The last argument which has been advanced by Mr. Ramamurthy is that as the other municipalities in which railway employees work have not imposed a similar tax, there is unreasonable discrimination against the railway employees working at Bhusawal. This argument is without any substance. The tax is levied by the Bhusawal Municipality not only on persons employed in the railway, but also on all employed persons including persons employed in private service. Consequently, it cannot be said that the railway employees alone have been selected for the purpose of imposing the burden of tax upon them. Section 73 of the Municipal Boroughs Act specifies several taxes which every municipality is competent to impose. Each municipality has, therefore, to decide, having regard to the conditions prevailing in its municipal area and other circumstances, what taxes and at what rates it should impose. The mere fact that some other municipalities have not levied a similar tax will not, therefore, be a sufficient ground for holding that art. 14 of the Constitution has been contravened.

These are all the grounds on which the validity of the tax has been questioned. For the reasons which I have given, we see no substance in them. The application, therefore, fails. Rule discharged. No order as to costs.

Rule discharged.

Before the Hon'ble Mr. H. K. Chainani, Chief Justice, and Mr. Justice Gokhale.

AMBABAI JANHAVIBAI v. STATE OF MAHARASHTRA.*

Bombay Personal Inams Abolition Act (Bom. XLII of 1953), Secs. 5, 7, 10—Inamdar in possession of uncultivated lands on appointed date—Whether such lands will vest in State Government under s. 7.

Section 7 of the Bombay Personal Inams Abolition Act, 1952, does not apply to lands which on the appointed date were in actual possession of the inamdar even if they were uncultivated lands. Therefore, where it is shown that the lands, cultivated or uncultivated, were in possession of the inamdar on the appointed date, the inamdar would become the occupant of such lands under s. 5 of the Act and such lands will not vest in the State Government under s. 7 of the Act.

Section 7 of the Act deals with lands and other properties, which were not in the possession of any person on the appointed date, while s. 5 of the Act makes provision for lands, which on that date were in possession of the inamdar or some other person.

THE facts are stated in the judgment.

*Decided, January 21, 1965. Special Civil Civil Application No. 1268 of 1963).
Application No. 1267 of 1963 (with Special

G. N. Vaidya, for the petitioner.

M. A. Rane, Assistant Government Pleader, for opponent No. 1.

CHAINANI C. J. The petitioners were the Inamdars of two Inam villages Vinchur and Sayakhede in Niphad Taluka. The Inams were abolished by the Bombay Personal Inams Abolition Act, 1952. In each of the two villages the Inamdars were in actual possession of some Kuran lands. These lands were not sown or cultivated, but grass grew naturally in these lands. The Inamdars used to graze their cattle on these lands and they also used to sell the grass and realised income from it. As the lands were in possession of the petitioners, they were shown as the occupants of the lands. The Collector subsequently felt that they had wrongly been shown as occupants, as in his opinion the lands vested in Government under s. 7 of the Act. A mutation entry was, therefore, made deleting the names of the petitioners. This was objected to by the petitioners. An inquiry was then held under s. 37(2) of the Land Revenue Code in order to decide whether the lands vested in the Government under s. 7 of the Act. The Mamlatdar held that as the lands were uncultivated lands, they vested in Government. This order has been confirmed in appeal by the Deputy Collector and subsequently by the Additional Collector and also by the Revenue Tribunal.

Sub-section (2) of s. 5 of the Act is in the following terms:

(a) An inamdar in respect of the inam land in his actual possession or in possession of a person holding from him other than an inferior holder, referred to in clause (b) below, or

(b) an inferior holder holding inam land on payment of annual assessment only, shall primarily be liable to the State Government for the payment of land revenue due in respect of such land held by him and shall be entitled to all the rights and shall be liable to all obligations in respect of such land as an occupant under the Code or the rules made thereunder or any other law for the time being in force."

This sub-section applies to lands, which on the appointed date, that is, the date on which the Act came into force, were in the possession of the Inamdar or of a person holding from him other than an inferior holder or of an inferior holder. Such lands do not vest in the State Government, but are to be held by the Inamdar or the inferior holders as occupants under the Land Revenue Code. The sub-section does not make any exception in the case of uncultivated lands.

Section 7 of the Act provides:

"All public roads, lanes and paths, the bridges, ditches, dikes and fences, on or beside, the same, the bed of the sea and of harbours, creeks below high water mark and of rivers, streams, nallas, lakes, wells and tanks, and all canals, and water courses, and all standing and flowing water, all unbuilt village site lands, all waste lands and all uncultivated lands (excluding lands used for building or other non-agricultural purposes), which are situate within the limits of any inam village or inam land, shall, except in so far as any rights of any person, other than the inamdar may be established in or over the same and except as may otherwise be provided by any law for the time being in force, vest in and shall be deemed to be, with all rights in or over the same or appertaining thereto, the property of the State Government and all rights held by an inamdar in such property shall be deemed to have been extinguished..."

The explanation to this section states that for the purposes of this section, land shall be deemed to be uncultivated if it has not been cultivated for a continuous period of three years immediately before the appointed date. Under this section, all waste lands and all uncultivated lands, excluding lands used for building or other non-agricultural purposes and excluding rights which persons other than the inamdar had in such lands, vest in the State Government.

The question, which arises for determination, is whether the lands in dispute, in which grass grows naturally but which were in the possession of the

petitioners on the appointed date, vest in the State Government as uncultivated lands under s. 7. Mr. Vaidya, the learned advocate for the petitioners, has contended that as the petitioners were making use of these lands and were realising income by selling the grass which grew thereon, the lands cannot be said to have been uncultivated. We would have found it difficult to accept this argument, since it is admitted that no agricultural operations were carried out on the lands for the purpose of raising or growing grass on the lands. It is, however, not necessary for us to decide this point in these applications, because even assuming that the lands were uncultivated lands, it seems to us that they would not vest in the State Government by reason of the provisions of s. 5.

Section 5 provides for all lands, which on the appointed date were in possession of the Inamdar or of some other person. The section does not make any exception in regard to uncultivated lands in the possession of the Inamdar. Under this section, the Inamdar would become the occupant of all the lands, cultivated and uncultivated, which were in his actual possession, on the appointed date. Section 7 is also in general terms and states that all uncultivated lands, except the rights of any person other than the Inamdar, shall vest in the State Government. There, therefore, appears to be a conflict between the two provisions. It is a well-settled rule of construction that different provisions of the Act must be read together, so as to bring about harmony between them. This can be done by holding that s. 7 applies to lands, which were not in the possession of any person on the appointed date. This is also suggested by the scheme of the Act. Apart from waste and uncultivated lands, the other properties mentioned in s. 7 are public roads, paths, lanes, rivers, canals, etc., which ordinarily are not in the possession of any particular person, but the use and benefit of which are taken by the public in general. Section 7, therefore, appears to deal with lands and other properties, which were not in the possession of any person on the appointed date, while s. 5 makes provision for lands which on that date were in possession of the Inamdar or some other person. It has been urged by Mr. Rane that s. 7 carves out an exception to what is provided in s. 5. This argument does not seem to be correct, because s. 7 refers to many other properties such as public roads, rivers and canals, to which s. 5 does not apply and which ordinarily are not in the possession of any particular person. It has been contended that the intention of the Legislature that such lands should vest in Government is also shown by the fact that in s. 10 it has made provisions for compensation for the abolition or extinguishment of rights in uncultivated lands. This circumstance is not of much assistance, because in many villages there are uncultivated lands, such as lands used for grazing of village cattle, which are not in the possession of any person, but which are set apart or reserved for the use of all the villagers. The Legislature may have considered it desirable to provide for compensation for the loss of the Inamdar's rights, if any, in such lands.

It seems to us that the question whether the Inamdar loses his rights to the lands, which were in his actual possession, but which were not cultivated, should be decided by reading together ss. 5 and 7 and so construing them as to bring about harmony between them, and if this is done, s. 7 will, in our opinion, not apply to lands, which on the appointed date were in actual possession of the Inamdar, even if they were uncultivated lands.

The evidence in these cases shows that the lands in dispute were in possession of the petitioners on the appointed date. Under s. 5 the petitioners, therefore, became the occupants of these lands and these lands do not vest in the State Government under s. 7.

We, therefore, set aside the orders made by the Mamlatdar, the Deputy Collector, the Additional Collector and the Revenue Tribunal.

The petitioners should get their costs from the respondents.

Orders set aside.

APPEAL FROM ORIGINAL CIVIL.

Before Mr. Justice Patel and Mr. Justice Tulzapurkar.

MESSRS. HARINAGAR SUGAR MILLS LTD. v. M. W. PRADHAN.*

Civil Procedure Code (Act V of 1908), O. XL, r. 1—Companies Act (I of 1956), Secs. 434, 439, 433—Proceeding by way of winding-up petition whether a proceeding for realization of property within O. XL, r. 1—Court Receiver managing and administering joint family property—Whether Receiver can file winding-up petition in respect of debt due from company to joint family—Notice under s. 434 of Companies Act whether should demand debtor to make payment only to creditor himself.

A proceeding which is initiated by filing a winding-up petition for realising a debt due to a creditor of the company is a proceeding for realization of the property within O. XL, r. 1(1)(d) of the Civil Procedure Code, 1908.

*Bukhtiarpur Bihar Light Rly. Co. Ltd. v. Union of India,*¹ *Bowes v. The Hope &c., Society,*² *In re General Company for the Promotion of Land Credit*³ and *In re National Permanent Benefit Building Society: Ex parte Williamson,*⁴ referred to.

A Court Receiver appointed in a partition suit who has assumed management and administration of the entire joint family property can file a winding-up petition in his own name in respect of a debt due from the company to the members of the joint family. In such a case under ss. 434 and 439 of the Companies Act, 1956, read with O. XL, r. 1 of the Civil Procedure Code, 1908, the Court Receiver would be a creditor of the Company.

*In re Sacker: Ex parte Sacker,*⁵ *Macoun, In re,*⁶ *K. V. Mallayya v. T. Ramaswami & Co.*⁷ and *Achut v. Shivajirao,*⁸ referred to.

Section 434 of the Companies Act, 1956, does not require that a notice issued under it by a creditor should make a demand upon the debtor to make payment of the debt to himself. It is competent for the creditor to direct his debtor to make payment to a third party under such notice.

THE facts appear in the judgment.

H. D. Banaji, with *S. J. Sorabji*, instructed by *N. C. Dalal & Co.*, for the appellants.

M. R. Parpia, instructed by *Kanga & Co.*, for the respondent.

TULZAPURKAR J. This is an appeal preferred by Messrs Harinagar Sugar Mills Ltd. (hereinafter called "the Company") against the order passed by Mr. Justice Kantawala on September 22, 1964, in Company Petition No. 4 of 1964 admitting the petition and directing the advertisements to be given on and after October 13, 1964 in the "Indian Express" and "Bombay Samachar" and the Government Gazette.

A few facts giving rise to this appeal may be stated. The Company was incorporated in January 1933 and its authorised capital consists of 12,500 equity shares of Rs. 100 each and 25,000 equity shares of Rs. 10 each. The issued and subscribed capital of the Company consists of 7500 shares of Rs. 100 each and 25,000 equity shares of Rs. 10 each. All these shares are fully paid up. Out of this subscribed capital of the Company, 788 equity shares of Rs. 100 each and 14,265 equity shares of Rs. 10 each stand in the name of Narayanlal Bansilal who is the Chairman of the Board of Directors of the Company. Narayanlal Bansilal is also the *Karta* and manager of joint Hindu family consisting of himself, his sons and daughters and the shares standing in the name of Narayanlal

*Decided, December 14, 1964. O.C.J. Appeal No. 87 of 1964; Company Petition No. 4 of 1964.

¹ (1953) 24 Comp. Cas. 507.

² (1865) 11 H.L.C. 389.

³ (1870) L.R. 5 Ch. 303.

⁴ (1869) L.R. 5 Ch. 309.

⁵ (1888) 22 Q.B.D. 179.

⁶ [1904] 2 K.B. 700.

⁷ [1963] II M.L.J. 110, S.C.

⁸ (1936) 39 Bom. L.R. 224.

Bansilal were purchased out of the funds belonging to the joint family. According to the Court Receiver who was appointed Receiver in High Court Suit No. 224 of 1961 and who presented the petition for winding up, a large number of other shares of the Company were also purchased out of the funds belonging to the joint family and were taken in the names of Kishanlal Murlidhar Jayakrishna, Gangadas Gajanan and Sevaram Ranchhoddas as the 'Benamidars' for the joint family.

It appears that prior to March 8, 1956, the joint family of Narayanlal Bansilal owned a sugar farm at Harinagar in the State of Bihar. On March 8, 1956, by a registered conveyance made between Narayanlal Bansilal and his sons Balkrishna Narayanlal, Madhusudanlal Narayanlal and Madhavlal Narayanlal on the one hand and the Company on the other, the said sugarcane farm with all the crops, buildings, agricultural equipments, bridges, tools, pumping sets, live-stock, carts etc. was sold to the Company for rupees forty lakhs. Out of this price of rupees forty lakhs, it appears the Company had paid to the vendors (Narayanlal and his three sons) a sum of rupees ten lakhs on January 31, 1956, and it was agreed that the balance of rupees thirty lakhs should be paid by quarterly instalments of Rs. 2,50,000 each, the first of such quarterly instalment being payable on or before April 30, 1956, and subsequent instalments at the end of each subsequent quarter. The registered conveyance dated March 8, 1956, further provided that if the Company failed to pay the vendors any of the said instalments of Rs. 2,50,000 on the due date, the Company should pay interest at the rate of 5 per cent. per annum to the vendors on the amount of the unpaid instalment. It further appears that after the execution of the conveyance the Company paid to the vendors only two instalments of Rs. 2,50,000 each but failed to pay the remaining instalments aggregating to rupees twenty-five lakhs, and this is the debt which was claimed by the petitioner (the Court Receiver) under a statutory notice and upon neglect to pay the same a winding up petition was presented by the petitioner under following circumstances.

In or about July 1961 Madhusudanlal, one of the sons of Narayanlal, filed a partition suit on the Original Side of this Court being Suit No. 224 of 1961 against Narayanlal and others claiming certain share in the joint family properties and after filing the suit Madhusudanlal took out a Notice of Motion for appointment of Court Receiver as the Receiver of joint family properties. On October 20, 1961, the Court appointed the Court Receiver as the Receiver of all the joint family properties with all powers under O. XL, r. 1, cl. (d), of the Civil Procedure Code. After the Court Receiver thus came on the scene the Court Receiver issued the statutory notice on June 28, 1962, under s. 434 of the Indian Companies Act to the Company requiring the Company to make payment of rupees twenty-five lakhs with interest to the Additional Collector of Bombay and by that notice the Court Receiver further stated that if the said payment was not made within 21 days of the receipt of the notice, proceedings for winding up of the Company will be adopted without any further intimation. On July 17, 1962, the Company sent a reply to the Court Receiver raising several contentions. It was contended that a sum of rupees twenty-five lakhs and odd was not due to the joint family of Narayanlal Bansilal but as per the Company's balance-sheet the said amount was due and payable to Narayanlal Bansilal and his three sons who were the vendors under the conveyance dated March 8, 1956. It was further contended that the instalments due under the registered conveyance could not be paid by the Company on account of a notice of attachment dated July 24, 1956, that had been issued and served upon the Company by the Additional Income-tax Officer, Section V, Central Bombay under s. 46(5A) of the Indian Income-tax Act, 1922. The Company further contended that in any event the claim for rupees twenty-five lakhs had become barred by the law of limitation. In view of these contentions the Company pointed out that there was no question of payment of the said amount of rupees twenty-five lakhs to the Additional Collector of Bombay as required

by the Court Receiver and the Company further informed the Court Receiver that in spite of these facts being brought to his notice if any steps for winding up of the Company were taken, the Company would hold the Court Receiver personally responsible for any loss or damage that may be suffered by the Company on account of such steps being taken. Since the statutory notice that was issued by the Court Receiver on June 28, 1962, was not complied with by the Company, the Court Receiver presented a winding up petition, being Company Petition No. 4 of 1964, on January 10, 1964. After the petition was accepted, notice was issued to the Company and the Company put in affidavit in reply showing cause against the petition. After hearing the parties, the learned Judge by his order dated September 22, 1964, admitted the petition and directed that advertisements be given in newspapers mentioned in his order and in the Gazette. It is against this judgment and order that has been passed by the learned Judge that the present appeal has been preferred by the Company before us.

In this appeal Mr. Banaji on behalf of the appellant-Company has urged two or three technical contentions. In the first place he contended that the Court Receiver who had presented the petition for winding up had no power to present the same under O. XL, r. 1, of the Civil Procedure Code under which he was appointed by this Court in the partition Suit No. 224 of 1961; secondly, he urged that the Court Receiver was not a creditor of the Company within the meaning of s. 434 of the Indian Companies Act and, therefore, was not entitled to file the petition. He further contended that the statutory notice which had been issued by the Court Receiver on June 28, 1962, was invalid and not in accordance with the provisions of s. 434 of the Companies Act. Lastly, he contended that because of the prohibitory order and the notice of attachment that had been issued by the Additional Income-tax Officer under the provisions of s. 46(5A) of the Indian Income-tax Act, the Company could not pay the amount and could not comply with the requisitions contained in the Court Receiver's notice dated June 28, 1962, and therefore it could not be said that there was any neglect on the part of the Company to make payment. Apart from these technical contentions, Mr. Banaji also urged two points on merits. According to him, on the facts and circumstances of the case the petition had been preferred by the Court Receiver at the instance of the sons of Narayanlal out of ulterior motives and it had been filed *mala fide*. Mr. Banaji further urged that the Company was perfectly solvent and therefore the petition ought not to have been admitted and the directions with regard to the advertisements etc. ought not to have been given by the learned Judge. We shall deal with all these points one after the other presently.

In support of his contention that the Court Receiver had no power to present a winding up petition in this case, Mr. Banaji relied upon the provisions of O. XL, r. 1, cl(d) of the Civil Procedure Code and also on the order that had been made by this Court while appointing Court Receiver as the Receiver of the joint family properties. The relevant provisions of O. XL, r. 1, run as follows:

"1. (1) Where it appears to the Court to be just and convenient, the Court may by order—

(a) appoint a receiver of any property, whether before or after decree;

(b) ...;

(c) ...; and

(d) confer upon the receiver all such powers as to bringing and defending suits and for the realization, management, protection, preservation and improvement of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits, and the execution of documents as the owner himself has, or such of those powers as the Court thinks fit."

In this case the order appointing Court Receiver as *ad interim* Receiver of the property was passed on August 28, 1961, in the partition suit filed by Madhu-

sudanlal against Narayanlal and others being Suit No. 224 of 1961 and the said appointment was confirmed by an order dated October 20, 1961. The operative part of the order dated October 20, 1961, runs as follows:

"And it is further ordered that the Court Receiver be and he is hereby appointed Receiver of the properties belonging to the joint family in suit and all the books of accounts papers and vouchers with all necessary powers under Order XL Rule 1 of the Code of Civil Procedure including power to vote and/or exercise all the property rights in respect of the shares belonging to the joint family in the several joint stock companies mentioned in the plaint including power to file suit..."

Relying upon the aforesaid provisions Mr. Banaji in the first place urged before us that the Court Receiver in this case had been specifically clothed with the power to file a suit but in terms he had not been clothed with the power to present a winding up petition. However, it must be observed that apart from the power to file a suit which has been specifically referred to in the order dated October 20, 1961, the said order in terms confers upon the Court Receiver "all powers under O. XL r. 1, of the Code of Civil Procedure". In other words it is clear that all powers under O. XL, r. 1, cl. (d), of the Code of Civil Procedure have been conferred upon the Court Receiver in this case and it is clear that under cl. (d) of sub-r. (1) such powers include not only a power to bring and defend suits but powers "for the realisation, management, protection, preservation and improvement of the property". An attempt was made by Mr. Banaji to suggest that when a specific power to file a suit was conferred upon a Court Receiver, that power merely empowered the Court Receiver to commence all proceedings by filing of a plaint and since a winding up petition was not a proceeding which is commenced by filing of a plaint, the Court Receiver could not present a winding-up petition. In this behalf he relied upon some observations of this Court in the case of *Indrajitsinghji v. Rajendrasinghji*.¹ In our view, it is really unnecessary to consider this argument of Mr. Banaji for the simple reason that cl. (d) of sub-r. (1) of O. XL, r. 1, of the Code of Civil Procedure not only deals with powers which could be conferred upon the Court Receiver for the purpose of filing a suit but with all powers for the purposes of realisation, management, protection, preservation and improvement of the property. In this case under the order dated October 20, 1961, the Court Receiver was clothed not only with a power to file a suit but with all necessary powers for realisation, management, protection and preservation of the property under cl. (d) mentioned above. The only question that need, therefore, be considered is as to whether a proceeding which is initiated by filing a winding-up petition is a proceeding "for the realisation, management, protection and preservation of the property" or not. Mr. Banaji urged that ordinarily a winding-up petition is not the normal mode of realising a debt due to a creditor and that a suit would be the proper remedy for realisation of such a debt by a creditor. According to Mr. Banaji, a winding-up petition is a process by which the Court achieves the object of equitable distribution of debtor's property. In support of his contention Mr. Banaji referred us to the case of *Bukhtiarpur Bihar Light Rly. Co. Ltd v. Union of India*² and the relevant observations on which reliance was placed by him appear at p. 517 which run as follows:

"A winding up order may be a form of equitable execution, but there is no equity in making such an order when" the debt of the creditor is not in peril, although the substratum of the company may be gone, and when matters remain outstanding which can be best attended to in the interests of the shareholders by the company functioning as a company through its directors. A winding up order is not a normal alternative in the case of a company to the ordinary procedure for the realisation of the debts due from it."

Relying upon the above observations Mr. Banaji urged before us that the main object of a winding up proceeding is to ensure the equitable distribution of

the debtor's property. On the other hand Mr. Parpia on behalf of the petitioner relied upon the following passage which occurs in Palmer's Company Precedents, Part II, 1960 edn., at p. 25. The passage runs as follows:

"A winding-up petition is a perfectly proper remedy for enforcing payment of a just debt. It is the mode of execution which the court gives to a creditor against a company unable to pay its debts."

It appears clear that this passage is based upon three decided cases in *Bowes v. The Hope &c. Society*,³ *In re General Company for the Promotion of Land Credit*⁴ and *In re National Permanent Benefit Building Society: Ex parte Williamson*.⁵

In our view, in this case we are not called upon to decide the question as to whether a proceeding which is commenced by filing a winding-up petition is a normal or proper mode of realization of a debt or not. What we are really concerned with is as to whether such a proceeding is a proceeding "for realization of the property". It is true as has been pointed out by Mr. Banaji that the main or dominant object of a winding-up petition is to ensure the equitable distribution of the property of the debtor; but it cannot be forgotten that before there could be any equitable distribution of the property of the debtor amongst his creditors, his property must be first got in i.e. realised and it cannot be disputed that the property of the debtor is realised by filing a winding-up petition. It is no doubt true that the dominant object of a suit is to realise a particular debt, while that of a winding-up petition is the equitable distribution of the debtor's property amongst his creditors but, as we have said above, such equitable distribution must of necessity be preceded by the getting in of all such debtor's property and realisation of all such property. It cannot be disputed that a necessary consequence of filing a winding-up petition is the realisation of all the property of a debtor and thereafter the process of equitable distribution thereof commences. In this view of the matter it is clear that a proceeding which is commenced by filing a winding-up petition is a proceeding for realization of the property and therefore when the Court Receiver was clothed with all the powers under O. XL, r. 1(1)(d) of the Code of Civil Procedure, it must be held that he was clothed with the power to file a winding-up petition for the purpose of realizing the property the benefit of which would enure to all the creditors of the Company. We are, therefore, unable to accept Mr. Banaji's contention that the Court Receiver in the present case had no power to present a winding-up petition.

The next contention of Mr. Banaji is that the Court Receiver cannot be regarded as a creditor of the Company within the meaning of ss. 434 and 439 of the Indian Companies Act, and as such the Court Receiver who was after all an officer appointed by the Court in the partition suit could not by serving a statutory notice on the Company demanding payment of the debt file the winding-up petition. In this behalf Mr. Banaji relied upon a decision of an English Court in *In re Sacker: Ex parte Sacker*⁶ where it was held by the Court of Appeal that a receiver was not a 'creditor' entitled to present a bankruptcy petition against the debtor within the meaning of s. 6 of the Bankruptcy Act, 1883. In that case, in an action in Chancery Division, a receiver was appointed to collect, get in, and receive the goods comprised in its charge given to the plaintiffs by one of the defendants, including therein any balance of the proceeds of the goods so charged in the hands of the other defendants. An order was subsequently made for the payment by the last mentioned defendant to the receiver of a specific sum being the money received by him in respect of the proceeds of the goods and comprised in the charge. It appears that the receiver was not paid that amount, and the receiver presented a bankruptcy petition against the defendant who was ordered to pay. It was held that the receiver was not a creditor entitled to present a bankruptcy petition. Lord Esher M.R. after pointing out that the position of a receiver was not that of a trustee

3 (1865) 11 H.L.C. 380.

4 (1870) L.R. 5 Ch. 363.

5 (1869) L.R. 3 Ch. 309.

6 (1888) 22 Q.B.D. 179.

and that there was no debt due to him from the particular defendant went on to observe as follows (p. 183):

"...The petitioner is a receiver. He is not a trustee. There is no debt due to him from the appellant. He could not sue for this sum of money in his own name either at law or in equity. Even if he could by the authority of the Court sue for it in his own name, is the money due to him personally either at law or in equity? At law it is certainly not. The debt was due to another person for whom he is not a trustee. The money will not be his when he has got it. Would it be his in equity? I apprehend that he would hold it subject to the authority of the Court, who would deal with it according to the circumstances of the case, but certainly not for his benefit."

Fry, L.J. at page 185 pointed out the general rule as follows:

"...As a general rule, a receiver cannot maintain an action to compel obedience to an order for the delivery of goods or the payment of money to him by a party to the action. There may, no doubt, be exceptional cases in which a receiver can bring an action in his own name—when, for instance, he is the holder of a bill of exchange. In that case he can maintain an action, not because he is a receiver, but because he is the holder of the bill."

It would thus appear that according to the above decision under English law a receiver cannot maintain an action in his own name except in special cases. We may point out that the decision in *Re Sacker* came to be considered by the English Court in a later decision and the general observations made by Lord Esher have been dissented from and have been regarded as being *obiter* and that later decision is *Macoun, In re*.⁷ In this later case the Court of Appeal held that the Receiver who had obtained an assignment of the judgment debt over the creditor could present a bankruptcy petition and it was further held that the decision in *Re Sacker* only decided that the receiver who cannot sue in his own name cannot be a good petitioning creditor. The relevant observations of Vaughan Williams L.J. appear at p. 702 and they run as follows:

"I think those words (referring to the observations of Lord Esher in *In Re Sacker*) go very far to cover the proposition for which Mr. Hansell contended; but it was not really necessary for the case which was before the Court of Appeal that this question should have been determined—that is, the question whether a receiver having a title to sue at law could be a good petitioning creditor. It is plain from the judgments, I think, of each of the Lords Justices that in that case the position of things was such that it was perfectly impossible for the receiver to bring an action to recover the debt either at law or in equity; and therefore I think we must treat these observations of Lord Esher as *obiter*, and one can only look at the case as having decided that a receiver who could not sue could not be by himself a good petitioning creditor. Looking at the judgment of Fry L.J., I observe that he begins by saying that in that case the receiver could not have maintained an action either at law or in equity, and later on he deals with exceptional cases in which a receiver could maintain such an action. One of the cases which he gives is where the receiver is the holder of a bill of exchange, and the other is where he is in possession of chattels, and the chattels are wrongfully detained from him. In these circumstances it seems to me that we ought not to hold the case of *In re Sacker* to be an authority for the proposition that a receiver cannot be a good petitioning creditor even though the state of things is such that he could maintain an action at law... In the present case the receiver happens to be the assignee of a judgment, and I think that being the assignee of a judgment he can be a good petitioning creditor even though when the money is recovered it is recovered for the purpose of enabling the Court of Chancery to deal with it."

The position that emerges from a consideration of the above two cases is that under English law if a receiver could maintain an action at law in his own name, he could be a good petitioning creditor and could present a bankruptcy petition.

In our view, the position in India is more clear and unambiguous. Order XI of the Civil Procedure Code deals with appointment of receivers and under

r. 1 a receiver could be empowered to bring and defend actions and for the realization, management, protection, preservation and improvement of the property. It is well settled that once a receiver is appointed by a Court under O. XL, r. 1, of the Code of Civil Procedure with all the powers mentioned in cl. (d) of sub-r. (1), the property in respect whereof such a receiver is appointed is in the *custodia legis* and no party to the litigation except the receiver is entitled to deal with the property of which he is appointed a receiver. It is also well-settled that such a receiver appointed by the Court is entitled to file a suit in his own name. If necessary we may refer to the decision of the Supreme Court reported in *K. V. Mallayya v. T. Ramaswami & Co.*,⁸ where their Lordships of the Supreme Court have pointed out that "a receiver authorised to collect the debts" is empowered to institute suit therefor and a suit instituted by the Receiver in his own name is perfectly competent. A decision of our Court reported in *Achut v. Shivajirao*⁹ has also taken the same view. Though it is true that the property in respect whereof a receiver is appointed does not vest in the receiver, at the same time it is clear that the receiver so appointed is entitled to maintain action in his own name. In this view of the matter it is clear that though the debt in respect whereof a statutory notice was issued by the Court Receiver was really due to the members of the joint family, the Court Receiver who had been appointed in a partition suit and had assumed management and administration of the entire joint family properties for the benefit of such parties who may ultimately be found entitled thereto, would be a good petitioning creditor for the purpose of filing a winding-up petition since in our view it is clear on authorities that such a receiver is entitled to maintain an action in his own name. Reading the provisions of ss. 434 and 439 of the Companies Act along with the provisions of O. XL, r. 1 of the Civil Procedure Code we are of the opinion that the Court Receiver would be a creditor of the Company and as such was entitled to present the winding-up petition.

The next contention of Mr. Banaji is with regard to the statutory notice that was issued by the Court Receiver under s. 434 of the Indian Companies Act. In this behalf a two-fold contention was urged by Mr. Banaji before us. In the first place he contended that the statutory notice, which was a formal document, as well as the provisions of s. 434 should be strictly construed and so construed the notice in question would appear to be not in conformity with the said provisions. It may be stated that by his said notice dated June 28, 1962, addressed to the Company the Court Receiver pointed out that in the Company's balance sheet for the year ending September 30, 1961, a sum of Rupees twenty-five lakhs and odd was shown as due and payable by the Company to the joint family of Narayanlal Bansilal being the balance of the purchase price of the sugar farm belonging to the joint family purchased by the Company under the registered conveyance dated March 8, 1956, and that since he was appointed a Receiver of the joint family properties in High Court Suit No. 224 of 1961 he was issuing that notice to the Company. By that notice the Court Receiver called upon the Company

"to make immediate payment of the said sum of Rs. 25,00,000/- and interest payable thereon at 5% per annum in the manner above mentioned and to give you notice as I hereby do, that if you will fail to pay the amount to the Additional Collector of Bombay, by whom the debt is attached within 21 days from the receipt of this letter by you. I will, without any further intimation to you, take proceedings for the winding up of the Company."

Incidentally it may be stated that a large amount by way of income-tax arrears and penalty to the tune of rupees thirty-five lakhs and odd was due and payable by Narayanlal Bansilal to income-tax authorities and in respect of the said dues the Additional Income-tax Officer, Section V, Central Bombay, had served a notice dated July 24, 1956, on the Company under s. 46(5A) of the Indian Income-tax Act, 1922, whereby the Additional Income-tax Officer

had called upon the Company to pay to him whatever amount was due from the Company to him or was held by the Company on account of Narayanlal Bansilal in liquidation of the said income-tax dues. The Additional Income-tax Officer had pointed out to the Company that any payment that would be made by the Company to him in pursuance of his notice would in law amount to a good and sufficient discharge of the Company's liability to Narayanlal Bansilal and the officer had further pointed out to the Company that if after service of his notice the Company made any payment to Narayanlal Bansilal, the Company would be held personally liable to the income-tax authorities to the extent to which such payment would be made by the Company to Narayanlal Bansilal. In other words, under the relevant provisions of the Income-tax Act the Income-tax authorities had served a prohibitory order and had in effect attached the debt of rupees twenty-five lakhs and odd in the hands of the Company. It was in these circumstances that the Court Receiver in his statutory notice under s. 434 of the Companies Act had called upon the Company to make payment of rupees twenty-five lakhs and odd to the Additional Collector of Bombay, by whom the debt had been attached, within the prescribed period of 21 days.

With regard to the above notice which was issued by the Court Receiver under s. 434 of the Indian Companies Act, Mr. Banaji's first contention was that the Court Receiver had not called upon the Company to make payment of the debt to himself and that was not in compliance with the provisions of s. 434 of the Companies Act. Mr. Banaji drew our attention to the provisions of s. 434(1)(a) of the Companies Act whereunder a creditor to whom a Company is indebted in a sum exceeding Rs. 500 can serve on the Company a notice calling upon the Company either to make payment of the sum so due or to secure or compound for it to the reasonable satisfaction of the creditor. What was urged by Mr. Banaji was that by the present notice the Court Receiver left no scope to the Company to secure or compound the debt to the reasonable satisfaction of himself by calling upon the Company to make payment of the amount due directly to the Additional Collector of Bombay. Mr. Banaji, therefore, urged that the notice that was issued by the Court Receiver was invalid and not in accordance with the provisions of s. 434 of the Act. We are unable to accept this contention of Mr. Banaji for the simple reason that the section nowhere requires that by such notice the creditor should make a demand upon the debtor to make payment of the debt to himself. It is perfectly competent for the creditor to direct his debtor to make payment to a third party under such notice. Further, we fail to appreciate as to how by issuing a notice in question the Court Receiver put it beyond the reach of the Company to secure or compound for the debt to the satisfaction of the Court Receiver. On receipt of such notice from the Court Receiver, it would have been perfectly open to the Company to secure or compound for the debt to the reasonable satisfaction of the Court Receiver if the Company were so minded to do so. On the other hand, what we find is that the Company by its reply dated July 17, 1962, raised various disputes with regard to their liability of the said debt by contending that debt was not due to the joint family of Narayanlal and others but that it was due and payable to the four individuals from whom the Company had purchased a sugarcane farm. Significantly enough, we may point out that this difficulty which is now being put before us by Mr. Banaji has not even been referred to by the Company in its reply dated July 17, 1962. It has nowhere been stated by the Company in its reply that because of the manner in which the notice has been given, the Company had been deprived of its right to secure or compound for the debt to the reasonable satisfaction of the Court Receiver. It is clear on the facts of the case that under the conveyance a sum of rupees twenty-five lakhs and odd was payable by the Company to Narayanlal Bansilal and his sons. There is no dispute that the income-tax dues amounting to more than thirty-five lakhs of rupees were due and payable by Narayanlal Bansilal to the Income-tax authorities and in that behalf the

debt in the hand of the Company had been attached by the Additional Income-tax Officer. This fact is even referred to by the Court Receiver in his statutory notice. After referring to these facts the Company has been called upon by the Court Receiver to make payment of the debt due to the Additional Collector of Bombay obviously for the purpose of liquidating the income-tax dues. In these circumstances it is difficult to accept Mr. Banaji's contention that the notice that has been issued by the Court Receiver is defective or is not in accordance with the provisions of s. 434 of the Indian Companies Act.

Mr. Banaji then contended that there was a bona fide dispute regarding this liability of rupees twenty-five lakhs and odd, for according to the Company the amount of rupees twenty-five lakhs which was payable by the Company under the registered conveyance dated March 8, 1956, was not a debt due and payable to the joint family of Narayanlal Bansilal and his sons but it was a debt due to the four individuals mentioned in the conveyance and, therefore, the Court Receiver was not entitled to serve a statutory notice upon the Company and make a demand for payment of that debt on behalf of the joint family. In this behalf it would be pertinent to note that in the partition suit it was admitted by Narayanlal Bansilal in para. 14 of his affidavit filed to show cause against a Notice of Motion for the appointment of Receiver that the balance of purchase price was payable under the conveyance dated March 8, 1956, to the joint family in respect of Harinagar Sugarcane farm. In the said paragraph Narayanlal Bansilal *inter alia* stated as follows:

"Referring to para. 10(c) of the affidavit I deny there is any manipulation in the Balance Sheet of Harinagar Sugar Mills Ltd. as falsely sought to be suggested by the 3rd defendant. No loan of Rs. 25,00,000/- has been given by me to the said company. The said amount is the balance of the purchase price payable by the said company to the joint family in respect of Harinagar Cane Farm."

It is true, as has been pointed out by Mr. Banaji, that this admission which has been made by Narayanlal Bansilal would not be binding on the Company since a Company is a different entity from Narayanlal Bansilal. But when we are considering the question on merits as to whom the amount was really due it does appear to us that the affidavit filed by Narayanlal Bansilal and the statements made by him in that affidavit would be relevant and could be taken into consideration by us. It cannot be forgotten that Narayanlal Bansilal was a Chairman of the Board of Directors of Harinagar Sugar Mills Ltd., and was also the *Karta* and manager of joint Hindu family consisting of himself, his sons and daughters. In view of this dual position which Narayanlal Bansilal occupied at the material time, the admission made by Narayanlal Bansilal in his affidavit which we have quoted above would clearly go to show that the amount of Rs. 25,00,000 being the balance of purchase price was payable by the Company to the joint family of Narayanlal Bansilal and his sons and this admission of Narayanlal would go a long way to indicate that the dispute raised by the Company in its reply in that behalf was not bona fide. On the other hand the contention raised by the Company to say the least was frivolous.

Mr. Banaji then urged that because of the prohibitory order and the attachment that had been levied by the Additional Income-tax Officer on the debt claimed by the Court Receiver in his statutory notice, the Company was unable to comply with the Court Receiver's notice and, therefore, it could not be said that mere non-payment on the part of the Company would amount to a neglect to make payment. In this behalf ss. 439, 433 and 434 of the Indian Companies Act would be material. Section 439 categorises persons who can make an application for winding up of a Company and under that section *inter alia* an application for winding-up of a Company can be presented by any creditor or creditors including any contingent or prospective creditor or creditors. Section 433 provides for circumstances in which a Company may be wound up and under cl. (e) it could be wound up if it is unable to pay its debts. Section 434 provides that under certain circumstances a Company shall be

deemed unable to pay its debts. Court Receiver in this case claiming to be a creditor of the Company presented this petition to the Court for winding-up of the Company and before he presented the petition the Court Receiver had issued and served a statutory notice upon the Company under s. 434 of the Companies Act whereunder a presumption has been raised as regards the Company's inability to pay its debt under certain circumstances. Under s. 434(1) (a) it has been provided that a Company shall be deemed to be unable to pay its debts if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding five hundred rupees then due, has served on the company, by causing it to be delivered at its registered office, by registered post or otherwise, a demand under his hand requiring the company to pay the sum so due and the company has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor. In other words if the conditions which have been laid down in cl. (a) of sub-s. (1) of s. 434 are complied with, the presumption arises that a Company is unable to pay its debt. In order that such a presumption should arise, it is necessary that there must be a creditor to whom the Company is owing a sum exceeding Rs. 500; secondly such a creditor must serve a notice upon the Company by delivering the same at its registered office making a demand for the sum so due and lastly if the Company has neglected to pay the said sum within three weeks of such service of the notice upon it, then the Company would be deemed to be unable to pay its debt. What was urged by Mr. Banaji was that in the present case because the debt had been attached by the Income-tax authorities and a prohibitory order had been issued on the Company, the Company did not make any payment and therefore the presumption with regard to the inability on the part of the Company to pay its debt would not arise because there was no neglect on the part of the Company to make payment of the sum due.

In this behalf Mr. Banaji referred us to a decision of the English Court in *In re European Banking Co.: Ex parte Baylis*.¹⁰ In that case several petitions had been presented for winding-up of a Company and when all the other petitions had been dismissed the question was as to whether the petition which had been presented by a creditor who had only to recover £ 65 from the Banking Company should have been accepted and winding-up order be made on the petition. The petitioning creditor was a creditor of a banking company for only £ 65 and the debt had been attached in Lord Mayor's Court and the question arose as to whether the petition on behalf of such a creditor whose debt had been attached in Lord Mayor's Court should be accepted or dismissed and the Court dismissed the same. Mr. Banaji relied upon the observations of Sir R. T. Kindersley, V. C., which run as follows (p. 522):

"...The question then is, whether, if there were no other Petition than this of Mr. Baylis, an order for winding-up the company ought to be made thereon. Though Mr. Baylis appears as a creditor in the books of the company for £65 (a very inconsiderable sum), the fact is, that before the Petition was presented, an action had been brought against him by one of his creditors in the Lord Mayor's Court, under which this debt, which was assumed to be due to him from the *European Bank*, was attached. It is true that does not absolutely do away with the debt, and he still remains legally a creditor of the bank. But the attachment is more efficacious than a mere stop order, for it seizes the debt into the hands of the Lord Mayor's Court. Under these circumstances, I am of opinion that if this had been the only Petition, the Court would not have made an order upon it to wind up the company, on the ground that the interest of the Petitioner as a creditor is so uncertain in its character, that the Court ought not, upon the ground of that interest, to impose upon the shareholders of the company so great a burden as a winding-up order. Dealing with the Petition as if it had been the only one presented, I shall dismiss it with costs."

In our view, the facts of the present case are clearly distinguishable from the

facts which obtained in the case decided in *In re European Banking Co.* In the first place, from the facts which have been recited in the report it appears that the Court considered the amount due by the banking company to the creditor as a very inconsiderable amount; secondly, the fact that the petitioner's debt had been attached in Lord Mayor's Court was undoubtedly taken in consideration as a result of which it was stated that the attachment had the effect of seizing debt into the hands of Lord Mayor's Court. In those circumstances it was held that the interest of the petitioner as a creditor was very uncertain in its character and, therefore, the petition for winding-up should have been dismissed. In the present case the facts are entirely different. The amount claimed by the Court Receiver on behalf of the joint family is not an insignificant amount. Incidentally it may be stated that the petitioner in his petition had referred to several other debts which the Company owed to other creditors apart from this debt of Rs. 25,00,000 which was payable to the joint family of Narayanlal Bansilal and his sons. Further the most important distinguishing feature, in our view, is that in this case by the statutory notice issued under s. 434 the Court Receiver had in fact called upon the Company to make payment to the Income-tax authorities for the purpose of liquidating the income-tax dues for non-payment of which the debt had been attached. If by the statutory notice the Court Receiver had called upon the Company to make payment of the dues to himself in spite of the attachment that had been levied by the income-tax authorities on that debt, the Company would in that case have been unable to comply with such a requisition because of the attachment levied on that debt. But here the Court Receiver expressly asked the Company to make payment of the debt due to the Additional Collector of Bombay for the purpose of liquidating the income-tax dues for the non-payment of which the attachment had been levied. In these circumstances it is difficult to accept Mr. Banaji's contention that because of the subsisting attachment on the debt at the instance of the income-tax authorities, the Company was unable to comply with the requisitions contained in the statutory notice issued by the Court Receiver. On the other hand, a direct compliance of the statutory notice would have resulted in the payment of the income-tax dues and the attachment obviously would have fallen to the ground. As we have pointed out earlier, without putting forth any such difficulty the Company in its reply raised all sorts of contentions against the liability to pay the amount. In these circumstances it is not possible for us to accept Mr. Banaji's contention that there was no neglect on the part of the Company to make payment as is contemplated by the provisions of s. 434 of the Indian Companies Act.

In our view, the learned trial Judge was right in coming to the conclusion that none of the technical points that had been urged before him on behalf of the Company had any substance.

On merits Mr. Banaji contended before us that the petitioner had not been presented by the Court Receiver bona fide but the proceedings were instituted at the instance of Madhusudanlal and other sons of Narayanlal with ulterior motives of causing harm to the Company and the shareholders. In this behalf Mr. Banaji drew our attention to the several passages in the affidavits that had been filed before the learned trial Judge to show that there were disputes between Narayanlal Bansilal on the one hand and his sons on the other and that the sons were trying to get elected as Directors of the Company and because the sons failed in their attempt to get power, they had instructed the Court Receiver to apply and obtain directions from the Court to wind-up the Company and thereafter the present petition was filed by the Court Receiver. In other words, according to Mr. Banaji the main object with which the petition had been filed was to cause harm to the interest of the Company and its shareholders because the sons had failed to secure a controlling interest or power in the management of the Company. On the facts of the case we do find that there were disputes between the father on the one hand and the sons on the

other and the other nominees of the father, but it is also clear that the father apart from preventing the sons from getting any hand in the management of the Company is also trying to fight his personal disputes with his sons and is taking shelter under both his dual capacity, one as a Chairman of the Board of Directors of the Company and the other as a *karta* and manager of the joint Hindu family as and when the occasion arises. In this behalf it is an admitted position that several litigations are pending between the father on the one hand and the sons on the other and several suits have also been filed by the Court Receiver against the so called *benamidars* of the father in respect of shareholdings in the Company. But quite apart from this position, there could be no dispute that the Company has failed and neglected to pay the debt that was claimed by the Receiver under a statutory notice during the prescribed period of 21 days and, therefore, a right undoubtedly accrued to the Court Receiver as a creditor to file a winding-up petition against the Company. Even apart from this debt, in the winding-up petition the Court Receiver has referred to several other debts which are due and payable by the Company to the third parties. For instance, there is a reference to a debt to the tune of Rs. 8,00,000 owed by the Company to the Bank of India in respect whereof the Bank of India had obtained a decree against the Company and amongst several grounds that have been put forward by the Court Receiver in his winding-up petition there are principally two on which the petition was pressed, first that the Company was unable to pay its debts and, secondly, it was just and equitable that the Company should be wound up. In this regard it would be useful to refer to the observations of Chief Justice Chagla in *Bachharaj Factories Ltd. v. Hirjee Mills Ltd.*,¹¹ where the learned Chief Justice has pointed out that once a party had put proper materials before the Court making out a *prima facie* case for winding-up, considerations about the motive with which the petition was presented would be irrelevant. The relevant observations appear at p. 392 of the report which run as follows:

"...We have not permitted Mr. Mathalone to go into the merits of these allegations about the mala fides of the petitioners because in our opinion these allegations are entirely irrelevant. If the petitioners have made out a case for the winding up of the company, if they have placed materials before the Court which satisfy the Court that the company is insolvent, if they have placed materials before the Court which satisfy the Court that the substratum of the company is gone, it is difficult to understand what the motive of the petitioners has got to do with the question whether an order of winding up should be made or not."

It is true that in that case the petitioners had placed sufficient materials before the Court to show that the substratum of the company had gone and it was not possible for the company to carry on its business without difficulty. In the present case we may point out that apart from the several debts that are owed by the Company to several creditors which have not yet been satisfied by the Company, a suggestion was made by us to Mr. Banaji that if the Company were able to pay Rs. 25,00,000 in cash or secure the same by way of any guarantee through any Bank or Insurance Company, the winding-up petition may not be proceeded further, and Mr. Banaji had taken time to consider that suggestion and even after adjourning the matter once or twice, nothing has been done by the Company in that behalf to secure the amount of Rs. 25 lakhs and odd to the Income-tax authorities to the satisfaction of those authorities. In these circumstances we do not feel that there is any substance in the contention urged by Mr. Banaji that the petition is actuated by mala fides and, therefore the same ought not have been admitted by the learned trial Judge.

In the result, the appeal fails and is dismissed with costs.

Having regard to the fact that the Inspector to look into the affairs of the Company was appointed somewhere about 1955 and all attempts of investigation

11 (1954) 57 Bom. L.R. 378.

had been defeated by one method or the other, we do not think that the advertisements can be stayed any longer. We direct that the advertisements shall be published on Wednesday December 16 and the petition to be heard on January 11, 1965. The Court Receiver to be at liberty to withdraw the amount of Rs. 500 deposited by the Company towards his costs.

Appeal dismissed.

APPELLATE CIVIL.

Before the Hon'ble Mr. H. K. Chainani, Chief Justice, and Mr. Justice Gokhale.

I. R. HINGORANI v. PRAVINCHANDRA KANTILAL SHAH.*

Maharashtra Co-operative Societies Act (Mah. XXIV of 1961), Secs. 91, 93, 2(16)—Maharashtra Co-operative Societies Rules, 1961. Rule 75—Bombay Co-operative Societies Act (Bom. VIII of 1925), Sec. 54—Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), Sec. 68—Practice—Dispute when referred to Registrar under s. 91—"Claiming through a member", meaning of words—Dispute relating to accommodation provided by society between member and person to whom member has given such accommodation—Whether such dispute touching business of society—Dispute between such parties relating to rent or compensation or for mesne profits and jurisdiction of Registrar or nominee.

The correct practice when a dispute is referred to the Registrar under s. 91 of the Maharashtra Co-operative Societies Act, 1960, is for the Registrar to issue notices to both the parties and give them an opportunity of being heard on the question whether a dispute exists. It is only after the Registrar has heard the parties or given them an opportunity of being heard that he can decide or satisfy himself whether a dispute within the meaning of s. 91 of the Act exists. It is his decision so arrived at which will be final under s. 91(2) of the Act.

The question whether a dispute within the meaning of s. 91 of the Act exists so as to enable the Registrar or his Nominee to entertain a reference in respect of such dispute must be decided by reference to the averments made in the application for reference made under rule 75 of the Maharashtra Co-operative Societies Rules, 1961.

The words "claiming through a member" in s. 91(1)(b) of the Act mean deriving such title or rights through a member as the member possessed or had acquired by reason of his being a member or in his capacity as a member.

Shyam Co-operative Society v. Ramibai,¹ *Malvan Co-op. Bank v. Kamalakar*,² *Krishna Ayyar v. Urban Bank Ltd.*, *Calicut*,³ *Narayana Ayyar v. Co-op. Urban Bank Ltd.*,⁴ and *Vegetols Ltd. v. Wholesale Co-op. Stores, Chittoor*,⁵ referred to.

A dispute in regard to the occupation of accommodation provided by a Co-operative housing society between a member of the society and the person to whom he has given such accommodation is a dispute touching the business of the society within the meaning of s. 91 of the Act.

Tarkhundali v. Potdar,⁶ and *Madhava Rao v. Surya Rao*,⁷ referred to.

A dispute in regard to rent or compensation payable to a member of a co-operative housing society by a person to whom he has given his tenement for occupation will not ordinarily touch the business of the society. But a claim for mesne profits is consequential or incidental to a claim for possession and if the Registrar or Nominee is competent to entertain the application for possession made against such a person, he will also have jurisdiction to decide the claim for past as well as future mesne profits made against him until possession is given.

Importers v. Phiroze,⁸ referred to.

*Decided, March 1, 1965. Special Civil Application No. 2048 of 1963 (with Special Civil Application No. 1249 of 1964 and Misc. Application No. 312 of 1963).

¹ (1952) 54 Bom. L. R. 517.

² (1954) 56 Bom. L. R. 629.

³ (1933) I.L.R. 56 Mad. 970.

⁴ [1936] A.I.R. Mad. 81.

⁵ [1956] 1 M.L.J. 36.

⁶ (1961) 63 Bom. L.R. 985, F.B.

⁷ [1963] Mad. 1047, F.B.

⁸ (1952) 55 Bom. L.R. 271, S.C.

THE facts appear in the judgment.

Sp. C. A. No. 2048 of 1963:

G. N. Vaidya, for the petitioner.

C. J. Shah, instructed by *Parmanand & Co.*, for respondent No. 1.

V. H. Gumaste, Additional Government Pleader, for respondents Nos. 3 to 5.

Sp. C. A. No. 1249 of 1964:

P. B. Sawant, for the petitioner.

A. M. Setalvad, instructed by *Little & Co.*, for respondent No. 1.

B. R. Naik, for respondent No. 3.

C. R. Dalvi, for respondent No. 4.

Misc. Petition No. 312 of 1964:

F. S. Nariman, instructed by *Chimanlal Shah & Co.*, for the petitioner.

A. M. Setalvad, instructed by *Little & Co.*, for respondents Nos. 1 and 2.

B. R. Naik, for respondent No. 3.

CHAIYANI C. J. These three applications have been heard together, because they raise a common question in regard to the interpretation of s. 91 of the Maharashtra Cooperative Societies Act (hereinafter referred to as the Act). The facts in application No. 2048 of 1963 are as under. Respondent No. 1 in this application is a member of Shalimar Co-operative Housing Society. As such member he is the holder of a flat on the fifth floor of Shalimar building, which belongs to the society. On April 24, 1959, there was a leave and license agreement between the petitioner and respondent No. 1, by which respondent No. 1 allowed the petitioner to occupy his flat on payment of monthly compensation of Rs. 250 for a period of eleven months. Respondent No. 1 subsequently revoked the leave granted to the petitioner to occupy the flat and on March 8, 1963, called upon the petitioner to hand over possession of the premises and also to pay arrears of compensation due from him. As the petitioner did not vacate the flat, respondent No. 1 made an application to the Registrar that the dispute should be decided under the provisions of the Act. In this application he asked for possession of the flat, Rs. 3,250 as arrears of compensation and also future compensation until possession had been delivered. The Assistant Registrar, after going through the application made by respondent No. 1, passed an order that a dispute within the meaning of s. 91(1) of the Act existed and, therefore, referred this dispute for decision to the nominee mentioned in his order. Notice was then issued to the petitioner. He appeared before the nominee and filed a written statement, in which he contended that the nominee had no jurisdiction to decide the dispute. It appears that the petitioner thereafter addressed a letter to the Assistant Registrar in the matter. On November 12, 1963, he was informed by the Assistant Registrar that the question whether the matter fell within the purview of s. 91 of the Act had been already considered before referring the same to the Registrar's nominee and that consequently the petitioner's application had been filed. Thereafter the petitioner filed the present special civil application in this Court, in which he has prayed that the order of reference made by the Assistant Registrar as well as the proceedings pending before the nominee should be quashed.

In the other application No. 1249 of 1964, respondent No. 3 is a member of the Nirmal Co-operative Housing Society, respondent No. 4. As a member of the Society respondent No. 4, he had been allotted a flat on the second floor of the society's building. On August 23, 1960, respondent No. 3 gave the flat on leave and license basis to the petitioner. On the same day the petitioner addressed a letter to respondent No. 3, in which the terms of agreement are mentioned. In this letter he has stated that permission had been given to him to occupy the flat from August 23, 1960, on leave and license basis on payment of Rs. 125 per month for the use of the premises. On November 27, 1963, the Society respondent No. 4 gave a notice to respondent No. 3 calling upon respon-

dent No. 3 to quit, vacate and deliver peaceful possession of the flat to the society, as he had not been residing in the flat allotted to him and had parted with its possession in contravention of by-law 78. On February 3, 1964, respondent No. 3 gave a notice to the petitioner cancelling and revoking the leave and license granted to him to occupy the flat and called upon him to quit, vacate and deliver peaceful possession of the flat to respondent No. 3. In July 1964, he made an application to the Registrar requesting that the dispute may be referred for decision under ss. 91 to 96 of the Act. He asked for an order directing the petitioner to quit, vacate and deliver vacant and peaceful possession of the flat. He also prayed for arrears of compensation as well as future compensation. On August 4, 1964, the Assistant Registrar passed an order stating that he was satisfied that a dispute within the meaning of s. 91 of the Act existed and referred the same for decision to his nominee respondent No. 2. Thereafter the petitioner approached this Court. In his application he has prayed that the order made by the Assistant Registrar respondent No. 1 referring the dispute for decision to his nominee should be set aside.

The dispute in Misc. Application No. 312 of 1963 is about the ground floor of a building, which originally belonged to respondent No. 4. On June 29, 1961, respondent No. 4 executed an agreement, by which he leased the entire ground floor of his building to the petitioners for a monthly rent of Rs. 250. Clause 6 of this agreement mentions that the property had been mortgaged to the Deccan Merchants Co-operative Bank, respondent No. 3. On October 26, 1961, in proceedings under s. 91 of the Act between respondents Nos. 3 and 4, the Registrar's nominee passed a consent award for Rs. 4 lakhs against respondent No. 4. As respondent No. 4 committed default in paying the amount under the award, on January 3, 1963, an order was made under s. 98 of the Act for the sale of the building. As there were no bidders, on May 13, 1963, the Collector issued a certificate of transfer under s. 100 of the Act in favour of the Bank, respondent No. 3. Under this certificate the right, title and interest of respondent No. 4 in the building was to vest in respondent No. 3. On June 5, 1963, respondent No. 3 gave a notice to the petitioners that their possession of the premises was unauthorised and illegal and the petitioners were called upon to quit, vacate and deliver vacant possession of the premises. On June 11, 1963, respondent No. 3 made an application to the Registrar for a reference under s. 93 of the Act. In para. 5 of the application it is stated that respondent No. 4 had deliberately with a view to frustrating a part of the claim of the Bank made an attempt to create tenancies in respect of the said premises or otherwise part with possession of the premises and that the petitioners and other opponents mentioned in the application had no right, title or interest in the premises. Respondent No. 3, therefore, prayed that the dispute should be decided by the Registrar or his nominee under ss. 91 to 96 of the Act and that the petitioners should be asked to quit, vacate and deliver the premises in their possession. A prayer for compensation was also made. On June 19, 1963, the Assistant Registrar passed an order stating that he was satisfied that a dispute within the meaning of s. 91 of the Act existed and referred it for decision to his nominee. The petitioners then filed a petition on the Original Side of this High Court, in which they have prayed that the order made by the Assistant Registrar referring the dispute for decision under the provisions of the Act should be quashed.

Section 91 of the Act is in the following terms:

"91. (1) Notwithstanding anything contained in any other law for the time being in force, any dispute touching the constitution, elections of the office bearers, conduct of general meetings, management or business of a society shall be referred by any of the parties to the dispute, or by a federal society to which the society is affiliated, or by a creditor of the society, to the Registrar, if both the parties thereto are one or other of the followings:—

(a) a society, its committee, any past committee, any past or present officer, any past or present agent, any past or present servant or nominee, heir or legal representa-

tive of any deceased officer, deceased agent or deceased servant of the society, or the Liquidator of the society;

(b) a member, past member or a person claiming through a member, past member or a deceased member of a society, or a society which is a member of the society;

(c) a person, other than a member of the society, who has been granted a loan by the society, or with whom the society has or had transactions under the provisions of section 45, and any person claiming through such a person;

(d) a surety of a member, past member or a deceased member, or a person other than a member who has been granted a loan by the society under section 45, whether such a surety is or is not a member of the society;

(e) any other society, or the Liquidator of such a society.

(2) When any question arises whether for the purposes of the foregoing sub-section, a matter referred to for decision is a dispute or not, the question shall be considered by the Registrar, whose decision shall be final.

(3) Save as otherwise provided under sub-section (3) of section 93, no Court shall have any jurisdiction to entertain any suit or other proceedings in respect of any dispute referred to in sub-section (1).

Explanation 1.—A dispute between the Liquidator of a society and the members of the same society shall not be referred to the Registrar under the provisions of sub-section (1).

Explanation 2.—For the purposes of this sub-section, a dispute shall include—

(i) a claim by or against a society for any debt or demand due to it from a member or due from it to a member, past member or the nominee, heir or legal representative of a deceased member, or servant or employee whether such a debt or demand be admitted or not;

(ii) a claim by a surety for any sum or demand due to him from the principal borrower in respect of a loan by a society and recovered from the surety owing to the default of the principal borrower, whether such a sum or demand be admitted or not;

(iii) a claim by a society for any loss caused to it by a member, past member or deceased member, by any officer, past officer or deceased officer, by any agent, past agent or deceased agent, or by any servant, past servant or deceased servant, or by its committee, past or present, whether such loss be admitted or not;

(iv) a refusal or failure by a member, past member or a nominee, heir or legal representative of a deceased member, to deliver possession to a society of land or any other asset resumed by it for breach of conditions of the assignment."

Rule 75 of the rules made under the Act states that a reference of a dispute under s. 91 shall be made in writing to the Registrar in Form P. Sub-section (1) of s. 93 states that if the Registrar is satisfied that any matter referred to him or brought to his notice is a dispute within the meaning of s. 91, the Registrar shall subject to the rules decide the dispute himself or refer it for disposal to a nominee or Board of Nominees appointed by the Registrar. Section 96 states that when a dispute is referred to arbitration, the Registrar or his Nominee or Board of Nominees may, after giving a reasonable opportunity to the parties to the dispute to be heard, make an award on the dispute.

The first question, which has been raised in all the three applications, is that the Registrar or the Assistant Registrar was bound to hear the petitioners before making the orders referring the disputes to his Nominees. We have been told that the practice at present generally followed by the Registrar is that after an application for reference has been scrutinised in his office, he refers the matter to a nominee. If a contention is then raised before the nominee that he has no jurisdiction, because no dispute exists within the meaning of s. 91, the nominee refers back the matter to the Assistant Registrar, who then decides whether a dispute within the meaning of s. 91 exists. This practice has been generally found to be convenient. It also saves time because we were told that only in about 5 to 10 per cent. of cases the nominees' jurisdiction to entertain and decide a reference is challenged. The practice is also supported by several decisions of the Maharashtra Co-operative Tribunal, to which our attention has been drawn. The question which we have to consider is whether

this practice is in accordance with law. Sub-section (1) of s. 93 refers to the satisfaction of the Registrar, while sub-s. (2) of s. 91 gives finality to the decision of the Registrar. It has been urged that as sub-s. (2) of s. 91 refers to a decision by the Registrar and not to the satisfaction of the Registrar, what sub-s. (1) of s. 93 contemplates is provisional satisfaction of the Registrar arrived at after perusal of the application for reference made to him, but without hearing the parties. The difficulty in accepting this argument is that it is only after the Registrar is satisfied that a dispute within the meaning of s. 91 exists that the Registrar can proceed to decide the dispute himself or refer it for disposal to his Nominee. The jurisdiction of the Registrar or his Nominee to decide a dispute is, therefore, dependent on the Registrar being satisfied that such a dispute exists. The Registrar cannot, however, come to the conclusion that a dispute exists unless he first applies his mind to the matter. The words used in sub-s. (2) of s. 91 are: "When any question arises" and not "when any question is raised". The question whether a dispute exists will arise as soon as the Registrar applies his mind to the matter in order to satisfy himself about the existence of a dispute within the meaning of s. 91. His satisfaction on this point will, therefore, be equivalent to his decision within the meaning of sub-s. (2) of s. 91. If he decides that a dispute exists, then he will take further action under sub-s. (1) of s. 93 to decide the dispute himself or refer it for disposal to his Nominee. It has been conceded before us that the question about the existence of a dispute has to be decided by the Registrar judicially and that the proceeding before him is a quasi-judicial proceeding. This necessarily implies that the Registrar must hear the parties before he decides or satisfies himself about the existence of the dispute. The present practice, therefore, does not appear to us to be in accordance with law. The correct practice would be for the Registrar to issue notices to both the parties and give them an opportunity of being heard on the question whether a dispute exists. It is only after the Registrar has heard the parties or given them an opportunity of being heard that he can decide or satisfy himself whether a dispute within the meaning of s. 91 exists. It is his decision so arrived at which will be final under sub-s. (2) of s. 91 of the Act.

None of the petitioners was heard by the Assistant Registrar before the order of reference was made. We would, therefore, have remanded the matters to the Assistant Registrar for deciding the question about the existence of a dispute within the meaning of s. 91 after hearing the parties, but we have decided not to do so, since the questions raised are general questions, which arise in many cases and also because the parties desire that we should decide them, so that the position in law may be clarified.

Following the decisions of the Supreme Court in *Raizada Topandas v. Gorakhram*¹ and *Vasudev v. Board of Liquidators*,² a Full Bench of this Court has held in *Dattatraya Krishna v. Jairam Ganesh*,³ that in order to determine which Court has jurisdiction to try a suit, the Court should read the plaint as a whole and ascertain the real nature of the suit and what in substance the plaintiff has asked for. The jurisdiction of the Court should, therefore, be determined at the time of the institution of the suit when the plaint was filed and the plea of the defendant would not determine or change the forum. The same principle must apply in a proceeding under the provisions of the Co-operative Societies Act and the question whether a dispute within the meaning of s. 91 exists so as to enable the Registrar or his Nominee to entertain a reference in respect of such dispute will have to be decided by reference to the averments made in the application for reference made under r. 75.

Under s. 91 it is not every dispute in respect of which a reference can be made for its determination under the provisions of the Act. Two conditions must be satisfied before a reference can be entertained and these are:

¹ (1963) 66 Bom. L.R. 106, S.C.
² (1963) 66 Bom. L.R. 205, S.C.

³ (1964) 66 Bom. L.R. 645, F.B.

(1) That the dispute must touch the constitution, elections of the office bearers, conduct of general meetings, management or business of a society; and

(2) that both the parties to the dispute must be one or other of the persons mentioned in cls. (a) to (e) of sub-s. (1) of s. 91.

In the three cases before us, it has been contended on behalf of the respondents that the disputes touch the business of the societies concerned. The question as to what the words "touching the business of a society" signify has been considered by a Full Bench of this Court in *Farkhundali v. Potdar*.⁴ At pages 986-987 it was observed:

"...The nature of business, which a society does, is to be ascertained from the objects of the society. But whatever the society does or is necessarily required to do for the purpose of carrying out its objects can be said to be part of its business. The word 'touching' is also very wide and would include any matter which relates to, concerns or affects the business of the society."

The Full Bench has cited with approval the decision of the Full Bench of the Madras High Court in *Madhava Rao v. Surya Rao*⁵ that the words "touching the business of the society" must be given their full import and that the dispute need not directly arise out of the business of the society, but it is enough if it has reference or relation to or concern with its business.

The petitioners in the first two applications are in occupation of flats, which belong to Co-operative Housing Societies. Clause (16) in s. 2 of the Act defines a housing society as meaning a society, the object of which is providing its members with dwelling houses. It has been urged by Mr. Vaidya and Mr. Samant that the dispute in each of these two applications is essentially between a member of the society and the person to whom he had given his flat for occupation, that no relief has been claimed against the society, that the society is, therefore, not concerned with the dispute and that consequently the dispute cannot be said to touch the business of the society. There is not much force in these arguments. Regulation 4 in Form A in the Model By-laws is as under:

"No tenant shall assign, underlet, vacate or part with the possession of a tenement or any part thereof without the previous consent in writing of the society."

The Regulations of both the societies, to which the buildings in question belong, contain a similar Regulation. Consequently the flats now in occupation of the petitioners could not have been given to them for occupation without the permission of the societies. The object of a co-operative housing society being to provide housing accommodation to its members, it is the business of the society to see that such accommodation is occupied by its members or by persons approved by it and not by unauthorised persons. Every member is bound by the rules, by-laws and regulations of the society. In respect of the common amenities provided by the society he has to pay certain charges and expenses to the society. A housing society is, therefore, vitally concerned with the question as to who occupies the accommodation provided by it. A dispute in regard to the occupation of such accommodation is, therefore, a dispute connected with the business of such a society. In any case there can be no doubt that such a dispute will touch the business of the society.

Clause (iv) in Explanation 2 in s. 91 brings within the ambit of this section a dispute arising out of a refusal or failure by a member, past member or a nominee, heir or legal representative of a deceased member, to deliver possession to a society of land resumed by it for breach of conditions of the assignment. This clause does not refer to a person claiming through a member. It has, therefore, been argued that a dispute, in which possession is claimed from a person claiming title through a member is outside s. 91. The clause provides for a case in which a society seeks possession from a member on account of breach of the conditions on which the land had been assigned to him. In such a case the award, if any, made against the member would be binding on every person

claiming through such member. The society can also make such person a party to the application made by it against the member. This position had been made clear by the Supreme Court in *Importers v. Phiroze*⁵ where it has been observed:

"...under the ordinary law a decree for possession passed against a tenant in a suit for ejectment is binding on a person claiming title under or through that tenant and is executable against such person whether or not he was or was not a party to the suit. The non-joinder of such a person does not render the decree any the less binding on him. It is in this sense, therefore, that he is not a necessary party to an ejectment suit against the tenant. It is, however, recognised that such a person is, nevertheless, a proper party to the suit in order that the question whether the lease has been properly determined and the landlord plaintiff is entitled to recover possession of the premises may be decided in his presence so that he may have the opportunity to see that there is no collusion between the landlord and the tenant under or through whom he claims and to seek protection under the Act (Rent Act), if he is entitled to any. Such a person may be joined as a party to the suit from the beginning of the suit or at any later stage of the suit if the Court thinks fit to do so."

This may be the reason why a person claiming through a member is not mentioned in cl. (iv) of the Explanation. This omission would not, therefore, indicate that a dispute in regard to possession of premises between a member and the person who has obtained the premises from the member is not a dispute within the meaning of s. 91 of the Act.

It was contended that the claim for compensation made against each of the petitioners cannot be said to touch the business of the society of which the particular respondent is a member and that such a claim cannot, therefore, be entertained by the Registrar. A society is ordinarily not concerned with how much amount a member charges to or recovers from the person to whom he has given his tenement for occupation. Even if he gives it free or remits the whole amount payable, it will not affect the society. Consequently, a dispute in regard to rent or compensation payable to a member will not ordinarily touch the business of the society. A claim for mesne profits is, however, consequential or incidental to a claim for possession. The Court which has jurisdiction to decide a suit for recovery of possession of property has also jurisdiction to award mesne profits until possession has been delivered. This has been so held by the Supreme Court in *Importers v. Phiroze*, in which at p. 277 it has been observed:

"...The appellant points out that on the face of the plaint the plaintiffs declined to recognise it as a lawful occupant as sub-tenant or otherwise and treated it as a mere trespasser having no lawful claim to the demised flat and, therefore,... the suit in so far as it claimed compensation from him cannot be said to be a suit for recovery of rent. The last part of the contention need not detain us long, for the suit was undoubtedly one for possession of the flat and the claim for compensation was only incidental and ancillary to the claim for possession. Jurisdiction to entertain a suit for possession will empower the Court not only to pass a decree for possession but also to give directions for payment of mesne profits until delivery of possession. Such direction for payment of mesne profits is usually an integral part of the decree for possession." Consequently if the Registrar or his Nominee is competent to entertain the applications for possession made against the petitioners, he will also have jurisdiction to decide the claims for past as well as future mesne profits made against them until possession had been given.

In application No. 2048 of 1963 the society has not been made a party to the application for reference made to the Registrar. Mr. Vaidya has, therefore, argued that the dispute cannot be said to touch the business of the society. This argument is without any merit. The nature of the dispute will not change merely because the society has not been made a party to the proceeding. Section 91 itself contemplates that a dispute touching the business of

a society may arise between a member and a member or between a member and a person claiming through a member.

In the third application, Miscellaneous Application No. 312 of 1963, the property was transferred to the Bank in part satisfaction of the amount due to it under the award obtained by it against respondent No. 4. The property was, therefore, acquired by the Bank in the ordinary course of its business. Thereafter it was necessary for the Bank to do all things necessary to look after and manage the property. In the course of its management, it evidently considered it necessary or desirable to recover possession from the petitioners. Consequently the dispute in regard to possession of the premises occupied by the petitioners can also be said to touch the business of the Bank.

Mr. Nariman has referred to *Dinkar Wasudeo v. Registrar, Cooperative Societies*,⁶ in which it was held that the word "dispute" in s. 54 of the Bombay Co-operative Societies Act, 1925, implies some kind of disagreement between the parties concerned, some reference to a legal claim or liability and that the word "dispute" cannot be said to be the same thing as a cause of action or the mere incurring of a liability. Mr. Nariman has contended that the tenancy of the petitioners has not been determined by giving them a proper notice and that consequently the Bank has no legal claim to the possession of the premises. The question whether a person has made a legal claim is quite different from the question whether he will be able to establish or prove that claim. At the preliminary stage when the Registrar has to decide the question of jurisdiction, he has only to consider whether the claim as made in the application for reference is a legal claim. In the present case the Bank's claim for possession cannot be said to be not a legal claim. Whether the Bank will be able to prove this claim is a different matter.

The next question, which arises for consideration, is whether the petitioners can be said to belong to one or the other of the categories of persons specified in cls. (a) to (e) of sub-s. (1) of s. 91. None of the petitioners is a member of the particular co-operative society. Every petitioner has acquired his rights from a member of the society. The only clause which would, therefore, be applicable to him is cl. (b), provided he can be said to be a person claiming through a member. There has been a great deal of argument before us as to what these words exactly signify. Mr. Nariman has contended that these words refer to a person who though not a member claims as a member, that is, membership rights, by virtue of some transaction or relationship with a member. Section 22 of the Act mentions the persons who may be admitted as members of a society. Under cl. (b) a firm, company or any other body corporate constituted under any law for the time being in force, or a society registered under the Societies Registration Act, can be a member of the society. Under cl. (f) a registered public trust can also be a member of the society. Section 29 states that a transfer of or charge on the share or interest of a member in the share capital of a society shall be subject to such conditions as may be prescribed. Sub-rule (1) of r. 24 provides that no transfer of shares can be effective unless it is made as provided in this sub-rule. Sub-section (1) of s. 30 states that on the death of a member of a society, the society shall transfer the share or interest of the deceased member to a person or persons nominated in accordance with the rules, or, if no person has been so nominated, to such person as may appear to the committee to be the heir or legal representative of the deceased member. Sub-rule (1) of r. 25 provides that for the purpose of transfer of his share or interest under sub-s. (1) of s. 30, a member of a society may, by a document signed by him or by making a statement in any book kept for the purpose by the society, nominate any person or persons. Sub-rule (2) of r. 20 states that a society may admit minors and persons of unsound mind inheriting share or interest of deceased members as its members through their legal representatives or guardians respectively. These provisions deal with transfer of shares and acquisition of rights of membership by inheritance or otherwise.

Mr. Nariman has urged that a person can be said to claim through a member only when he claims *qua* a member, that is, when he claims the rights of membership, under these and other similar provisions, on account of transfer of shares to him or as a partner of a firm of which he is a member or as the heir or legal representative of a member or other similar reason.

In *Shyam Co-operative Society v. Ramibai*,⁷ a charitable trust was a member of the appellant co-operative society. The trust had advanced Rs. 4 lakhs to the society. Subsequently the trustees filed a suit to recover the amount. A notice of motion was taken out by the appellant society to stay the suit on the ground that under s. 54 of the Bombay Co-operative Societies Act the dispute could only be adjudicated upon by arbitration as provided in that section. This notice of motion was dismissed and the order was confirmed in appeal. The relevant part of s. 54 was as follows:—

"54. (1) (a) If any dispute touching the... business of the society arises... between the society... and any... member... of the society..., it shall be referred to the Registrar for decision by himself or his nominee...

The dispute shall include claims by a society for debts or demands due to it from a member or a past member or the heirs or assets of a past member, whether such debts or demands be admitted or not."

It was held that under this section the dispute must be between the society and a member as a member, that it must relate to a transaction in which the member was interested as a member and that s. 54 would have no application in a case where a member had advanced a loan to a society, which he was under no obligation to advance. At p. 518 the learned Chief Justice observed:

"...Now, before a case can fall under s. 54, it is not sufficient that there should be a dispute touching the business of the society. What is further required is that the dispute must be between the society and its member, and proper emphasis has got to be laid upon the expression 'member' used in this section. The dispute must be between the society and the member as a member or *qua* a member. It must be a dispute in which the member must be interested as a member. It must relate to a transaction in which the member must be interested as a member."

Thereafter s. 54 was amended and the following words were inserted into the second paragraph in cl. (a) of sub-s. (1) before the words "whether such debtor..."

"as well as claims by a member or past member or the heirs of a past member for any debts or demands due to him from the society."

The section as amended came up for consideration in *Malvan Co-op. Bank v. Kamalakar*.⁸ It was held having regard probably to the words "any debts or demands", that the section as amended applied to a dispute in regard to a loan advanced to a member otherwise than in his capacity as a member. At p. 631 the learned Chief Justice observed:

"...Therefore, the Legislature by enacting this second paragraph was extending the scope of a dispute which had been defined in s. 54(1). ...Therefore, for the purpose of this enlarged definition of a 'dispute', all that is necessary is that there should be a debt or demand due to a society by a member and a claim to be made by a society in respect of that debt or demand. It is unnecessary for the purpose of this enlarged definition that the debt must be due from a member in his capacity as a member or *qua* a member. It is sufficient if there is a debt or a demand due by the member howsoever the debt or demand might arise, provided the debt or demand is due to the society and a claim is made by the society in respect of that debt or demand."

Provisions similar to s. 54 of the Bombay Co-operative Societies Act, 1925, are contained in s. 68 of the Friendly Societies Act, 1896. Clause (a) in sub-s. (1) of this section is as under:

"Every dispute between—

(a) a member or person claiming through a member or under the rules of a regis-

tered society or branch, and the society or branch or an officer thereof... shall be decided in manner directed by the rules of the society or branch..."

It has been held that disputes to be decided under this section must have relation to the membership of the member, such as the repayment of money deposited by a member and that dispute between a society and a member not in his capacity as a member, for example, a claim by a society against one of its officers for misappropriation of funds or a dispute with a member as mortgagor or mortgagee, are not disputes within this clause, see para. 123 at page 65 in Halsbury's Laws of England, Vol. 18, Third edn.

Section 51 of the Madras Co-operative Societies Act, 1932, contains similar provisions about the settlement of disputes between a co-operative society and its members. In *Krishna Ayyar v. Urban Bank Ltd., Calicut*,⁹ the Madras High Court has held that in order that a dispute can be dealt with by the Registrar under s. 51 of the Madras Co-operative Societies Act, it must be a dispute between the society and a member in his capacity as a member. In that case it was decided that a dispute between the appellant and the Co-operative Bank, of which the appellant was a member, arising out of the matters relating to the appellant's acts as the Bank's Vakil, was not a dispute to which the Act applied and that the Registrar had, therefore, no jurisdiction to deal with the matter. The same view has been taken in *Narayana Ayyar v. Co-op. Urban Bank, Ltd.*,¹⁰ and *Vegetols Ltd. v. Wholesale Co-op. Stores, Chittoor*.¹¹ In the last case it was observed that for a claim to fall within s. 51 of the Act, it should be a claim by the society against a member as a member touching the business of the society and that a liability of a member to the society which is not incurred by the member as a member is outside the scope of s. 51.

In these cases, therefore, it has been held that the domestic tribunal set up by the Act has jurisdiction to decide only those cases in which a claim is made by or against a member as a member. These decisions do not, however, support Mr. Nariman's contention that a person can be said to claim through a member only when he claims membership rights.

Mr. Nariman has laid stress on the fact that whereas in the case of a deceased member cl. (b) of sub-s. (I) of s. 91 refers to a person claiming through a deceased member, in cls. (i) and (iv) of Explanation 2 the words used are: "Nominee, heir or legal representative of a deceased member." Mr. Nariman has argued that the Legislature has thereby indicated in what sense the word "member" has been used. We are not impressed by this argument. The only persons, from whom a society can recover a debt due to it from a deceased member, are his nominee, and heir or legal representative. These are also the persons who can claim a debt due to a deceased member from the society. Similarly, the persons against whom a society can proceed for obtaining possession of premises allotted to a deceased member are his nominee, or heir and legal representative. An award passed against such persons will also bind the person claiming through the deceased member. Consequently reference to nominee, heir or legal representative in these clauses in the Explanation does not support Mr. Nariman's argument that only a person claiming membership rights can be said to be a person claiming through a member.

In our opinion, there is nothing in the Act or in the rules to justify our giving such a narrow meaning to the expression "claiming through a member" as has been suggested by Mr. Nariman.

Mr. Setalvad has, on the other hand, argued, and his arguments have been adopted by Mr. Naik, that the word "member" in s. 91 should not be interpreted to mean a member acting in his capacity as a member, because otherwise an anomalous position might arise, viz., that while s. 91 will apply when a society has advanced a loan to a person other than a member by reason of cl. (c) in sub-s. (I) of s. 91, it will not apply when the loan is given to a

⁹ (1933) I.L.R. 56 Mad. 970.

¹¹ [1956] 1 M.L.J. 36.

¹⁰ [1936] A.I.R. Mad. 81.

member otherwise than in his capacity as a member. There would have been force in this argument but for the decision in *Malvan Co-operative Bank v. Kamalakkar*. The first clause in Explanation 2 is substantially in the same terms as the second para. of s. 54 of the Bombay Co-operative Societies Act, 1925, as amended which was construed in *Malvan Co-operative Bank v. Kamalakkar*. In view of this decision a dispute arising out of a loan advanced to a member by a society will also be a dispute within the meaning of s. 91.

Section 91 is very much wider in terms than the corresponding s. 54 of the Act of 1925. Clauses (c) and (d) bring within the ambit of this section several persons other than members, who enter into transactions with a Co-operative society. Mr. Setalvad has contended that in view of the fact that the special provisions of the Act relating to settlement of disputes have been made applicable to a large number of persons, who have dealings with a co-operative society, the word "member" should no longer be given a limited meaning. Mr. Nariman has, on the other hand, urged that as the Legislature has in cls. (c) and (d) specified categories of non-members who are covered by s. 91, it cannot be said that the Legislature intended to alter the previous position in regard to the meaning which has been given by judicial decisions to the word "member".

It seems to us that the words "claiming through a member" must be given their ordinary meaning, that is, deriving title or rights through a member. At the same time weight must be attached to the word "member" and having regard to the decision referred to above, the title or rights claimed must be those to which a member was entitled or which he could claim by virtue of his being a member. The words "claiming through a member" therefore mean deriving such title or rights through a member as the member possessed or had acquired by reason of his being a member or in his capacity as a member.

In the first two applications, the petitioners have acquired their rights of occupation of the flats in their possession respectively from respondent No. 1 and respondent No. 3 in these applications. These respondents were allotted these flats by the housing societies, of which they were members. As members they were entitled to the allotment of these flats. Consequently, the petitioners in these applications are persons claiming through members within the meaning of cl. (b) in sub-s. (1) of s. 91. The dispute in each application also touches the business of the particular society. Consequently these disputes are disputes within the meaning of s. 91. The order passed in each case by the Assistant Registrar, Co-operative Societies, referring the dispute for decision to his Nominee, is therefore correct.

The rule issued in each application will, therefore, be discharged. No orders as to costs.

The position is different in Miscellaneous Application No. 312 of 1963. The building, a part of which is in occupation of the petitioners, belonged to respondent No. 4. It did not belong to, nor had it been acquired from the Co-operative Bank respondent No. 3, of which respondent No. 4 was a member. The petitioners cannot, therefore, be said to be claiming through a member of the Bank as a member. Consequently cl. (b) will not apply and the disputes between them and the Bank cannot be the subject of a reference under sub-s. (1) of s. 91.

In this view, it is not necessary to consider the other points raised by Mr. Nariman that after the transfer of the property to the Bank under s. 100 of the Act, the petitioners became direct tenants of the Bank. We have also not heard Mr. Nariman on his other contention that s. 91 is not applicable, as the petitioners are the tenants of the premises.

In this application we, therefore, set aside the order made by the Assistant Registrar referring the dispute between the petitioners and respondent No. 3 to his Nominee for decision. The petitioners should get their costs of this application from respondent No. 3.

We have been told that our interpretation of sub-s. (2) of s. 91 and sub-s. (1) of s. 93 may lead to considerable increase in the work in the office of the

Registrar, with the result that proceedings may be considerably delayed. This is, however, a matter for Government to consider. If Government decides to amend the Act, Government may also consider whether the power to decide whether a dispute exists within the meaning of s. 91 should not be vested in the authority to whom the matter is referred for disposal. The words "with whom the society has or had transactions under the provisions of section 45" in cl. (c) s. 91(I) do not seem to be appropriate to bring out the intention of the Legislature. Section 45 provides

"Save as provided in the Act, the transactions of a society with persons other than members, shall be subject to such restrictions, if any, as may be prescribed."

It is, therefore, not clear which persons are intended to be covered by the above words in cl. (c) in sub-s. (I) of s. 91. For instance, if no restrictions have been prescribed under s. 45, the question would arise whether all the persons with whom the society has transactions will be within the ambit of cl. (c). Clause (d) refers to a person other than member, who has been granted a loan by the society under s. 45. The section which provides for loans to persons other than members is s. 44. These questions may also be considered in case Government decides to amend the Act.

Orders accordingly.

CRIMINAL APPELLATE.

Before Mr. Justice Tambe and Mr. Justice Palekar.

LAXMAN PADMA BIJAGAT v. THE STATE.*

Indian Evidence Act (I of 1872), Secs. 25, 24, 114, 133—Sea Customs Act (VIII of 1878), Secs. 171A, 6, 187A, 167(81)—Central Excise and Salt Act (I of 1944), Sec. 21—Land Customs Act (XIX of 1924), Sec. 3—Criminal Procedure Code (Act V of 1898), Secs. 164, 154-176—Indian Penal Code (XLV of 1860), Sec. 191—Constitution of India. Art. 20—Excise officer discharging duties under Sea Customs Act whether police officer within s. 25, Evidence Act—Whether Central Government can appoint officers of customs by issuing notification—Person in authority merely explaining provisions of s. 171A of Sea Customs Act to accused before recording his confession—Such confession whether hit by s. 24, Evidence Act—Whether service of summons a condition precedent to recording of statement under s. 171A—Evidence of accomplice whether can be taken as corroboration to evidence of another accomplice—Confession of co-accused whether can be relied on in considering evidence of accomplice—Whether statements made by person under s. 171A affected by art. 20(3) of Constitution—Customs Officers whether bound to maintain diary.

An officer of the Central Excise Department is not a police officer within the meaning of s. 25 of the Indian Evidence Act, 1872, for all purposes, though he may be such a police officer so far as he conducts an investigation in respect of offences under the Central Excise and Salt Act, 1944. Therefore, an Excise officer while discharging his duties under the Sea Customs Act, 1878, is not a police officer within s. 25 of the Indian Evidence Act.

Confession recorded by an officer of the Central Excise Department while enquiring into a case falling under the Sea Customs Act, 1878, under which latter Act he is also appointed an officer, cannot be said to be made to a police officer and is, therefore, not hit by the provisions of s. 25 of the Indian Evidence Act.

Raja Ram v. State of Bihar,¹ distinguished.

*State of Punjab v. Barkat Ram*² and *Emperor v. Mallangowda*,³ referred to.

*Decided, December 16-19/21-22, 1964. Criminal Appeal No. 1759 of 1963 (with Criminal Appeals Nos. 53 & 1 of 1964), against the order of conviction and sentence passed by H. S. Ursakar, Presidency Magistrate, 19th

Court, Esplanade, Bombay, in Case No. 93/W of 1962.

1 [1964] A.I.R. S.C. 828.

2 [1962] A.I.R. S.C. 276.

3 (1917) 19 Bom. L.R. 683.

Under s. 6 of the Sea Customs Act, 1878, it is open to the Central Government to adopt any mode of appointment of officers of customs. It may make a general order of appointment by issuing a notification, or it may make appointment by issuing an order individually appointing any individual person named in the order to be an officer.

Section 24 of the Indian Evidence Act, 1872, contemplates that the threat referred to therein must emanate from the person in authority. Therefore, where a person in authority before recording the confession of an accused merely explains to him the provisions of s. 171A of the Sea Customs Act, 1878, the confession is not hit by the provisions of s. 24 of the Indian Evidence Act as it cannot be said to have been obtained by a threat within the meaning of s. 24. Further, in merely explaining the provisions of s. 171A of the Sea Customs Act to the accused making the confession there is no threat given by the person in authority recording the confession which could have raised any hope in the mind of the accused or led him to suppose that he was to gain any advantage in reference to the proceeding against him relating to the offence of smuggling.

Queen v. Thompson,⁴ distinguished.

Section 171A of the Sea Customs Act, 1878, does not contemplate the service of a summons as a condition precedent enabling the Customs Officer to record the statement under s. 171A of the Act.

It is not safe to accept the evidence of an accomplice as corroboration to the evidence of another accomplice and the confession of a co-accused as a piece of evidence lending assurance to the mind of the Court in considering the evidence of the accomplice. There may, however, be exceptional cases where evidence of an accomplice could be taken as corroboration to the evidence of another accomplice and the confession of a co-accused could be relied on for lending assurance to the mind of the Court. In considering the question as to whether a conviction could be founded on a testimony of the accomplice without corroboration, the latter part of s. 114, III. (b) of the Indian Evidence Act, 1872, is relevant.

Kashmira Singh v. State of Madhya Pradesh,⁵ distinguished.

Queen v. Chutterdharee Sing,⁶ *Bhuboni Sahu v. The King*,⁷ *Rex v. Baskerville*,⁸ *State v. Lakshmichand Choradia*⁹ and *Criminal Appeals 208 and 209 of 1963*,¹⁰ referred to.

A person examined under s. 171A of the Sea Customs Act, 1878, does not stand in the character of an accused person inasmuch as there is no formal accusation made against him by any person at that time. The fact that subsequent to the making of the statement he becomes an accused person is not sufficient to bring the statement within the mischief of art. 20(3) of the Constitution of India.

Rainbow Trading Co. v. Asst. Collector of Customs,¹¹ dissented from.

M. P. Sharma v. Satish Chandra, *District Magistrate, Delhi*,¹² *Mohd. Dostagir v. State of Madras*,¹³ *Narayanlal v. M. P. Mistry*,¹⁴ and *State of Bombay v. Kathi Kalu*,¹⁵ referred to.

There is no provision in the Sea Customs Act, 1878, requiring the Customs Officer to maintain any diary.

THE facts are set out in the judgment.

R. Jethmalani, with *S. B. Naik* and *S. A. Dhurandhar*, for appellant-accused No. 5.

S. S. Kavlekar, with *M. S. Shete*, *Pitre* and *H. S. Kably*, for appellant-accused No. 8.

H. R. Pardiwalla, with *I. S. Talcjia*, for appellant-accused No. 9.

Adi. P. Gandhi, with *B. M. Mistry*, Special Prosecutors for Central Excise.

4 [1893] 2 Q.B. 12.

5 [1952] S.C.R. 526.

6 (1866) 5 W.R. (Criminal) 59.

7 (1949) L.R. 76 I.A. 147, s.c. 51 Bom. L.R. 955.

8 [1916] II K.B. 658.

9 (1964) Criminal Appeals Nos. 960 to 964 of 1962, decided by Tambo and Kantawala, JJ., on January 17, 1964.

10 (1964) Criminal Appeals Nos. 208 and 209 of 1963, decided on February 3, 1964 (Supreme Court) (Unrep.).

11 [1963] A.I.R. Mad. 434.

12 [1954] S.C.R. 1077.

13 [1960] A.I.R. S.C. 756.

14 [1961] A.I.R. S.C. 29.

15 [1961] A.I.R. S.C. 1808.

TAMBE J. Criminal Appeal No. 1759 of 1963 is preferred by original accused No. 5—Laxman Padma Bhagat; Criminal Appeal No. 53 of 1964 is by Haroon Haji Abdulla, original accused No. 8; and Criminal Appeal No. 1 of 1964 is by Ayub Kassim Kika, original accused No. 9. These three appeals can be disposed of by one judgment. They arise out of the judgment of the learned Presidency Magistrate, 19th Court, Esplanade, Bombay, where the aforesaid three appellants along with 15 others were put up for trial. Out of these 18 accused, accused No. 17 was discharged; accused Nos. 14, 15 and 18—Haji Mohamed Barkati, Haji Sattar and Yusuf Nabib—had been absconding, and, therefore, their cases were separated. Original accused No. 4, Noor Mohamed Alu Bhati was jointly tried along with the remaining accused, but on the date of the judgment, it was found that he had absconded, and therefore, his case was separated. Accused No. 1, Govind Narayan Bengali, who was also jointly tried, died after the close of the case but before the pronouncement of the judgment. Accused Nos. 11, 12, 13 and 16—Shankar Aitwar Koli, Usman Saleh, Adam Budda and Gulam Nabi have been acquitted.

In short, as a result of the judgment only 8 of the accused, namely, accused Nos. 2, 3, 5, 6, 7, 8, 9 and 10 have been convicted of offences under s. 120-B, Indian Penal Code, for having conspired to smuggle gold into India without a valid permit and thereby evading duty payable thereon, and to evade the prohibition enacted in this matter by notifications made under certain various enactments. Only accused Nos. 5, 8 and 9 have appealed.

The following facts are no more in dispute, and there is ample evidence establishing them. In April or May 1961, Police Inspector Mr. Bhesadia (P.W. 30) attached to the Anti-Corruption and Prohibition Intelligence Bureau, Bombay, received certain information about smuggling operations, and he took certain measures to pursue the information and to arrange for watch. On August 13, 1961, he received certain information at his residence in Dhobi Talao that the smuggled gold was likely to be landed at Versova beach the same night. He, therefore, went to Madh Island at about 4 p.m. in a police car driven by one Rajaram Sawant, the police driver. At about 8-40 p.m., he received information that the smuggled gold was to be landed at Versova beach. He, therefore, proceeded in his car from Madh Island to Versova beach reaching there at about 9-30 p.m. On reaching the beach, he received further information as a result of which he went to the house of Govind Narayan Bengali, accused No. 1 in this case. The house of this Govind is situate in a locality at Versova known as Tare Gally which is close to the Versova beach. The house consists only of one room and a verandah. As Mr. Bhesadia and his driver Rajaram approached the house, the door of the house was slammed in their face. Bhesadia latched the door of the house from outside, kept Rajaram on guard at the door, and rushed to the window, the only other opening of the room. At the time, one Ismail Tharu was trying to escape through the window. Bhesadia pushed him in, called Rajaram and put him on guard at the window, and then opening the door, entered the room, where he found Govind, accused No. 1, his brother Dharma Narayan accused No. 2, his cousin Bhaskar Bhavan Pedhe accused No. 3, Ismail Tharu, a foreigner, and Kashinath, the first witness in this case, P.W. 1. Accused Nos. 1 to 3 and Kashinath are fishermen residing in the village Versova. Ismail is a foreigner. Bhesadia also noticed that there was a heap of small gunny bags in a corner of the room. He further found that the gunny bundles were wet and were heavy, and he surmised that the gunny bags would contain smuggled gold. He, therefore, sent Rajaram to fetch *panchas*. Rajaram brought three *panchas* including Panch Minoo Fitter (P.W. 12). One of these persons was sent back to Bombay to inform at the houses of the two *panchas* remaining behind that they had been detained. Bhesadia questioned the inmates of the room. He offered his own search and the search of the *panchas* but that was declined by these persons. Then Bhesadia took the search of the persons of all the five persons in the presence of the *panchas*. Nothing was found on the four fisher-

men, but on the person of the foreigner, that is, Ismail, he found a plastic purse containing Rs. 75 in red currency, Rs. 293 in Indian currency notes, one envelope and a letter in Gujarati (exh. 3). This letter is written in code words containing also some figures. The articles were returned. Bhesadia also in the presence of the *panchas* searched the room as well as the cupboard in the room, but it contained only certain personal papers of accused No. 1. Bhesadia then sent Rajaram out to search whether any car was waiting to take away the smuggled gold in view of the answers he received from the suspects. Rajaram returned after about an hour and half, by about 11-30 p.m., and reported that he was not able to find any car. Bhesadia again sent Rajaram to phone to his (Bhesadia's) office and later also asked Rajaram to ring up the customs people, as well as his superior officer, one Police Superintendent Shete. In response to the telephone messages, Sub-Inspector Lagli, Sub-Inspector Soman and Sub-Inspector Kulkarni arrived a little before 2 a.m. Kulkarni was kept on guard, and the other two Sub-Inspectors were sent for making confidential inquiries. At about 2 a.m., Assistant Collector of Customs, Mr. Jokhi, an officer of the Central Excise, Randive, Deputy Superintendent of Central Excise (P.W. 22), and some other officers of the Central Excise Department arrived. Bhesadia appraised them of the detection of the contraband and the suspects found in the room. Thereafter, Jokhi and Randive interrogated these five persons, each one separately, by taking them out of the room. It is the prosecution case that each one was taken by Jokhi and Randive to an adjoining hut at some distance from this house. The questioning continued till about 5-30 a.m. Mr. Warty (P.W. 28), Superintendent of the Central Excise by that time also arrived along with some other excise officers. It is under the supervision of Mr. Warty that further inquiries in the case have been made. Mr. Warty also interrogated these persons in the hut till about six or 6-30 a.m. of August 14, 1961. Thereafter, the seventeen bundles inside the room were brought on the verandah adjoining the room, and Mr. Warty proceeded to prepare the *panchnama* of the property contained in these seventeen bundles. The bundles were opened in the presence of the *panchas* one after another, and it was found that each bundle contained two jackets, each one having small packets stitched inside, in each of which was concealed one gold slab weighing about ten tolas. The slab was of the shape of a biscuit. The gold slabs had marks of foreign refineries thereon. When the total gold found in the seventeen bundles was counted, it was found not to tally with the total number of figures contained in the letter (exh. 8) found on the person of Ismail. Mr. Bhesadia surmised the figures on the letter represented the weight of the gold. He, therefore, further interrogated in this respect and thereafter Kashinath pointed out the eighteenth bundle of gold lying in the sand behind the house of Govind, accused No. 1. The bundle was half buried in the sand. The bundle was brought and the gold found in it was similarly concealed in the jacket which was counted. The total number of tolas tallied with the total of the various figures in the letter. The foreign gold smuggled weighed 35,730 tolas valued at Rs. 50,02,200. The smuggled gold is exh. "Z-31" in this case. The gold was sent under armed guard to the Central Excise office in six trunks brought there by Mohandas, another Deputy Superintendent of Central Excise (P.W. 29). On inspection of this gold in the Mint, it was found of the purity of 999. The preparation of the *panchnama* continued from 6-30 in the morning till 5 p.m. The *panchnama* (exh. N) prepared in the presence of the *panchas* is dictated by Warty and was taken down by Mr. Gupte, another Excise Officer. Exhibit N is signed by Mr. Warty and by Bhesadia. It is also signed by accused No. 1 Govind from whose house the property had been seized, as well as by Kashinath, the first prosecution witness in this case.

Now, these five persons in the house of Govind were also taken to the Central Excise Office situate somewhere nearabout Churchgate. It appears that Mr. Warty had gathered from the interrogation that the gold was brought in a mechanized boat "Al-Sabri" formerly named "Sufilla Mohmadi". Mr. Warty,

therefore, put a trunk call to the custom officer at Veraval for intercepting the mechanized boat "Al-Sabri". However, "Al-Sabri" could not be intercepted.

These five persons were detained at the Excise Office for the night and next morning (15th) the statements of all the five persons have been recorded by different officers. The statement of accused No. 1 Govind at exh. Z-27 was recorded by Mr. Rane (P.W. 26), Deputy Superintendent of Excise. The statement of Dharma, accused No. 2 at exh. Z-28 was recorded by Rane. Statement of accused No. 3 Bhaskar was recorded by Mohandas (P.W. 29), Deputy Superintendent of Excise. The statement of Kashinath was recorded by Karnik, another Deputy Superintendent of Excise (P.W. 24), and the statement of Ismail was recorded by Mr. Warty, Superintendent of Excise. The statements of all these persons were recorded by these different officers from morning till noon. They are elaborate and detailed statements.

Before recording these statements, all these five persons were explained the provisions of s. 171A of the Sea Customs Act, 1878, hereinafter referred to as the Act, and it has been noted in these statements that these persons have made these statements realising their responsibility under the provisions of s. 171A. All these five persons according to prosecution were allowed to go that same evening, and the record discloses that the five summonses were further issued to accused No. 1 Govind under the provisions of sub-s. (1) of s. 171A of the Act. They are exhs. Z-35 to Z-39. Exhibit Z-35 is a summons issued on August 15, 1961, requiring attendance of Govind on 16th. Exhibit Z-36 is the summons issued on August 16, 1961, requiring his attendance on 17th. Exhibit Z-37 is the summons issued on August 19, requiring his attendance on August 21, 1961. Exhibit Z-38 is the summons issued on 21st requiring his attendance on August 22. And exh. Z-39 is the summons issued on August 22, requiring his presence on August 23.

Govind was arrested on August 23, 1961, and produced before the Presidency Magistrate on the same day. He was offered bail but he could not avail of it on the same day. Later, he was released on bail and had been on bail throughout the trial. Accused Nos. 2 and 3 were arrested on August 21 and were produced before the Presidency Magistrate on the same day. They were offered bail, and they availed of it on a later date. Neither Ismail, nor Kashinath were arrested. Later, both were cited as witnesses. Kashinath has been examined but Ismail absconded before he was examined in Court. As a result of the information received from these statements, the inquiries further proceeded.

It is the prosecution case that accused No. 5 Laxman Padma Bhagat, accused No. 6 Kashinath Laxman Kapatil, also known as Istucha Kasha, accused No. 7 Mahadev Pandu Ragabhagat and one Devchand Motiram (P.W. 2) voluntarily surrendered on September 8, 1961, and on the same day their statements have been recorded by Mr. Ranadive (P.W. 22). Accused Nos. 5, 6 and 7 were arrested on September 11, 1961, and produced before the Presidency Magistrate. They were on bail during the trial. Devchand has been examined as prosecution witness No. 2. Similarly, it is the prosecution case that accused No. 9 Ayub Kassim Kika voluntarily surrendered on November 26, 1961, and gave his written statement in his own hand in Gujarati on November 26, 1961. On the same day he was arrested and produced before the Magistrate. He was also on bail during the trial. The other accused were found and their statements also have been recorded on various different dates. Except the statement of accused Nos. 14, 15 and 18, the statement of all the remaining accused have been recorded on different dates as and when they were found. It is not necessary for the purpose of this appeal to go in detail as to the date on which the statements of the remaining accused were recorded. It may be, however, stated that the finding of the accused and the recording of the statements continued till about March 29, 1962.

Certain other investigations were also made, and as a result, a complaint has been filed under s. 187A of the Act by Mr. Jokhi, the Assistant Collector of

Customs against the aforesaid 18 accused, for having committed offences under s. 120(B) of the Indian Penal Code read with s. 167(81) of the Sea Customs Act, 1878, and s. 8(1) of the Foreign Exchange Regulation Act and s. 120(B) of the Indian Penal Code read with s. 8(1) and s. 23 of the Foreign Exchange Regulation Act of 1947: and offences under s. 167(81) of the Sea Customs Act and offences under s. 167(81) of the Sea Customs Act read with s. 109 and s. 114 of the Indian Penal Code and offences under s. 8(1) read with s. 23 of the Foreign Exchange Regulation Act, 1947, or offences under s. 8(1) and s. 23 of the Foreign Exchange Regulation Act of 1947 read with s. 109 and s. 114 of the Indian Penal Code.

The prosecution case as disclosed at the trial, in brief, may be stated: The brains behind the conspiracy were the absconding accused No. 14, Haji Mohamed Barkati, and his brother accused No. 15, Haji Sattar. They are Memons speaking Gujarati language. They with the help of accused No. 9, Ayub Kassim Kika, who has been referred as their nephew, and accused No. 1, Govind, a fisherman of Versova, acted as agents for receiving gold sent from Dubai, a place in the Persian Gulf. The *modus operandi* of the operations was that gold was despatched in mechanised vessels from Dubai and was met in the stream near Bombay by a small mechanized launch arranged therefor. Gold brought from Dubai in the mechanised vessel was transhipped in mid-stream in the mechanised launch arranged by Govind. A man from the foreign ship used to come down the small launch to accompany the gold. The gold was then brought to the Versova beach and then with the help of some fishermen from Versova was removed to the house of Govind. Therefrom gold was arranged to be shifted by accused Nos. 14 and 15 with the help of accused No. 9 as well as accused No. 8, Haroon Haji Abdulla, who is a resident of Jamsalai, a place in Saurashtra, to different places in Bombay, to the details of which we will presently advert. Both Haji Mohamed as well as Haji Sattar lived in a furnished flat in Duru Mahal, taken by them on leave and license basis, on the Marine Drive but not on the sea face, in May 1960. The telephone No. of this place is 242935. Accused Nos. 14 and 15 also took another flat on leave and licence basis from November 1, 1960, in a building known as "Avillion" situate at Little Gibbs Road, Malabar Hill, Bombay. Accused No. 9 with the help of one Issak Mohamed had taken a room in a flat of Mohiddinkhan near the J. J. Hospital. The room was taken on leave and license basis from August 1, 1960, for 11 months, and, according to the prosecution, these three places were the operation centres of accused Nos. 14 and 15. Now, in pursuance of the aforesaid conspiracy to smuggle gold, it is the prosecution case that the accused have in fact smuggled gold on four occasions in four trips, to which we will presently advert. It is also the prosecution case that some of the accused i.e. accused Nos. 14, 15, 1 and 9 have participated in smuggling gold in all the four trips, while others have participated in smuggling gold in one or more trips. We would in brief state the part played by these different accused in these four trips as well as a trip referred to as Reconnaissance trip in the judgment of the learned Magistrate arranged for the purpose of fixing the place for transshipment of gold from the foreign mechanised vessel to the small mechanised launch arranged by Govind for mid-stream.

The Reconnaissance Trip: In or about December 1960 or January 1961, one Dosa Malik introduced Haji Sattar, accused No. 15, to accused No. 1, Govind, and accused No. 1 agreed to help them to land gold by arranging local boats to tranship the contraband gold to the shore. Thereafter accused No. 1 arranged to get the boat of one Ganpat Koli, a fisherman residing in Madh Island, and in that boat, Govind, Kashinath, accused No. 9, Ayub, and accused No. 15 Haji Sattar, as well as Ganpat went in the night previous to the day on which gold was landed for the first time, towards the Colaba-Dandi. There, Ayub pointed out a place where Govind should meet the foreign vessel the next day for the transshipment of gold. They then came back.

First Trip: The next night, Govind arranged the boat of Shankar, accused

No. 11 a fisherman of Versova. In that boat, Kashinath, P.W.1, Govind accused No. 1, Ayub, accused No. 9, Hira, accused No. 10, and Haji Sattar, accused No. 15, went to the appointed spot. The foreign vessel came to the rendezvous at about 8-30 p.m. Haji Sattar flashed a signal by torch. The foreign vessel responded to the signal. Thereafter both the boats were brought together. A rope was thrown from the foreign vessel to Govind's launch. Both Ayub and Haji Sattar then went up the foreign vessel. The foreign vessel then towed Govind's launch towards Bandra side as Govind's launch had developed some trouble. After the repairs were completed, two gunny bags containing 4000 tolas of gold were transhipped from the foreign vessel to Govind's launch. According to the prosecution, the value of gold was about Rs. 1,19,903-20 nP. Along with gold also came one Ismail. They then returned to Versova beach and there removed the gold from the launch to Govind's house, and as it was late at night, they slept there. Early morning, next day, the two bundles were opened and the jackets were taken out. Kashinath and Hira, accused No. 10, were asked to put on these jackets under their clothes. Thereafter, Haji Sattar, Ayub, Kashinath, Hira, and Ismail left the house of Govind. They travelled by a bus upto the Andheri Railway Station, and at Andheri they boarded a local train and got down at Matunga. At Matunga the party separated. Kashinath and Hira were taken by Ayub in a taxi to his room near the J. J. Hospital. There, Kashinath and Hira removed the jackets and handed them over to accused No. 9, Ayub. Ayub paid Rs. 5 each to these two persons. Then Kashinath and Hira returned to Govind's house at Versova. At that time, at the house of Govind were sitting, Devchand, P.W.2, and Laxman Padma, accused No. 5. On that evening, Ismail returned to Dubai. Kashinath reached him in a country boat to the foreign vessel which was standing in the mid-stream waiting for him. Three or four days thereafter, Govind paid Rs. 100 to Kashinath. Thus, according to the prosecution, in the first trip, accused Nos. 1, 9, 10, 15, Kashinath and Ismail participated. It may be stated that accused No. 11, Shankar, whose boat was used in this trip, had also gone in the boat, and therefore, it is the prosecution case that he also had participated in this trip.

Second Trip: This trip took place sometime in April or May 1961. Govind had arranged the boat of one Dharma Pandu, P.W.3. In this boat travelled Kashinath, Dharma Pandu and his two or three servants. The boat was taken at night to another place in the mid-stream called Utran near Marva. The foreign vessel described by the witness as "white mechanised launch" came there. After the identity had been established by torched signals, some persons from the foreign vessel asked as to who were in the small launch. Kashinath replied that he was Govind's man. A rope was then flung down and the two boats were brought together. Eight packets of gold were then transhipped from the foreign vessel to the local boat. These 8 packets contained 15,000 tolas of gold valued at Rs. 18 lacs. Ismail also came down to the local boat from the foreign vessel. They all then returned to the Versova beach. On the shore were present Govind, accused No. 1, Devchand, P.W.2, Laxman Padma, accused No. 5, and Haji Sattar, accused No. 15. Gold was then carried to the house of Govind. There, a big blue car with a white top was waiting. Ayub, accused No. 9, was sitting in the car. The 8 packets containing gold were put in the luggage boot of this car, and in this car went Ayub accused No. 9, Haji Sattar, accused No. 15, and Ismail. This time, gold was carried in this car to the flat of one Kantilal at Vile Parle. For this trip Kashinath received Rs. 500 from Govind. Thus, according to the prosecution, in this second trip, accused No. 1, accused No. 5, accused No. 9, accused No. 15, Kashinath, P.W. 1, Devchand, P.W.2, and Dharma Pandu, P.W.3, and Ismail participated.

Third Trip: About 9 or 10 days after the second trip, Govind again engaged the boat of Dharma Pandu. In this trip, at about 7 or 7.30 p.m. Kashinath, Dharma Pandu and his two or three servants went to another place known as Aksa Light House. The foreign vessel "Safina Mahmedi" was there. The

same procedure was followed and this time, 14 bags containing gold were transhipped to the local boat of Dharma Pandu. This time, however, Ismail did not come to the local boat, but instead, Noor Mahmed, accused No. 4, came in the local boat. They then returned to the Versova beach. On the beach were waiting accused No. 1, Govind, accused No. 5, Laxman, accused No. 8, Haroon, accused No. 9 Ayub, accused No. 15, Haji Sattar. Gold was then carried by them behind the house of Govind and there put in another car, a black car, and in that car went Haroon, accused No. 8, Ayub, accused No. 9, Noor Mahomed, accused No. 4, Haji Sattar, accused No. 15. The car was driven by Ayub. Thus, according to the prosecution, in the smuggling of gold in this trip participated accused Nos. 1, 4, 5, 8, 9 and 15, and prosecution witnesses Kashinath and Dharma Pandu. The gold brought in this trip was 28,000 tolas valued at Rs. 39,20,000.

Fourth Trip: And this brings us to the fourth trip, when Inspector Bhesadia discovered the smuggling. In this trip, Govind engaged the boat of Hira, and in this boat on August 13, 1961, travelled Kashinath, accused No. 6, accused No. 7 and Devchand. The local boat this time went to another place called "Tera" very near the Versova beach. After the usual procedure of signals, both the boats were brought together and 18 packets tied in gunny bags were transhipped from the foreign vessel to the local boat. Ismail came in the local boat. On the shore were present accused No. 1 Govind, accused No. 5 Laxman, accused No. 10 Hira, and accused Nos. 4, 8 and 9 were waiting on the sand with a car nearby. Govind and Kashinath took Ismail to Govind's house. Then both of them returned and the 18 packets of gold were then carried by Kashinath, Govind, Dharma, accused No. 2, Bhaskar-accused No. 3, accused No. 5-Laxman, Hira-accused No. 10 and one Kishan, and brought to the rear of the house of Govind; and while the packets were being taken inside the house of Govind, Inspector Bhesadia raided the place. By the time Bhesadia had come, 17 bags were taken inside the house of Govind, and only one was lying outside. On realising that Bhesadia had come, others ran away and only accused Nos 1, 2, 3 and Kashinath and Ismail were found there. Thus, in the smuggling of gold in this trip, according to the prosecution, accused Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10 participated. So also prosecution witnesses Kashinath and Devchand and Ismail participated. These are the overt acts on which the prosecution relies in support of its case.

Now, the defence of the accused in general was one of denial. According to accused Nos. 1 to 3, gold was lying in the beach and it was Bhesadia who brought it into his (Govind's) house. The other accused denied their presence or participation in any of these trips. According to them, their statements were taken by coercion and by administering threat to them. It is not necessary to go into details of the defence raised by these various accused. We will refer to the defence of these three appellants when we deal with the evidence against each of the three appellants.

Now, the evidence tendered by the prosecution in support of its case may be briefly stated: As already stated, Kashinath, who had participated in all the five trips, i.e. the reconnaissance trip and the four trips in which gold was brought; Devchand, who had participated in the second and the fourth trips, and Dharma, who had participated in the second and the third trips, have been examined as prosecution witnesses. Dharma, however, has turned hostile to the prosecution. He no doubt in his evidence admitted that his boat was taken by Govind on these two occasions i.e. 2nd and the 3rd trips, but he denies having gone in the boat himself. The evidence of Kashinath fully supports and corroborates the prosecution case stated above. Similarly, Devchand's evidence also fully corroborates the prosecution case relating to the 2nd and the 4th trips. The prosecution also has filed the statements of Kashinath and Devchand recorded under s. 171A of the Sea Customs Act, by way of corroboration to the evidence of these two witnesses. The prosecution has also filed the statements of the various accused recorded under s. 171A of the Sea Customs Act. We have

already stated that these statements are detailed ones and fully support and corroborate the prosecution case but only in respect of the trips in which each one of them has participated.

Besides the statements of these various accused, recorded under s. 171A of the Sea Customs Act, the other documentary evidence tendered by the prosecution consists of Ex. S, a chit found on the person of Ismail in the search made on the night of August 13, 1961, i.e. when Bhesadia raided the place. We have already stated that this chit is in code words, and we would presently show that some of the code words in the chit are also found in some of the foreign telegrams received at the address where Ayub was residing near the J.J. Hospital. The prosecution has also tendered in evidence through its witness Mohiddinkhan, P.W. 5, the leave and license agreement for 11 months of date August 1, 1960, executed by accused No. 9 in favour of his landlord Mohiddinkhan, P.W. 5, which is Ex. E in the case. Accused No. 9 has admitted the execution of this document and has also admitted that he was living in the room from August 1, 1960 to June 1961. Mohiddinkhan has deposed that Issak Mohamed, P.W. 4, who is a relation of accused No. 9, had approached him for securing a room for accused No. 9's residence, as accused No. 9 had recently got married. He has further stated that the accused lived with his wife in the room for about a couple of months after taking the room. Thereafter his wife went to her native place. He further found that there were a number of persons visiting accused No. 9 at night time, and one night at about 2 a.m. one person disclosing himself as Haji Sattar was shouting from the streets for Ayub. As Ayub was occupying one of the rooms in his flat, he was disturbed by the nocturnal activities of Ayub and he, therefore, refused to renew the leave and license agreement. According to him, the agreement was not renewed and, therefore, accused No. 9 ceased residing there from June 1961. Mohiddinkhan has also further deposed that at the time of the termination of the leave and license, he had returned the deposit of Rs. 3,000 to accused No. 9 for which he had executed a receipt. That receipt has, however, not been produced in this case. The explanation given by him was that when his house was white-washed, the receipt has been lost. Mohiddinkhan has also further deposed that telegrams on the address of Ayub used to come from foreign countries. In absence of Ayub, at times he or his wife had received them on behalf of accused No. 9. Letters also were received from foreign countries, and some of them had the postage mark of Kuwait. Copies of 13 foreign telegrams—Z-51 to Z-63—addressed to one Salim C/o Accused No. 9 at his address in the flat of Mohiddinkhan have been produced by the prosecution. P.W. 35, Sumant Mastakar, an employee of Foreign Telegraph branch, has been examined as a witness, and he has deposed that the copies produced by him are flimsy copies of the foreign telegrams received. According to him, when the foreign telegrams are received, the teleprinter prints two copies; one copy is delivered to the addressee and the second copy remains in the office and that is called the flimsy copy. The flimsy copies of these 13 telegrams, as already stated, have been filed in this case. Along with these copies the delivery memos in respect of these telegrams have also been filed. However, no evidence has been tendered in proof of the fact that the delivery memos are signed by accused No. 9 or for him by witness Mohiddinkhan. The delivery memos are purported to have been signed by Ayub. Some signatures are in English, one in Urdu and one in Gujarati. These documents Z-51 to Z-63 when compared with Ex. S, the chit found on the person of Ismail, disclose that there are certain common code words e.g. Sajid, Paman, Abhal, Dubez etc. frequently appearing in these telegrams. These telegrams are of the period between April 11, 1961 to August 8, 1961. All these telegrams are from Dubai, and the 2nd, 3rd and the 4th trips, to which we have referred, are between this period. The *panchnama* made on the night of August 13 further discloses that on 11 out of the 18 gunny bags, there were written words "Dubai" and the words on the remaining bags were very faint, and therefore, not decipherable.

The prosecution also has examined Issak Lakhi, P.W. 4. Issak corroborates

the evidence of the landlord Mohiddinkhan. It is through his intervention that Mohiddinkhan had given the room in his flat near the J. J. Hospital to accused No. 9, Ayub, in August 1960 for a period of 11 months. Issak is a relation of accused No. 9, being his mother's sister's son. He has deposed that the business of accused No. 9 is plying a truck. He has a truck of his own. He came to Bombay sometime in 1956 and was staying with him (witness). Later, he got married and then took the room in the flat of Mohiddinkhan. His truck as well as the truck of accused No. 9 was plied in the business concern known as Kapadia Transport. He has further deposed that one Ahmed Gorabhai, a Pakistani national, came to India in December 1960. Gorabhai is a brother-in-law of accused No. 9, their wives being sisters. Both accused No. 9 and Gorabhai came to his place with a request that he should find a driver for the car of Gorabhai. He showed two drivers, out of which Salim P.W. 10, was selected by him as his driver. According to him, he had visited Gorabhai 4 or 5 times. Gorabhai was residing at the time with his family in a flat in Duru Mahal, and on the occasions he visited Gorabhai in this flat, he used to see besides his family members, Haji Sattar, accused No. 15, and Haji Bhai, accused 14. He has given description of Haji Sattar as of sallow complexion having one golden tooth. Haji Bhai has been described as a person having a Namaj mark on his forehead and was wearing glasses. Similar descriptions of these two accused has also been given by accused No. 1, Govind, in his confession, Kashinath in his evidence, and Dave, the estate agent, Salim, driver of accused Nos. 14 and 15, Yusuf, their cook, and Maladwalla, the landlord of the "Avillion" in which accused Nos. 14 and 15 had taken a flat. In fact, there is no dispute in this case as to the identity of accused Nos. 14 and 15, and that they were residing at Duru Mahal and had taken another flat in "Avillion". The witness has stated that accused No. 9 was in Bombay till the end of August 1961 when he took away his truck. He left Bombay and went to his native place Panoli, a place near Ankleshwar in Gujarat.

Salim, P.W. 10, has deposed that he was working as a motor driver for persons residing in Duru Mahal from May 9, 1960 to May 1961. The name of his master was Mr. Haji, accused No. 14. Both Haji Mohamed and Haji Sattar were brothers. Both Haji Sattar and Haji Mohamed spoke Gujarati or Memon language. They had two cars. One was a Plymouth car, bearing No. BYZ 4280. The colour of the Plymouth car was blue, but the top was painted white. It may be noticed that the gold carried in the second trip was in a car of blue colour with a white top. The other car was an Ambassador, bearing No. BMC 1400 of cement colour and blue strips in the middle. It may be noticed that the gold carried in the third trip was in a small car of blueish colour. Salim was driving both these cars as ordered by his master. The masters were also driving the cars at times. Similarly, accused No. 9 Ayub was also driving these cars. He has identified accused No. 9 as the person who was also driving these two cars. Further he has identified accused No. 9 as the person staying near the J. J. Hospital. According to this witness, accused No. 9 used to come to Duru Mahal to his masters accused Nos. 14 and 15, every day at about 9 or 10 a.m. and was also having his lunch there. Sometimes, he used to stay late at night and at times he had to reach accused No. 9 to his room near the J. J. Hospital in the car. He further states that as his masters, accused Nos. 14 and 15, had another residence at Malabar Hill, he used to drive them there along with accused No. 9. They used to visit this flat at times, once in four days or ten days or fifteen days. One Gorabhai was staying there. Out of the two cars, one used to remain at Duru Mahal and the other at the flat at Malabar Hill. The visits of his masters to this flat were of very short duration of few hours. About four months after joining his services, Haji Mohamed's family left for Pakistan. The Plymouth car which was seized during the inquiry from the compound of a place, "Kotak Kunj" at Babulnath Road, was identified by him as the car belonging to his master. It would be noticed that though accused No. 9's relation Issak has deposed

that Ahmed Gorabhai was living in the same flat with accused Nos. 14 and 15, and that he had given Salim as driver to Gorabhai, the evidence of Salim is quite contrary that Gorabhai was living at "Avillion" and Salim was engaged as a driver not by Gorabhai but by accused Nos. 14 and 15.

P.W. 6, John D'souza, a motor repairer, and P.W. 7, Asrani, working at the All Cars Services, have deposed that the aforesaid two cars, namely, the Plymouth and the Ambassador cars, belonged to the two muslim persons, accused Nos. 14 and 15, residing at Duru Mahal and were repaired and serviced by them.

Yusuf Bhora, P.W. 11, has deposed that he worked as a cook in Duru Mahal for accused Nos. 14 and 15, from October 1960, and left the services on June 4, 1961. He was attending to his duty at about 9 or 9.30 a.m. in the morning and used to be in the flat till about 9.30 p.m. In the flat were staying—Haji Mohamed, accused No. 14, Haji Sattar, accused No. 15, and their son-in-law Haji Suleman. Their family stayed in the flat for about a month and a half. The pay was paid to him by accused No. 14. He knew Gorabhai, who had at times visited the flat of his master, and on some occasions stayed there for the whole day. He, however, did not know where Gorabhai was staying. He corroborates the evidence of driver Salim, that his masters had two cars—the Plymouth and the Ambassador. He also identifies the seized Plymouth car as the car belonging to his master. A fortnight before June 4, 1961, accused Nos. 14 and 15 left the flat, and gave him notice for the termination of his services. The furniture in the flat was removed by accused No. 9, 3 or 4 days after accused Nos. 14 and 15 had left the place. He was present when the furniture was removed. He was asked by his master to attend the flat when the furniture was to be removed by accused No. 9 and, therefore, he had attended. He removed the furniture with the help of 3 or 4 coolies and carried it away in a truck. The key of the flat was handed over by accused No. 9 to the owner of the flat. It is not in dispute that the owner of the flat is one Mrs. Athaide. After that, he saw neither, accused No. 9, nor accused No. 14, nor accused No. 15. He admits that there was a telephone in the flat. This witness also corroborates that accused No. 9 was in the flat at Duru Mahal during the day, was taking his lunch there and moved in the cars of his master.

P.W. 16, Dave, is an estate agent. He deposes that Dr. Athaide, the owner of the flat had asked him to get a licensee for the flat. The flat was in the name of his wife. At the material time the flat was vacant. About three months prior to the occupation of this flat by accused Nos. 14 and 15, the flat had fallen vacant. He, however, kept the flat with himself and paid the rent thereof. He had advertised the flat in the "Times of India", and in response, one Mistry introduced him to accused No. 14. He wanted a furnished flat with a telephone. Ultimately, the aforesaid flat in Duru Mahal was given on leave and license basis in May 1960 to accused No. 14. It had a telephone and the number was 242935. The description given by him of accused No. 14 is the same as that given by Salim, the driver and Yusuf, the cook. At times he used to visit the flat in connection with the flat amenities. Five or six months after accused No. 14 occupied the flat in Duru Mahal, he wanted another flat, and also wanted a garage for their car near it. He along with accused No. 14 and another named Ayub Kassam Kika had gone in their car to find a place and a garage. He had shown them a flat in "Avillion" at Malabar Hill. It was approved by accused No. 14 and Ayub Kassam. In one of the visits to this flat, accused No. 9 also had accompanied accused No. 14. After approving the flat, Hajibhai, accused No. 14, told him that he would like to have the tenancy agreement in respect of this flat in "Avillion" in the name of two persons Ayub Kassim Kika and Ayub Mohamed. He accordingly conveyed the desire of accused No. 14 to the landlord of "Avillion", one Maladwalla. The agreement was drafted. The man who called himself as Ayub Kassim Kika signed it. Ayub Mohamed did not sign in his presence. Accused No. 14 told him that he would get the agreement signed by Ayub Mohamed

and then give him back the agreement. Later on, the agreement was given to him and it bore the signatures of both Ayub Kassim Kika and Ayub Mohamed. It is necessary to note that the witness has not identified accused No. 9, Ayub as the person who has signed as Ayub Kassim Kika. The aforesaid agreement purporting to have been signed by Ayub Kassim Kika and Ayub Mohamed is Ex. "I". About a week thereafter, a garage nearby was also hired by them. He identified the Plymouth car in the Court as the car of accused No. 14. The possession of flat in Duru Mahal which was in occupation of accused No. 14 was surrendered by accused No. 9 to the landlord. On the document of surrender accused No. 9 had signed as Ayub Mohamed and it is at that time that he learnt that the name of accused No. 9 was Ayub Mohamed. He also at times found in his visit to the flat in Duru Mahal Ayub Kassam Kika besides accused No. 9. The aforesaid evidence of Dave shows that though the real name of accused No. 9 was Ayub Kassim Kika, he was posing as Ayub Mohamed; while another person was posing as Ayub Kassim Kika. The evidence also discloses that at the time of his visits to the flat in Duru Mahal, he used to find accused No. 9 there and accused No. 9 had also accompanied accused No. 14 in one of the visits for the approval of the flat in "Avillion," and it is accused No. 9 who had delivered possession of the flat to the landlord. Accused No. 9, though he has admitted visits to accused Nos. 14 and 15 in the flat at Duru Mahal, as well as to the flat in "Avillion", has denied that he had anything to do either with the fixation of the tenancy of the flat in "Avillion" or the surrender of flat in Duru Mahal or the removal of the furniture therefrom. To this we would advert when we deal with the case against accused No. 9.

Maladwalla, P.W. 8, is the landlord of the "Avillion". He has deposed that he also stays in another flat in the same building since about February 1961. Flat No. 9 on the third floor was given to Ayub Kassim Kika and Ayub Mohamed in November 1960. Both Ayub Kassim Kika and Ayub Mohamed had signed the tenancy agreement in his presence. According to him, his tenants spoke in Gujarati and were Memons. The description given by this witness of his tenants Ayub Kassim Kika and Ayub Mohamed tallies with the description of accused Nos. 14 and 15 given by the other witnesses. It can reasonably be inferred that in taking this flat, accused Nos. 14 and 15 were posing themselves as Ayub Kassim Kika and Ayub Mohamed, hiding their real identity. He has further deposed that none of these persons was present in Court. These persons had two cars, the big one had blue and white colour and the other was an Ambassador. The flat taken on lease was not occupied regularly or continuously by any person, but on occasions it was visited. His tenants had given him a telephone number in case he (Maladwalla) wanted to contact them. The telephone number was noted by him in his diary, and referring to the diary he has deposed that the number was 242935. It is to be noticed that this telephone number was of the telephone in the flat in occupation of accused Nos. 14 and 15 in Duru Mahal. The reason given by him for giving this telephone number was that as the tenants were not continuously occupying the flat, he should be in a position to contact them in case the rent of the flat was not regularly received by him. On this telephone number he had contacted them on 2 or 3 occasions, and that was in connection with the delay in the matter of payment of rent. He has further deposed that Ayub Kassim Kika and Ayub Mohamed are the names given to him by these two Gujarati speaking Memons at the time of the execution of the document. At the time of taking the flat, they had told him that they were taking this flat for their mother. Later they told him that as she was not coming, they were leaving the flat. The possession of this flat was handed over to him in May 1961. According to him, his tenants were introduced to him by estate agent Dave.

Lallubhai, P.W. 9, is the person who had occupied the flat in Duru Mahal on its possession being handed back to the landlord by accused No. 9. According to him, he occupied the flat from June 15, 1961, and stayed there for 7

months. Ex. M filed in the case is a leave and license agreement executed by him in favour of Dr. Athaide. Five or six days before the execution of this agreement, he had visited the flat. At that time he saw two men and one woman in the flat. They looked like Memons and spoke Gujarati language. One of them showed him the flat. He was a young man of fair complexion of height 5'6". He had parted hair in the middle. He had no opportunity to see the other man. The man who showed him the flat told him that the real tenant of the flat had gone away and possession of the flat would be given on June 11. Sometime after he occupied the flat, he started receiving bills for the telephone, the number of which was 242935, for the arrears of the telephone bills relating to the period in occupation of the previous tenants. He wrote to the landlord Mrs. Athaide at Poona and also paid the bills to Dave as the line was threatened to be cut. These telephone bills were produced at the time the evidence of this witness was recorded, which were handed over back to the Customs Officer, and seized from him under a *panchnama*. We have already stated that this flat was searched on September 16, 1961, by Dy. Supdt. of Excise, Mr. Chipkar, P.W. 23. Dave in his evidence has also stated that after the flat in Duru Mahal had been vacated, it was given to Lallubhai. As regards the arrears of telephone bills paid by Lallubhai, Dave has deposed that he had in this connection seen accused No. 14 in the Sea Face Hotel in July 1961 and accused No. 14 paid him Rs. 200.

Devchand, P.W. 2, who, according to the prosecution, had taken part in the second and the fourth trips, has deposed that he waited for 4 or 5 days after gold had been brought in the second trip, and thereafter he went to accused No. 1's place, as no payment was made to him; and demanded money for assisting him in the second trip. Govind told him that he had no money, but asked him to wait. He then called his wife and asked her to give him the chit. She took out a chit from the purse and gave it to Govind. A telephone number was noted on the chit in Marathi. Accused No. 1 told him:

"Dial that number and say 'halo', 'halo' and ask for Kanti, and on being asked as to who was phoning, say that 'I was Pant'. If the person answering says that he is Kanti, tell him to meet him (Govind) at 10 a.m. at Mahim."

The witness then rang up the number written on the chit. The number written was 242935. It may be noticed that this telephone number was of the flat in Duru Mahal in occupation of accused Nos. 14 and 15. After the connection was established, the person at the other end asked him who he was. He replied that he was Pant. Then the person on the other end replied that he was Kanti. He then gave him the message to meet Govind at Mahim the next day at 10 a.m. The man at the other end said that he will. He then returned back to Govind and gave him the message. The next day, Govind asked him to accompany him to Mahim. He, therefore, went to Mahim with accused No. 1. They went near a Christian Church at the bus stop at Mahim. They saw a car standing there. He stood at a distance and Govind went near the car. There were two persons in the car. One of them got down and talked to Govind for about 10 to 15 minutes. Then the man entered the car and the car went away. Govind told him that that man was their Seth. They then returned to Versova and next day Govind paid him Rs. 500. The chit on which the telephone number was written remained with him for 2 or 3 days and thereafter he returned the same to Govind. The description given by this witness of the man who came out of the car and talked to Govind tallies with the description of accused No. 14. The aforesaid evidence of Devchand establishes close connection between accused Nos. 1 and 14 and 15. In the cross-examination of Devchand, it has been brought out that he has not received much education, he was illiterate. He could read Marathi figures only 1 to 100. He cannot read English figures. It had been put to him that he was deposing falsely when he stated that he rang No. 242935, but he denied the same. In view of the aforesaid admissions, we were in the beginning hesitant in accepting this part of the evidence of this witness, which has been accepted

by the learned Judge of the trial Court, but we find the other circumstances in the case which indicate that this part of the evidence of this witness is true. It would be noticed that on August 13, 1961, the smuggling operations were detected. On August 15, the statements of five persons, i.e. accused Nos. 1 to 3, Kashinath and Ismail were recorded. Though in the statement of Govind, mention was made of the flat in "Avillion," there was no mention of the flat in Duru Mahal in occupation of accused Nos. 14 and 15, nor was the telephone number of the flat in Duru Mahal disclosed by any of them. The flat in "Avillion" was searched on August 16, 1961, but the flat in Duru Mahal had not been searched till a month thereafter. Now, it is in the evidence of Devchand that noticing that the police had come on August 13, 1961, he along with some other accused ran from the spot and next morning, accused No. 5, accused No. 6, he himself, and Dharma Pandu left Versova and went to Uttan a place near Bassein. They stayed in Uttan for four or five days, where they met accused No. 7, who told them that the police were visiting their house. Therefore, he and accused Nos. 5, 6 and 7 left Uttan and went to another place called Kalan. There they stayed for 20-25 days. His maternal uncle then came, took him to Bombay and produced him before Mr. Ranadive. His statement has been recorded by Ranadive on September 8, 1961. It is thereafter on September 16, 1961, that the flat in Duru Mahal has been searched. This shows that the fact that the flat in Duru Mahal was in occupation of accused Nos. 14 and 15 was for the first time became known to the Inquiring Officers after the statement of Devchand had been recorded. On the record the statements of accused Nos. 1 to 3 and Kashinath have been placed. Ismail also was another person who was found at the spot. His statement also has been recorded on August 15, 1961, but it has not been placed on record, possibly because Ismail could not be examined, he having absconded. However, Mr. Gandhi, learned counsel for the prosecution, has stated before us that he has ascertained that Ismail's statement does not disclose either the telephone number of the flat in Duru Mahal or that accused Nos. 14 and 15 were living in Duru Mahal. His statement discloses that Ismail was taken only to the flat in "Avillion". There is also another circumstance which indicates that the fact that the flat in Duru Mahal was in occupation of accused Nos. 14 and 15 was known to the Inquiry Officers only from the statement of Devchand. Now as already stated, Devchand's statement was recorded on September 8. The flat in Duru Mahal was searched on September 16. At that time the flat was in occupation of Lallubhai, P.W. 9, whose evidence we have already discussed. The telephone bills for arrears for the period of occupation of accused Nos. 14 and 15 were seized at that time. On that day, Lallubhai's statement was recorded. It is only thereafter that statements of persons connected with this flat during the time of its occupation by accused Nos. 14 and 15 have been recorded. The statement of Dave, the estate agent, was recorded on September 23. The statement of Salim, the motor driver, was recorded on September 27. The statement of Yusuf, the cook, was recorded on September 27, and the statement of Issak, who was an occasional visitor to this flat was recorded on September 29. This being the other evidence on record, we see no reason to discard this part of the statement of Devchand. We have, therefore, no hesitation in agreeing with the learned Magistrate that this part of the evidence of Devchand is true, and as already stated, this part of his evidence establishes a very close association between Govind and accused Nos. 14 and 15. It is in Govind's house that the smuggled gold was found and since that time, accused Nos. 14 and 15 could not be traced and have absconded, and it is not in dispute that they have absconded.

There is also another piece of evidence which establishes close association between Govind and accused Nos. 14 and 15, and that is the evidence of Salastekar, P.W. 18. He is a practising advocate of 32 years' standing. He has deposed that he prepared an agreement for the sale of a mechanised launch on March 11, 1961. The draft is put on record at Z-A. The draft shows that

for a consideration of Rs. 39,000 one Ibrahim, a resident in Jam Balai in Saurashtra, sold the mechanised launch "Safina Mohamedi" bearing registration No. BP 338 to Bhaskar Bhavnya Peve, who is accused No. 3 in the case, and who is the cousin of Govind. It may be noticed that this Bhaskar was in the house of Govind when the gold was seized. Now, the evidence of Salastekar discloses that on the day he prepared the agreement of sale, five persons had come to his house—two Mahomedans very finely dressed, the vendor of the launch, who appeared to the witness to have hailed from Saurashtra, and two Kolis. One of the Kolis told him that his brother wanted to purchase a motor launch and they wanted him to draft an agreement in respect of the said sale. He then asked the names of the vendor and the vendee, the sale price, the name of the mechanised launch, and then prepared the draft. He also prepared a draft of the receipt to be given by the seller to the purchaser on receipt of consideration. The draft prepared is in his own hand and that has been produced in Court as Z-8. On the basis of the said draft, a final agreement was engrossed on a stamp paper of Rs. 1.50 and was executed. The well-dressed gentleman counted notes one by one and they were paid to the vendor. A net cash of Rs. 39,000 was paid in his presence. These persons went back in a shining big car. The witness has identified accused No. 3 as the purchaser of the launch. In view of the statement of this witness that one of the Kolis had told him that his brother wanted to purchase the boat, it could be reasonably inferred that the other person was Govind though he has not been identified by Salastekar in Court. In any event, the evidence of Salastekar establishes that in the name of accused No. 3, who was undoubtedly in the conspiracy, a mechanised launch "Safina Mohamedi" was purchased in March 1961, but the price was paid by the well dressed Muslim gentleman who came in a big shining car. It could reasonably be inferred that they were accused Nos. 14 and 15. To this conclusion of fact, the confession of accused No. 1 lends complete assurance that the launch was purchased by accused No. 14. Mr. Kalkundre, P.W. 21, was Sub-Inspector in charge of Customs House at the material time. He has deposed that it was part of his duty to keep the record of arrivals and departures of vessels at and from Versova. From the record, he has deposed that "Safina Mohamedi" arrived at Versova on March 9, 1961. It was in Versova port from March, 3, 1961 to March 20, 1961. During the period it was in port, it was sold by the previous owner to accused No. 3. He identified accused No. 3 as the purchaser of the vessel "Safina Mohamedi". An application for transfer of the vessel in the name of accused No. 3 has been exhibited at Z-14. Z-12 is a copy of the register showing that "Safina Mohamedi" was transferred in the name of accused No. 3. It is the prosecution case that this mechanised boat "Safina Mohamedi" was after its purchase used for bringing gold from the Persian Gulf to Indian shore in the second and the third trips, and also in the 4th trip but under a changed name "Ali Sabri". There is however no substantive evidence to support the prosecution case. The confession of accused No. 4 states that gold was brought in the second trip in "Safina Mohamedi" and in the third trip in "Mohamed". The evidence of Kashinath is to the effect that in the second and the third trips the same boat came.

Then there is the evidence of P.W. 35, Mastakar, an official from the Telegraphic Office in the Foreign Telegrams Branch. We have already stated that he had produced the flimsy copies of the foreign telegrams received in the name of Salim c/o accused No. 9 at his address at the room in the flat of Mohiddinkhan P.W. 5, near the J. J. Hospital. We have already dealt with these telegrams. They are 13 in number, Z-51 to Z-63. They are of the period between April 11, 1961 to August 8, 1961, the period relating to the second, third and the fourth trips. The last telegram Z-63 is of date August 8, 1961, and the boat carrying gold arrived in Versova on August 13, 1961. It is in evidence that 5 or 6 days are required for a boat to come from the Persian Gulf to India. The date on the chit found from the person of Ismail Ex. 5, is August

7, 1961. The code words like "Sajid, Paman, Abbal" frequently occurring in the telegrams are also found in Ex. 6 which is seized from the person of Ismail. There is also in Exhs. Z-62 and Z-63 found the word "pante". Then there is the evidence of the Customs Officers: Warti, the Superintendent under whose directions the inquiry has been made, and the Deputy Superintendents, Ranadive, Chipkar, Karnik, Rane, Poplay and Mohan Das. Messrs. Warti, Ranadive, Rane and Mohandas have recorded the statements of these different accused persons as well as other persons. Chipkar has searched the flat at Duru Mahal and the flat in "Avillion" has been searched by Karnik. It is not necessary to deal in detail with the evidence of these witnesses. We would, later, refer to their evidence relevant for the purpose of considering the specific cases against accused Nos. 5, 8 and 9.

Now, it is not in dispute before us that on the aforesaid evidence, clearly a conspiracy to smuggle gold evading the prohibition as well as defrauding the Government of its dues has been clearly established. It is also not in dispute that such a conspiracy did exist between some un-known persons in the Persian Gulf, accused Nos. 14 and 15, and the persons found in the house of Govind at the time when gold was seized on August 13, 1961, i.e. accused Nos. 1 to 3, Kashinath and Ismail. The only question that has been urged before us on behalf of the appellants-accused Nos. 5, 8 and 9 is that the evidence on record does not establish that these accused had in any manner participated in the conspiracy or were in any manner concerned with the smuggling of gold. We would, therefore, in brief state the prosecution case against each of the three accused and the evidence on the basis of which the learned Magistrate has convicted them.

Accused No. 5: Laxman Padma Bhagat is a fisherman of Versova. According to the prosecution, he has participated in the 2nd, 3rd and the 4th trips. He was waiting at the shore when gold was brought in a local boat to the shore of Versova in the second trip. He was also waiting at the shore when the local boat brought gold to the shore of Versova in the third trip. He thereafter carried the packages from the shore to the house of Govind and then put them in the luggage boot of the car. In the 4th trip also he removed gold from the shore to the house of accused No. 1, Govind. But when he discovered that the police party had come, he along with accused Nos. 6 and 7 and witness Devchand ran away. The prosecution also alleges that he had participated in the transfer of the mechanised vessel "Safina Mohamedi" to accused No. 3. The evidence on the basis of which the prosecution has placed reliance to prove these overt acts against accused No. 5, is the evidence of these two witnesses Kashinath and Devchand. The confession of accused No. 5 himself was recorded by Ranadive on September 8, 1961, Ex. Z-18. The prosecution has also placed reliance on the confession of co-accused Nos. 1, 3, 6, 7 and 10 in support of the case. We have already stated that the defence is one of denial, and the accused had stated that he had not made any voluntary confession. The learned Magistrate has based the conviction on the basis of the evidence of Kashinath and Devchand as well as the confession of accused No. 5 and the confessions of co-accused Nos. 1, 2, 3, 6, 7 and 10.

Accused No. 8: The case of the prosecution against accused No. 8 is that he had participated in the third trip as well as the fourth trip. In the third trip he came with accused No. 15. Accused No. 15 had introduced him to accused No. 1 as the man of his confidence. After gold had been placed in the car, he along with accused No. 9, accused No. 15 and accused No. 4 went in that car. In the 4th trip, he was waiting near the house of accused No. 1 with a car, to carry gold. He and Ismail had some talk, but as the police raided Govind's house, he ran away. The evidence on which reliance has been placed by the prosecution is the evidence of Kashinath, the confession of Govind, accused No. 1, and the confession of accused No. 4. The prosecution also relies on the conduct or attitude adopted by accused No. 8 in giving replies to the show cause notice issued to him, as to why the gold found on the

night of 13th should not be confiscated. The learned Magistrate has founded the conviction on the evidence of Kashinath, and confessions of co-accused Nos. 1 and 4 only.

Accused No. 9: The prosecution case against accused No. 9 had been that he had participated in all the trips as well as the reconnaissance trip. It is he who had fixed the place of rendezvous between the foreign vessel and the local boat. In the first trip, he along with others went in the local boat to meet the foreign vessel at the place fixed on the previous day. He and accused No. 15 then boarded the foreign vessel and these two persons along with gold and one Ismail returned back to Versova in the local boat. On that night, they slept in the house of Govind, and next morning Kashinath was asked to put on 2 jackets and Hira was asked to put on 2 jackets under their clothes and then Kashinath, Hira, accused No. 15, Ismail and accused No. 9 left Versova by bus and came to Andheri, and from Andheri they went by local train to Matunga. There, accused No. 9, Kashinath and Hira went in a taxi and Ismail and accused No. 15 went in a different way. Accused No. 9 then took Kashinath and Hira to his room, and there Kashinath and Hira gave the two jackets to accused No. 9 which he put in a steel almirah in his room. Accused No. 9 then gave them Rs. 5 each. In the second trip, accused No. 9 along with accused No. 15 were waiting in the car, and he along with accused No. 15 carried gold in that car, after it had been put in the luggage boot. In the third trip also he came in the car and carried gold in the car. At this time, it is accused No. 9 who himself drove the car. In the 4th trip also he had gone to the house of Govind and was waiting near the car to carry gold, along with accused No. 8. But as the police raided the house of Govind, he along with accused No. 8 ran away. The evidence on which reliance has been placed by the prosecution is the evidence of Kashinath, his own confession, Ex. Z-33, and the confession of accused Nos. 1, 4 and 10. Besides this, the prosecution has also referred to the evidence of his landlord Mohiddinkhan, in whose flat he was residing, as well as the evidence of the estate agent, Dave, Salim, the motor driver, and Yusuf the cook, to show his close association with accused Nos. 14 and 15. The learned Magistrate has principally founded the conviction on the evidence of Kashinath, and confessions of accused No. 9 and those of co-accused Nos. 1 and 10 read with the aforesaid evidence.

Before we consider all this evidence on merits, it is necessary to deal with legal arguments advanced as to the admissibility of certain evidence. This case has been elaborately argued by Mr. Kavlekar, learned counsel for accused No. 8, Mr. Jethmalani, learned counsel for accused No. 5 and Mr. Pardiwalla, learned counsel for accused No. 9. We will first deal with the contentions which have been raised and/or adopted by counsel for all the accused.

We would first deal with the admissibility of confessions of accused Nos. 5, 8 and 9 as against themselves as well as the confessions of their co-accused. In the first instance, it is contended that under s. 25 of the Indian Evidence Act, these confessions are inadmissible in evidence. That section provides that no confession made to a police officer shall be proved as against a person accused of any offence. We have already stated that the confessions have been recorded either by Warti, Superintendent in the Central Excise Department, or by Deputy Superintendents, Ranadive, Rane and Mohandas, also of the Central Excise Department. It is the argument of Mr. Jethmalani that on a true construction of the provisions of the Evidence Act and Central Excise Act an officer of the Central Excise Department is a police officer within the meaning of s. 25 of the Act. Reliance in this connection is placed on the decision reported in *Raja Ram v. State of Bihar*.¹ Mr. Gandhi, learned counsel for the prosecution, on the other hand, contends that on a true construction of the provisions of the Central Excise Act, an officer of the Central Excise is not a police officer within the meaning of s. 25 of the Evidence Act, and in the alternative, he further argued that at any rate, in dealing with this case, the officers

concerned were not acting in their capacity as excise officers but were acting in their capacity as customs officers, and that a customs officer is not a police officer. He has placed reliance in support of his contention on the decision of their Lordships of the Supreme Court in *State of Punjab v. Barkat Ram*.² It is not in dispute that the aforesaid officers who have recorded the confessions are officers of the Central Excise Department. The first question, therefore, that arises is whether they are also Customs Officers. There can hardly be any dispute that the present case which has been inquired into by them is a case falling under the Customs Act. The prosecution itself is for offences falling under s. 167(81) of the Sea Customs Act read with s. 120-B Indian Penal Code. Mr. Gandhi in the course of his argument has brought to our notice two notifications on which he places reliance to show that these officers are also officers of Customs Department. The first notification is issued by the Central Board of Revenue, bearing C.B.R. Notification No. 56-Customs, dated July 24, 1951, and No. 33, dated March 1, 1952 and No. 77-Customs, dated September 26, 1953. It is issued by the Central Board of Revenue in exercise of the powers conferred on it by sub-s. (1) of s. 3 of the Land Customs Act, 1924. Sub-section (1) of s. 3 of that Act provides that the Central Government may, by notification in the official gazette, appoint, for any area adjoining a foreign frontier and specified in the notification, a person to be the Collector of Land Customs and such other persons as it thinks fit to be Land Customs Officers. Sub-section (2) of s. 3 empowers the Central Government to delegate its aforesaid powers of appointment to the Chief Customs authority. It is not in dispute that the Chief Customs authority is the Central Board of Revenue. It is also not in dispute that the Central Government had validly delegated its power under sub-s. (1) of s. 3 to the Central Board of Revenue. Now, by the aforesaid notification No. 56-Customs, dated July 24, 1951, the Central Board of Revenue appointed all Deputy Collectors, Assistant Collectors, Headquarters Assistant Collectors, Superintendents, Deputy Superintendents, Inspectors, Nakedars, Supervisors, Range Officers, Assistant Range Officers, Women Searchers, Jamadars, Petty Officers, Amaldars, Sepoys and Peons, including all the officers of Central Excise employed for the time being in Central Excise Preventive Intelligence work and attached to the Headquarters of the Collectorate of Central Excise, Delhi, Calcutta, Patna, Shillong, Madras, Bombay and Baroda, to be Land Customs Officers within the jurisdiction of the respective Collectors of Land Customs under whom they were working. It is not in dispute that Mr. Wartti, Superintendent and the Deputy Superintendents, who had recorded the confessions, had been working at the material time at the headquarters of the Collectorate of Central Excise, Bombay. It is also not in dispute that they had been doing the Central Excise Preventive Intelligence work at the relevant time. By reason of this notification, therefore, the aforesaid officers are also the Land Customs Officers within the jurisdiction of the Collectorate of Bombay. Then we come to the second notification dated September 29, 1951. This notification is issued under s. 6 of the Sea Customs Act, and it is issued by the Central Government in exercise of its powers under s. 6 of the Sea Customs Act. Section 6 of the Sea Customs Act provides that "The Central Government may appoint such persons as it thinks fit to be officers of Customs, and to exercise the powers conferred, and perform the duties imposed, by this Act on such officers." Now, in exercise of this power, the aforesaid notification has been issued, and the material part of the notification reads:

"the Central Government hereby appoints all the Land Customs Officers who have been appointed or may be appointed from time to time to be such under sub-section (1) of section 3 of the Land Customs Act, 1924 (XIX of 1924), to be officers of Customs for their respective jurisdictions and to exercise the powers conferred and to perform the duties imposed on such officers by the first named Act."

The effect of this notification is that all persons who have been appointed under

s. 3 of the Land Customs Act as Land Customs Officers, are, by virtue of this notification, automatically appointed as Officers under the Sea Customs Act. Mr. Pardiwalla, however, argues that on reading these two notifications, it may appear that the officers who have recorded the confessions were officers under the Land Customs Act, but they have not been in law validly appointed officers under the Sea Customs Act by reason of the notification dated September 29, 1951. According to Mr. Pardiwalla, the Central Government has no power under s. 6 to appoint an officer by a notification. According to him, the appointment must be by name. The argument is founded on the difference in the language between sub-s. (1) of s. 3 of the Land Customs Act and the language used in s. 6 of the Sea Customs Act. It is his argument that sub-s. (1) of s. 3 of the Land Customs Act mentions "by a notification", while in s. 6 of the Sea Customs Act such a phraseology has not been used. It is true that the words "by a notification" do not occur in s. 6 of the Sea Customs Act. But then, the section also does not prescribe any particular mode by which an officer of Customs is to be appointed. The section neither says "by a notification" nor "by name". So also it does not mention that the appointment is to be made by making a separate order of appointment for each individual. Thus, there being no mode of appointment prescribed in s. 6 of the Sea Customs Act, it could be reasonably presumed that the Legislature has left it open to the Central Government to adopt any mode of appointment. It may make a general order of appointment by issuing a notification, or if found convenient, it may make appointment by issuing an order individually appointing any individual person named in the order to be an officer. In our opinion; therefore, the argument of Mr. Pardiwalla as to the invalidity of appointment of these officers as Customs Officers under this notification, must fail. In our opinion, these officers were, at the material time, validly appointed officers under the Sea Customs Act, and therefore, they were competent to exercise power conferred on them by the provisions of the Sea Customs Act. It is next argued by Mr. Pardiwalla that it may be that these officers were validly appointed Customs Officers and were competent to exercise the powers conferred on them by the Sea Customs Act, but nonetheless, they did not cease to be Officers of the Central Excise Department; and officers of the Central Excise Department are police officers within the meaning of s. 25 of the Evidence Act, and therefore, even though these officers of the Central Excise Department were acting in their capacity as officers under the Sea Customs Act and exercising powers thereunder, they did not cease to be police officers. The argument raises two questions. The first question, therefore, is whether an officer in the Central Excise Department is a police officer within the meaning of s. 25 of the Evidence Act. If the answer to the first question is in the affirmative, the second question that arises is whether an officer of the Central Excise Department when acting in his capacity of an officer under the Sea Customs Act, still continues to be a police officer. We have already stated that the decision on which reliance has been placed in support of the contention that the officers of the Central Excise are police officers is reported in *Raja Ram v. State of Bihar*. Before turning to this decision, and the earlier decision of their Lordships in *Barkat Ram's* case, it would be convenient first to refer to certain provisions of the Central Excise and Salt Act, hereinafter referred to as the Central Excise Act, on the basis of which this contention is founded.

Chapter III of the Central Excise Act deals with the powers and duties of officers and landholders. Section 13 empowers the Central Government to confer power on the Central Excise Officers of arresting any person whom he has reason to believe to be liable to punishment under this Act. Section 14 empowers the Central Excise Officer duly empowered by the Central Government in this behalf, to summon any person whose attendance he considers necessary either to give evidence or to produce a document. Sub-section (2) of s. 14 provides that all persons so summoned shall be bound to attend, either in person or by an authorised agent, and are also bound to state the truth upon any subject re-

specting which they are examined, and also are bound to produce documents in their possession. Sub-section (3) provides that every such inquiry as aforesaid shall be deemed to be a "judicial proceeding" within the meaning of s. 193 and s. 228 of the Indian Penal Code. Section 15 provides that all officers of police and Customs and all officers of Government engaged in the collection of land revenue and village officers are required to assist the Central Excise officers in the execution of their duties under that Act. Sections 16 and 17 are not material. Section 18 provides that all searches made under this Act or any rules made thereunder, and all arrests made under this Act shall be carried out in accordance with the provisions of the Code of Criminal Procedure, 1898, relating respectively to searches and arrests made under that Code. Section 19 provides that every person arrested under this Act shall be forwarded without delay to the nearest Central Excise Officer empowered to send persons so arrested to a Magistrate, or if there is no such Central Excise Officer within a reasonable distance, to the officer in charge of the nearest police station. Pausing here, the examination of these sections shows that it is not every Central Excise Officer who is empowered to arrest a person or is empowered to issue a summons. It is only those officers of the Central Excise on whom such power is conferred by the Central Government. Further, it is clear that the officer of the Central Excise who is empowered to arrest would not necessarily be an officer empowered to send the arrested person to nearest Magistrate. What s. 19 provides is that when a person has been arrested by a Central Excise Officer, he must be forwarded without delay to the nearest Central Excise Officer who has been empowered to send persons arrested to a Magistrate. It is only if such an officer is not found within a reasonable distance that he is empowered to send him to the nearest police station. Section 20 provides that the police officer in charge of the police station to whom any person is forwarded under s. 19, shall either admit him to bail to appear before the Magistrate having jurisdiction, or in default of bail forward him in custody to such Magistrate. Section 21, on which the principal argument is founded, reads:

"21.(1) When any person is forwarded under section 19 to a Central Excise Officer empowered to send persons so arrested to a Magistrate, the Central Excise Officer shall proceed to inquire into the charges against him.

(2) For this purpose the Central Excise Officer may exercise the same powers and shall be subject to the same provisions as the officer-in-charge of a police station may exercise and is subject to under the Code of Criminal Procedure, 1898, when investigating a cognizable case:

Provided that—

(a) if the Central Excise Officer is of opinion that there is sufficient evidence or reasonable ground of suspicion against the accused person, he shall either admit him to bail to appear before a Magistrate having jurisdiction in the case, or forward him in custody to such Magistrate;

(b) if it appears to the Central Excise Officer that there is not sufficient evidence or reasonable ground of suspicion against the accused person, he shall release the accused person on his executing a bond, with or without sureties as the Central Excise Officer may direct, to appear, if and when so required before the Magistrate having jurisdiction, and shall make a full report of all the particulars of the case to his official superior." It is the argument of Mr. Jetlmalani that s. 21 confers on certain officers of the Central Excise powers of the officer in charge of a police station. He is empowered to exercise all the powers which an officer of the police station can exercise under the Criminal Procedure Code in investigating a cognizable offence. He is empowered to grant bail to the suspect. There is, in fact, no difference between such officer of the Central Excise and an officer in charge of a police station. The case, therefore, fully falls within the decision of their Lordships of the Supreme Court in *Raja Ram Jaiswal v. State of Bihar*.

The said decision in *Jaiswal's* case relates to the case arising out of the Bihar and Orissa Excise Act (II of 1915). Facts in brief of that case were: that a

car was stopped by Excise Inspector Sinha on the Bayley Road, near the New Secretariat, Patna, at about 10 p.m. at night. The car belonged to the appellants' brother, and from the car, contraband Nepali Ganja was recovered. The material evidence incriminating the appellant was his confessional statement recorded by the Excise Inspector, and the question that arose was whether the confession was inadmissible in evidence by reason of the provisions of s. 25 of the Evidence Act. The contention raised was that the Excise Inspector was a police officer within the meaning of s. 25 of the Evidence Act. After examining the provisions of the Bihar and Orissa Act, the leading judgment summarised them in the following terms (p. 832):

"...Thus he can exercise all the powers which an officer in charge of a police station can exercise under Ch. XIV of the Code of Criminal Procedure. He can investigate into offences, record statements of the persons questioned by him, make searches, seize any articles connected with an offence under the Excise Act, arrest an accused person, grant him bail, send him up for trial before a Magistrate, file a charge sheet and so on. Thus his position in so far as offences under the Excise Act committed within the area to which his appointment extends are concerned is not different from that of an officer in charge of a police station. As regards these offences not only is he charged with the duty of preventing their commission but also with their detection and is for these purposes empowered to act in all respects as an officer in charge of a police station. No doubt, unlike an officer in charge of a police station he is not charged with the duty of the maintenance of law and order nor can he exercise the power of such officer with respect to offences under the general law or under any other special laws. But all the same, in so far as offences under the Excise Act are concerned, there is no distinction whatsoever in the nature of the powers he exercises and those which a police officer exercises in relation to the offences which it is his duty to prevent and bring to light. It would be logical, therefore, to hold that a confession recorded by him during an investigation into an excise offence cannot reasonably be regarded as anything different from a confession to a police officer. For, in conducting the investigation he exercises the powers of a police officer and the Act itself deems him to be a police officer, even though he does not belong to the police force constituted under the Police Act."

It is clear from the aforesaid observations that the expression "police officer" in s. 25 of the Evidence Act is not confined only to such officers who are appointed under the Indian Police Act, but includes also other officers who exercise the same powers as that of a police officer of a police station in respect of investigation of certain offences. The confessions recorded by them in exercise of that power of investigation into these offences would be inadmissible in evidence under s. 25 of the Evidence Act. The mere fact that they are also enjoined with duties other than investigating certain offences would not be a good reason for holding that they are not police officers provided the powers of investigation exercised by them are the powers of investigation under the Criminal Procedure Code, which are exercisable by a police officer in charge of the police station. The reason, therefore, given by their Lordships is in the following terms (p. 833):

"...The test for determining whether such a person is a 'police officer' for the purpose of S. 25 of the Evidence Act would, in our judgment, be whether the powers of a police officer which are conferred on him or which are exercisable by him because he is deemed to be an officer in charge of police station establish a direct or substantial relationship with the prohibition enacted by S. 25, that is, the recording of a confession. In other words, the test would be whether the powers are such as would tend to facilitate the obtaining by him of a confession from a suspect or a delinquent. If they do, then it is unnecessary to consider the dominant purpose for which he is appointed or the question as to what other powers he enjoys. These questions may perhaps be relevant for consideration where the powers of a police officer conferred upon him are of a very limited character and are not by themselves sufficient to facilitate the obtaining by him of a confession."

Their Lordships proceeded to contra-distinguish the provisions of the Sea Customs Act and the provisions of the Bihar and Orissa Excise Act, and pointed out that the officers under the Sea Customs Act, though they have certain powers

of investigation, are not clothed with the powers of a police officer of investigation under the Criminal Procedure Code. They are also not empowered to grant bail, nor can they send a charge-sheet to a Magistrate forwarding a person for trial. It is indeed true that under s. 21 of the Central Excise Act, officers mentioned therein have power to grant bail. It is also true that sub-s. (2) thereof provides that the said officers may exercise the same powers and shall be subject to the same provisions as the officer in charge of a police station may exercise and is subject to under the Code of Criminal Procedure, 1898, when investigating a cognizable case. But still, there is a difference between the provisions of s. 21 of the Central Excise Act and the provisions of the Bihar Excise Act which was being considered by their Lordships. The Excise Officer in the case which was considered by their Lordships possessed all the powers under the Criminal Procedure Code relating to investigation of offences, including that of sending a charge-sheet to a Magistrate and forwarding a person for trial; whereas, s. 21 has not expressly conferred that power on an officer under the Central Excise Act. He may exercise powers under the Code of Criminal Procedure only in respect of investigation. There is no power in terms conferred on him to make a report or send a charge-sheet to a Magistrate, forwarding a person for trial. It, therefore, cannot be said that the decision on which reliance has been placed fully supports the argument of Mr. Jethmalani that an officer of Central Excise is a police officer within the meaning of s. 25 of the Evidence Act. It must, however, be conceded that the Central Excise Officer having power to grant bail may enable him to exercise authority over the arrested person and influence his conduct if he so wishes, and in that sense it is possible to argue that that power would tend to facilitate obtaining a confession from the suspect. It is, however, not necessary for us for the purposes of this case to decide the question finally. It is clear on the reading of s. 21 as well as the decision of their Lordships that an officer of the Central Excise is not a police officer for all purposes, though he may be a police officer so far as he conducts an investigation in respect of offences under the Excise Act. Even when under the Bihar Act all the totality of power of investigation under the Criminal Procedure Code including power of making a report to a Magistrate, had been conferred on an Excise Officer under that Act, their Lordships have not held that he is a police officer for all purposes. Their Lordships observed:

"It would be logical, therefore, to hold that a confession recorded by him during an investigation into an excise offence cannot reasonably be regarded as anything different from a confession to a police officer."

It is only a confession recorded by an officer investigating an excise offence that falls under s. 25 of the Evidence Act. We have already pointed out that the officers in recording the confessions were acting in their capacity as Customs Officers. It is not in dispute that the Customs Officers have no power to grant bail, nor have they any power to submit a report on the conclusion of the investigation to a Magistrate, forwarding a person for trial. On the other hand, s. 187A of the Sea Customs Act provides that no Court shall take cognizance of any offence relating to smuggling of goods punishable under item 81 of the Schedule to s. 167, except upon complaint in writing, made by the Chief Customs Officer or any other officer of Customs not lower in rank than an Assistant Collector of Customs. The power to file a complaint is conferred only on high officers of Customs Department, like the Chief Customs Officer or an Officer not lower in rank than an Assistant Collector of Customs. The confessions in this case are recorded by the Superintendent or Deputy Superintendents. It is not in dispute that they are officers lower in rank than the Assistant Collector of Customs. Their Lordships of the Supreme Court in *Barkat Ram's* case have considered the provisions of the Sea Customs Act, and have held that a Customs Officer is not a police officer within the meaning of s. 25 of the Evidence Act. Section 21 of the Central Excise Act also does not make an officer of the Central Excise a police officer for all purposes. His powers of arresting or summoning persons

for examining them as witnesses or searches are only in respect of offences under the Central Excise Act. After the arrest of the person he is to be forwarded to a Central Excise Officer empowered to send the person to a Magistrate, and it is only this officer who is empowered to inquire into the charge against the person who is reasonably believed to be liable to punishment under the Excise Act, and it is only for this limited purpose that the powers of investigation of a police officer in charge of a police station are conferred on him, and he is empowered to exercise those powers under the Code of Criminal Procedure. The fiction thus enacted in this section cannot be carried further than the purposes for which it is enacted. It is clear that the said Central Excise Officers who are not by appointment police officers are empowered to exercise the same powers as are exercisable by an officer in charge of police station only in respect of investigation of offences under the Central Excise Act. It, therefore, follows that even assuming that an Excise Officer empowered to exercise powers under s. 21 of the Central Excise Act is a police officer within the meaning of s. 25 of the Evidence Act, while investigating offences under the Central Excise Act, it cannot be said that he is a police officer while discharging his duties under the Customs Act. We have already stated that the officers who have recorded the statements of the accused persons as well as witnesses in this case were at that time acting in their capacity as Customs Officers and not in their capacity as officers of the Central Excise, nor in discharge of their duties under the Central Excise Act. We have also held that they have been validly appointed Customs Officers under s. 6 of the Sea Customs Act. We have also pointed out that their Lordships in *Barkat Ram's* case have held that the Customs Officers are not police officers within the meaning of s. 25 of the Evidence Act. The confessions recorded by these officers, therefore, in our judgment, are not hit by the provisions of s. 25 of the Evidence Act.

Before proceeding with the other contention, we would like to state that Mr. Jethmalani has also in this respect referred to the decision reported in *Emperor v. Mallangowda*³. In our opinion, the case has no application to the facts of the present case. In that case, it has been held that a confession made to a regular police officer, whether that police officer was investigating officer or not, while in police custody was inadmissible, both under ss. 25 and 26 of the Evidence Act. We have already held that the Central Excise Officers when discharging their duties under the Sea Customs Act in their capacity as Customs Officers are not under the Central Excise Act.

It is next urged by Mr. Jethmalani that these confessions are also hit by the provisions of s. 24 of the Evidence Act. That section provides:

"24. A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds, which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him."

To attract the provisions of s. 24, the following facts need be established: (a) That the confession has been made by an accused person to a person in authority; (b) that it must appear to the Court that the confession has been caused or obtained by reason of any inducement, threat or promise proceeding from a person in authority; (c) that the inducement, threat or promise must have reference to the charge against the accused person, and (d) and the inducement, threat or promise must in the opinion of the Court be such that it would appear to the Court that the accused in making the confession believed or supposed that he would by making it gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him. All these conditions must cumulatively exist. Mr. Jethmalani first contends that the confessions have

been obtained under a threat within the meaning of s. 24 of the Evidence Act. The threat has been given by the officers who have recorded the statement. They are persons in authority within the meaning of s. 24. The threat which was given by them, according to Mr. Jethmalani, is the threat contained in s. 171A of the Sea Customs Act, which had been explained by the officers concerned to each of the persons whose confession has been recorded. It is not in dispute that the officers who have recorded confessions are persons in authority within the meaning of s. 24. But, it has, however, been vehemently contended by Mr. Gandhi that there is no threat contained in s. 171A of the Sea Customs Act. To appreciate the arguments of counsel for parties, it is necessary to read s. 171A of the Sea Customs Act. Section 171A, in so far as it is material, provides:

"171A. (1) Any officer of Customs duly employed in the prevention of smuggling shall have power to summon any person whose attendance he considers necessary either to give evidence...in any inquiry which such officer is making in connection with the smuggling of any goods.

(2) ...

(3) ...and all persons so summoned shall be bound to state the truth upon any subject respecting which they are examined or make statements...

Provided that the exemption under section 132 of the Code of Civil Procedure, 1908, shall be applicable to any requisition for attendance under this section.

(4) Every such inquiry as aforesaid shall be deemed to be a judicial proceeding within the meaning of section 195 and section 228 of the Indian Penal Code."

In short, the section empowers the Customs Officer to summon any person to give evidence in any inquiry in connection with the smuggling of goods save and except a *pardanashin* woman. The inquiry made under this section is deemed to be a judicial inquiry within the meaning of ss. 193 and 228, Indian Penal Code. A person so summoned is bound to appear and state the truth in giving evidence. If he does not answer, he would render himself liable to be prosecuted under s. 228, Indian Penal Code for causing interruption to a public servant in such a judicial proceeding. If, on the other hand, he answers or gives false evidence, he would be liable to be prosecuted under s. 193, Indian Penal Code for giving false evidence in a judicial proceeding. In short, a person summoned under s. 171A is told under the threat of criminal prosecution that he must state what he knows and he must state that truthfully. It is the argument of Mr. Jethmalani that this compulsion contained in the provisions of s. 171A is threat within the meaning of s. 24 of the Evidence Act. To each of the accused persons the provisions of s. 171A have been explained by the officers who recorded their statements. A threat, therefore, was given by the person in authority who has recorded the statement. The confessions are therefore hit by the provisions of s. 24 and inadmissible in evidence. In support of this argument, Mr. Jethmalani also referred us to the provisions of s. 164 of the Criminal Procedure Code, relating to the recording of confessions by a Magistrate. He argued that when a person accused of an offence is produced before a Magistrate for recording his confession, the Magistrate is bound to tell the accused that he (accused) is not bound to make a confession: If he makes a confession, that would be used against him. According to Mr. Jethmalani, law does not contemplate securing of a confession under compulsion. There can hardly be any dispute that there is a certain degree of compulsion implicit in the provisions of this section. If the person summoned under s. 171A refuses to answer questions he might be prosecuted under s. 228 of the Indian Penal Code for causing interruption to a public servant sitting in a stage of a judicial proceeding. If he makes a false statement, he is liable to be prosecuted under s. 193, Indian Penal Code. The question, however, to be considered is whether this degree of compulsion is a threat within the meaning of s. 24 of the Evidence Act. It is the argument of Mr. Gandhi that s. 171A only embodies the principle under s. 191, Indian Penal Code and bringing the provisions of s. 171A to the notice of the person who is examined, amounts only to bring to his notice the provisions of law for his own benefit, and there is no

threat involved therein. He also placed reliance on a decision of this Court in *Jinabhai Chhanabhai Patel v. The State of Maharashtra*.⁴ Section 191, Indian Penal Code, in our opinion, only defines what amounts to "giving a false evidence". The definition has been enacted for the purposes of the provisions of the Indian Penal Code, and in our opinion, it cannot be said that it contains any general principle of law of universal application as such. That a person should always tell truth is a moral principle, but it cannot be said to be a legal principle as such. Whenever the Legislature requires a person to tell truth, it has so enacted in various enactments. It is only when it has been so enacted and a person fails to tell truth that he comes within the mischief of the provisions of the Indian Penal Code.

Mr. Gandhi also has argued and drawn our attention to the oral evidence of Mr. Ranadive, that sub-s. (4) of s. 171A was not explained. All that was explained to the person whose statement was recorded was that he was under the provisions of the said section bound to tell the truth. It is sub-s. (4) of s. 171A which provides that the inquiry under s. 171A is deemed to be a judicial proceeding within the meaning of ss. 193 and 228 of the Indian Penal Code. Sub-section (4) not having been explained to the persons, it cannot be said that any threat as such was given to the persons whose statements were recorded. Now, the evidence which is given by Ranadive runs counter to the record made by him in recording the statements. We find practically the same endorsement at the commencement of every statement in the following terms:

"The provisions of Section 171A of the Sea Customs Act, 1878, have been explained to me. Accordingly I am bound to state the truth in the enquiry you are making."

This endorsement as to what happened at the time various statements were recorded is clear and not ambiguous. It does not say that the officer who recorded the statement had explained only a part of s. 171A i.e. sub-s. (3) of s. 171A and not the other parts. The contemporaneous record made thus is in conflict with the evidence given in Court by Ranadive. In the circumstances, we find it difficult to accept the oral evidence which runs counter to the aforesaid record made. We would, therefore, have to assume that all the provisions of s. 171A had been explained to the persons whose statements had been recorded. The question, however, that arises is whether in explaining the provisions of s. 171A, there was any threat within the meaning of s. 24 of the Evidence Act, given to the persons whose statements were recorded. Now, on the language of s. 24, it is not every threat that falls within its mischief, but it must be a threat "proceeding from a person in authority". Now, what has happened here is that the officers who recorded the statements have only explained the provisions of law contained in s. 171A of the Act. The compulsion therein, even though it may amount to a threat, emanates not from the officer who was recording the statement, but emanates from the provisions of law. What is contemplated in s. 24 is that the threat must emanate from the person in authority. Clearly in the instant case, there was no threat emanating from the person in authority. On the contrary, the officers recording the statements were only doing their duty in bringing to the notice of the persons the provisions of law. There is also another aspect of the case. On the terms of s. 24, it is not every threat or inducement or promise even emanating from the person in authority that is hit by s. 24, but it has to be such an inducement, threat or promise, which should lead the accused to suppose that "by making he would gain any advantage or avoid any evil of temporal nature *in reference to the proceedings against him.*" Now, here what has the person making the statement been told? He has been told that the law requires him to tell the truth.

"If you do not tell the truth, you may be prosecuted under section 193, Indian Penal Code, for giving false evidence. If you do not answer a question or if you persistently

⁴ (1963) Criminal Revision Application 21, 1963 (Unrep.).
No. 899 of 1962, decided by Naik J., on January

refuse to answer questions, you may be prosecuted under section 228, Indian Penal Code, for causing interruption in the proceedings."

The consequence or the advantage of telling the truth had no nexus much less a reasonable nexus of raising any hope or leading the persons making the statement to suppose that by making the statement they would be gaining any advantage or avoiding any evil of temporal nature in reference to the proceedings against them. The proceeding against them were in respect of the conspiracy to smuggle gold and the specific instances in which they had participated in smuggling gold. In explaining the provisions, the officer was not holding any hope to them that they would gain any advantage in reference to those proceedings. It does not, therefore, appear to us that in merely explaining the provisions of s. 171A, there was any threat given by the officers recording the statements which could have raised any hope in the minds of the persons making statements or led them to suppose that they were going to gain any advantage in reference to the proceedings against them relating to smuggling of gold. These being the circumstances of the case, in our opinion, the statements recorded by these officers are not hit by the provisions of s. 24 of the Indian Evidence Act.

Mr. Jethmalani has referred to Halsbury's Laws of England, 3rd Ed. Vol. 10, p. 473. The passage read by Mr. Jethmalani from Halsbury is founded on the decision in *The Queen v. Thompson*.⁵ It would be sufficient to refer to that case only. Now, the facts of this case were that a prisoner was tried for embezzling the money of a company. The evidence tendered was a statement made by him to the Chairman of the Company in which the accused stated: "Yes. I took the money." Afterwards, the accused had also given a list of the sums embezzled by him. In the evidence, the Chairman had stated that he had not given threat and no promise also was made by him to the accused in reference to the prosecution of the accused. He, however, admitted that he had stated to the brother of the prisoner: "It will be right for your brother to make a statement." In the circumstances of the case, the Court drew an inference that the aforesaid statement made by the Chairman to the brother of the accused that it would be better for the accused to make a statement was conveyed by the brother to the accused. In the circumstances, it was held that the confession was not admissible inasmuch as it appeared to the Court that the statement of the accused admitting the guilt was not free and voluntary. It would be seen that in the statement made by the Chairman to the brother of the accused that, it would be better for the accused to make a statement, there was an implicit promise. It proceeded from the person in authority, i.e. the Chairman himself, and further that it had reference to the proceedings against the accused, namely the embezzling of the company's money. These elements, as we have shown, are absent in the present case, where only the provisions of law contained in s. 171A were explained to the persons making the statements. The provisions contained in the said section had no reference or gave no advantage, or could not have raised any hopes in the mind of the persons making the statements in respect of or in reference to the proceedings which might have been started against them, namely, relating to smuggling of gold. The decision, therefore, has no application to the facts of the present case. Mr. Jethmalani stated that the decision in *The Queen v. Thompson* was cited only for the purpose of showing that the ratio of this case was followed by their Lordships of the Supreme Court in *Hem Raj v. The State of Ajmer*.⁶ We have already shown that the decision has no application to the facts of the present case.

It is next argued by Mr. Jethmalani that, at any rate, Ranadive and other officers who had recorded the statements, were not entitled to record the statements under s. 171A of the Sea Customs Act. They have, in fact, recorded the statements thereunder. Therefore, the threat which was conveyed to the

persons whose statements were recorded did not emanate or proceed from the provisions of the statute, but from these officers themselves. The argument is two-fold. In the first instance, Mr. Jethmalani argues that the officers who recorded the statements are officers of the Central Excise Department. Section 171A only empowers the officers appointed under the Sea Customs Act to record statements under the provisions of the said section. Ranadive and other officers were, therefore, not justified in recording the statements under that section. It is not necessary to deal in detail with this argument. We have already held that these officers have been duly and validly appointed officers under the Sea Customs Act, by reason of the aforesaid notification issued by the Central Government on September 29, 1951. We have also held that in holding the inquiry in respect of this case, these officers were acting in their capacity as officers appointed under the Sea Customs Act and not officers of the Central Excise. Therefore, in recording the statements under s. 171A of the Sea Customs Act, they did not go beyond their powers, nor was their action in any manner unjustified. The other argument advanced by Mr. Jethmalani was that, at any rate, they were not justified in recording the statements because no summons had been issued to the persons requiring them to attend the office to give evidence. The argument is founded on the provisions of sub-s. (3) of s. 171A, which says that "all persons so summoned shall be bound to state the truth". These persons were not summoned and yet they were told that they were bound to tell the truth. The argument in short is that the issuance of a summons is a condition precedent to the conferral of jurisdiction on the Customs Officers to record statements under s. 171A of the Act. Without issuing a summons, the Customs Officers are not entitled to and are not authorised to record statements under s. 171A. Reading all the sub-sections of s. 171A together, and having regard to the other provisions of the Act, it does not appear that the service of a summons is a condition precedent for conferring jurisdiction on the Customs Officer to record a statement under the said section. Sub-section (1) of s. 171A which confers power on the Customs Officer to summon a person, whose attendance he considers necessary to give evidence, or to produce documents, does not say that "any officer shall have power to issue a summons", but, on the other hand, it says "any officer of Customs shall have power to summon". The power conferred thus is a power to summon and not a power to issue a summons. So far as known to us, there is no provision in the Customs Act prescribing a procedure for issuance of a summons. We asked counsel as to whether there is any rule made prescribing any procedure for issuing a summons, or form of a summons prescribed. We have been informed by counsel appearing in the case that there is no rule framed under the provisions of the Act prescribing any procedure for issuing a service of a summons, nor is there any form prescribed. The ordinary meaning of the word "summon" is to demand presence of; call upon a person to appear. The power that is conferred is to require a person to appear. The person may be required to appear before the Customs Officer by serving a written notice or summons to that effect on him, or may be called by merely sending a message to him; or, if he happens to be in the presence of the Customs Officer, merely by telling him that his presence is required for giving evidence. Having regard to the phraseology used in s. 171A of the Act, and having regard to the fact that there is no procedure prescribed for issuing a service of summons, and no form of summons having been prescribed, in our opinion, the section does not contemplate the service of a summons as a condition precedent enabling the Customs Officer to record the statement under s. 171A of the Sea Customs Act. The Customs Officers were not, therefore, acting without jurisdiction in recording the statements even though in some cases there had been no service of a written summons as such on some of the persons. It is clear that the endorsement at the commencement of each statement to one of which we have already referred to leaves no doubt that before their statements were

recorded, the officers concerned had explained the provisions of s. 171A of the Act to those persons. The persons, therefore, had been duly required to make statements, and there is no invalidity in the matter of recording their statements. An argument also has been advanced before us by counsel for the appellants, that these officers apart from explaining the provisions of s. 171A of the Sea Customs Act, had, in fact, given an inducement, threat or promise to these persons, as a result of which these statements have been made. To this argument we would advert, when we proceed to deal with the facts against each of the accused.

The other legal argument, which had been advanced before us by counsel for all the appellants is that the evidence of an accomplice requires corroboration. Corroboration must proceed from independent source. Neither the evidence of another accomplice, nor the confessions of the co-accused can be looked into as corroboration to the evidence of an accomplice. Mr. Kavlekar has referred us to a decision of their Lordships of the Supreme Court in *Kashmira Singh v. State of Madhya Pradesh*,⁷ *Raju v. State of Mysore*⁸ and *Sarwan Singh v. State of Punjab*.⁹ Now, the provisions of the Evidence Act relating to the evidence of an accomplice are contained in s. 133 and illustration (b) of s. 114 of the Act. Section 133 provides that a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. Section 114 enables the Court to presume the existence of any fact which it thinks likely to have happened, having regard to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case. In this section are also included certain maxims by way of illustrations which are founded on the experience gained in the past. These illustrations are in two parts. The first part gives the maxims relating to presumptions, which a Court may draw, but the later part tells the Court that it should also have regard to certain special circumstances of each case in considering whether the maxim would have application to the facts of the case it has to consider. In other words, the first part of illustrations contains maxims and the later part exceptions to their application. Reading the illustrations as a whole it becomes clear that the maxims or rules of prudence though of general application, have no universal application. The first part of illustration (b) provides that the Court may presume that an accomplice is unworthy of credit, unless he is corroborated in material particulars. Thus, the position emerging from these two provisions is that though in law a conviction could be based on an uncorroborated testimony of an accomplice, it has been pointed out as a rule of prudence founded on the experience gained in the past that an accomplice is unworthy of credit, unless he is corroborated in material particulars. In other words, exceptions apart, ordinarily a presumption should be raised that the particular accomplice, whose evidence it has to consider is unworthy of credit, unless he is corroborated in material particulars. However, when we turn to the later part of illustration (b), it becomes clear that the Legislature itself has envisaged cases where such a presumption may have no application. It *inter alia* deals with cases falling under this very maxim. It provides: "But the Court shall also have regard to such facts as the following in considering whether such maxims do or do not apply to the particular case before it..." As to illustration (b), a crime is committed by several persons, say, A, B, C and D. All the criminals are captured on the spot and kept apart from each other. Each gives an account of the crime, implicating D, and the accounts corroborate each other in such a manner as to render the previous concert highly improbable. Reading the relevant portion of s. 114 as a whole, together with s. 133, the principle is that the accomplice being a participant in the crime, his testimony at its very threshold suffers from that infirmity, and casts a certain doubt as to its truthfulness. The Court, there-

⁷ [1952] S.C.R. 526.

⁹ [1957] A.I.R. S.C. 637.

⁸ (1952) 55 Bom. L.R. 191.

fore, should ordinarily presume that his testimony should not be accepted unless there be other circumstances in the case or other evidence in the case proceeding from independent source, that is, source other than the testimony of an accomplice, lending assurance to the mind of the Court that the evidence given by the accomplice is truthful as against a particular accused, and it would be safe to act on the testimony of the accomplice. But in a given case, there may be no necessity of such corroborative evidence because the assurance or guarantee for the truthfulness of the account in the statement may be furnished by statements implicating a particular accused, made by various participants in the crime without they having any opportunity of a previous concert. In other words, the later part of illustrations to s. 114 tells us that the experience of the world is that when a number of participants in the crime, without any previous concert, state that a particular person has joined in the commission of the crime, there might be no necessity for the corroboration of the testimony of an accomplice, because such statements by a number of participants without any previous concert itself affords a guarantee for reliability of the testimony of an accomplice. Of course, that again would depend on the nature of their statements, account of the crime given by them and the extent to which their statements corroborate one another. It appears that the later part of illustration relating to ill. (b) of s. 114 is founded on the observations of Mr. Justice Campbell occurring in the decision reported in *Queen v. Chutterdharee Sing*.¹⁰ The corroboration required to the testimony of the accomplice was a question being considered. In considering this question, it is observed:

"...It is necessary, then, to watch the evidence of such men with very great care; and I am glad to see that these Bhaugulpore cases are not usually sent up without strong corroborative evidence. There may be cases in which the evidence of different accomplices is given under such circumstances and with such real security against any possible intercommunication that they do, to the most careful mind, in a great degree, corroborate one another."

It would thus be seen that the Court finding the existence of statements of a number of participants in the crime corroborating one another is a relevant circumstance which could be taken into account in considering whether in a particular case corroboration to the evidence of an accomplice is required, and also in considering the nature and extent of the corroboration that is required before the evidence of an accomplice is accepted. It must be emphasised that each case would depend upon its own facts. No hard and fast rule can be laid down in this respect. The usual rule of prudence that has ripened more or less into a rule of law is that the Court will require corroboration to the testimony of an accomplice before it acts on it, and this rule of caution has to be kept in view by a Court in appreciating the evidence of an accomplice, and keeping these principles in view, we would appreciate the evidence of Kashinath and Devchand. Now, the reason underlying the principle that the evidence of an accomplice requires corroboration has been succinctly put by Sir John Beaumont in *Bhuboni Sahu v. The King*¹¹ in the following words:

"...Their Lordships, whilst not doubting that such a conviction is justified in law under s. 133 of the Evidence Act, and whilst appreciating that the coincidence of a number of confessions of co-accused all implicating the particular accused, given independently, and without an opportunity of previous concert, might be entitled to great weight, would nevertheless observe that Courts should be slow to depart from the rule of prudence, based on long experience, which require some independent evidence implicating the particular accused."

These observations of their Lordships also indicate that the confessions of the co-accused are not totally irrelevant in considering the evidence of an accomplice. It undoubtedly is a piece of weak evidence. What weight it has to be

¹⁰ (1866) 5 W.R. (Criminal) 59.

s.c. 51 Bom. L.R. 955, at p. 959.

¹¹ (1940) L.R. 76 I.A. 147, at p. 157.

given would depend on the circumstances of each case. Sir John Beaumont then proceeds:

"...The danger of acting on accomplice evidence is not merely that the accomplice is on his own admission a man of bad character who took part in the offence and afterwards to save himself betrayed his former associates, and who has placed himself in a position in which he can hardly fail to have a strong bias in favour of the prosecution; the real danger is that he is telling a story which in its general outline is true, and it is easy for him to work into the story matter which is untrue. He may implicate ten people in an offence, and the story may be true in all its details as to eight of them, but untrue as to the other two, whose names have been introduced because they are enemies of the approver."

The nature and extent of corroboration has been described by Sir John Beaumont as "some independent evidence". No hard and fast rule of general application can be laid down or has been laid down in any case as to what that "some independent evidence" has to be. The question has been considered in various decisions of their Lordships of the Supreme Court. The nature and extent of corroboration required has been stated in *Rex v. Baskerville*¹² the leading case on this subject. It has been stated thus (p. 667):

"...It would be in high degree dangerous to attempt to formulate the kind of evidence which would be regarded as corroboration, except to say that the corroborative evidence which shows or tends to show that the story of the accomplice that the accused committed the crime is true, not merely that the crime has been committed, but that it was committed by the accused."

The question has also been recently considered by this Court in *State v. Lakshmi Chand Choralia*¹³ and it has been observed:

"Even in respect of the evidence of an accomplice, all that is required is that there must be some additional evidence rendering it probable that the story of the accomplice is true and that it is reasonably safe to act upon it. Corroboration need not be by direct evidence that the accused committed the crime. It is sufficient even though it is merely circumstantial evidence of his connection with the crime."

In our opinion, therefore, having regard to the decisions to which we have just now referred, it is not possible to fully agree with the contention of Mr. Kavlekar that in considering the evidence of an accomplice, the evidence of another accomplice or the self-inculpatory confession of the co-accused are wholly or totally irrelevant. It is, of course, true that the evidentiary value of the evidence of another accomplice or the confession of the co-accused is not of great weight. In our opinion, the decision in *Kashmira Singh v. State of Madhya Pradesh*, on which reliance has been placed, is distinguishable on facts. No doubt in the head note it has been observed that "the confession of an accused person against a co-accused is not evidence in the ordinary sense of the term." In that case their Lordships were considering the question as to whether the confession of a co-accused can be held to be a substantive piece of evidence against the accused. "Evidence" has been defined in the Evidence Act, as "all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry (i.e. oral evidence)", and all documents produced for the inspection of the Court (i.e. documentary evidence). This is evidence in the strict sense of the term in the Evidence Act. An accomplice is a witness examined in the Court like any other witness, and therefore, the evidence of an accomplice given in Court in the strict sense is a substantive piece of evidence. Section 133 provides that an accomplice is a competent witness against an accused person, and even on an uncorroborated testimony of a person, conviction could be founded. The confession of the co-accused, however, stands on a different footing. It is not evidence within the meaning of the definition of "evidence" given in the Evidence Act, it none-the less is a material which could be taken into account. Section 30 of the

12 [1916] II K.B. 658.

984 decided by Tambe and Kantawalla, JJ.,

13 (1964) Criminal Appeals Nos. 960 to on January 17, 1964 (Unrep.).

Evidence Act provides that the confession of the co-accused when jointly tried may be taken into consideration as against the other accused. It is thus evidence but not a substantive piece of evidence. In other words, no conviction could be founded merely on the confession of a co-accused, while a conviction could be founded on the evidence of an accomplice which in the strict sense is evidence. The position has been made clear by their Lordships of the Supreme Court recently in Criminal Appeals Nos. 208 and 209 of 1963.¹⁴ In *Kashmira Singh's* case, on which Mr. Kavlekar has placed reliance in support of his contention that the confession of the co-accused is not evidence, one of the questions which was being considered was how far and in what way the confession of an accused person can be used against a co-accused. In this case, the confession of another accused Gurudayalsingh had played an important part in implicating the appellant Kashmira Singh. Their Lordships, in view of the definition of "evidence" contained in s. 3 of the Evidence Act, held that the confession of a co-accused is not a substantive piece of evidence on which conviction of an accused could be founded, but it could be used under s. 30 only for lending assurance to the mind of the Court about the truthfulness of other evidence, which, if believed, would establish the guilt of the accused. Considering the question as to whether it could be used as corroboration to the evidence of an accomplice or an approver, Mr. Justice Bose speaking for the Court, at page 530 of the report observed:

"Then, as regards its use in the corroboration of accomplices and approvers. A co-accused who confesses is naturally an accomplice and the danger of using the testimony of one accomplice to corroborate another has repeatedly been pointed out. The danger is in no way lessened when the 'evidence' is not on oath and cannot be tested by cross-examination. Prudence will dictate the same rule of caution in the case of a witness who though not an accomplice is regarded by the Judge as having no greater probative value. But all these are only rules of prudence. So far as the law is concerned, a conviction can be based on the uncorroborated testimony of an accomplice provided the judge has the rule of caution, which experience dictates, in mind and gives reasons why he thinks it would be safe in a given case to disregard it. Two of us had occasion to examine this recently in *Rameshwar v. The State of Rajasthan*.^{14a} It follows that the testimony of an accomplice can in law be used to corroborate another though it ought not to be so used save in exceptional circumstances and for reasons disclosed."

From the aforesaid observations of their Lordships, it is clear that the rule of prudence tells us that it would not be safe to accept the evidence of an accomplice as corroboration to the evidence of another accomplice and the confession of a co-accused as a piece of evidence lending assurance to the mind of the Court in considering the evidence of the accomplice. There may however be some exceptional cases where evidence of an accomplice could be taken as corroboration to the evidence of another accomplice and the confession of a co-accused could be relied on for lending assurance to the mind of the Court. In considering the question as to whether a conviction could be founded on a testimony of the accomplice without corroboration, the later part of s. 114, ill. (b) is relevant. As we have already stated, each case will have to be considered in the light of its own facts. Bearing these principles in mind, we would be approaching the facts of this case.

But before we proceed to deal with the case of each appellant accused, it is necessary to deal with one other legal argument advanced by Mr. Pardiwala on behalf of accused No. 9. Now, the contention of Mr. Pardiwala is that use of the confession of accused No. 9 as against him is violative of the fundamental right conferred on the accused under art. 20(3). Clause (1) of art. 20 provides that save and except for violation of a law in force, no person can be convicted. Clause (2) confers a guarantee against double jeopardy. A person cannot be prosecuted and punished for the same offence more than once and

¹⁴ (1964) Criminal Appeals No. 208 and (Supreme Court).
209 of 1963, decided on February 3, 1964 ^{14a} [1962] S.C.R. 377.

cl. (3) provides: "No person accused of an offence shall be compelled to be a witness against himself." To bring into operation the provisions of cl. (3) of art. 20, two conditions have to be fulfilled: (1) that a person must be one who has been accused of an offence, and (2) he must be compelled to be a witness against himself. It is the protection given to a person accused of an offence, and the protection is against he being compelled to be a witness against himself. It is the argument of Mr. Pardiwalla that the statement of accused No. 9 is of date November 26, 1961. Prior to that date statements of various other co-accused were recorded. Similarly, statements of prosecution witnesses Kashinath Devchand and Dharma were also recorded much prior to November 26, 1961. These accused as well as the prosecution witnesses had in their statements stated the part played by accused No. 9 in the conspiracy as well as in the four trips in which gold had been smuggled. Accused No. 9 thus was a person accused of an offence within the meaning of cl. (3) of art. 20 on the date he made the statement. Before accused No. 9 had made the statement, he had been explained the provisions of s. 171A of the Sea Customs Act, and he was, under the threat of a criminal prosecution contained in sub-s. (4) of s. 171A, told that he was bound to tell the truth. His statement Z-33 has been filed in the case and has been used as evidence against accused No. 9. The accused thus has been compelled to be a witness against himself. It is on the basis of this argument that Mr. Pardiwalla contends that the use of this statement against accused No. 9 is violative of the guarantee of the fundamental right conferred under art. 20(3). It is not in dispute that the statements of number of co-accused as well as statements of these three prosecution witnesses who were also accomplices were recorded prior to the date on which the statement has been made by accused No. 9. It is also not in dispute that Kashinath, accused No. 1-Govind, accused No. 10-Hira, and accused No. 4-Noor Mohamed, in their statements had implicated accused No. 9 in the commission of the crime. The question, therefore, that arises for consideration is whether on the date accused No. 9 made the said statement Z-33, he was a person accused of any offence within the meaning of art. 20(3), and the second question that arises is whether accused No. 9 had been compelled to be a witness against himself by reason of the fact that the provisions of s. 171A of the Sea Customs Act had been explained to him before he made the statement.

Turning to the first question, the expression "person accused of an offence" has been considered by their Lordships in various decisions, and it would be useful at this stage to refer to them to understand the true import of that expression. The question was first considered in *M. P. Sharma v. Satish Chandra, District Magistrate, Delhi*.¹⁵ There, after the first information report had been lodged against Mr. Sharma, a search warrant had been issued for searching the premises of Sharma under ss. 94 and 96, Criminal Procedure Code. The question that was being considered was whether the search and seizure of documents under ss. 94 and 96, Criminal Procedure Code, was violative of the provisions of cl. (3) of art. 20 of the Constitution. The provisions of cl. (3) of art. 20 have been elaborately examined by their Lordships in this judgment. Considering the question, Mr. Justice Jagganadha Das, speaking for the Court, at page 1088 of the report, observed:

"...It is available therefore to a person against whom a formal accusation relating to the commission of an offence has been levelled which in the normal course may result in prosecution."

Their Lordships have held that as the first information report had been lodged with the police, the appellant Sharma and others were persons accused of an offence. The question was next considered in *Mohd. Dastagir v. State of Madras*.¹⁶ Facts in that case were that the appellant had gone to the bungalow of a Deputy Superintendent of Police to offer him bribe in a closed envelope so that he might drop the action registered against him. The police

officer threw the envelope at the appellant. The envelope fell down and was picked up by the appellant. Later while the appellant was still in the bungalow, he was asked by the police officer to produce the envelope which he had thrown down. The appellant took out from his pocket some currency notes and placed them on table without the envelope. The notes were seized by the police officer and his office rubber stamp seal was placed on them. In these circumstances, the question considered was whether in requiring the appellant to produce the notes, there was any compulsion within the meaning of cl. (3) of art. 20. Their Lordships held that at the time the notes were produced by the appellant, there was no formal accusation against the appellant relating to the commission of an offence. The question next arose in *Narayanlal v. M. P. Mistry*.¹⁷ Facts in that case were that the appellant Raja Narayanlal Bansilal was a managing agent of a limited company. The Registrar of Companies had made a report to the Central Government that the affairs of the company were carried in fraud of the contributories and they disclosed an unsatisfactory state of affairs. The Registrar also reported that the managing agent was also utilising the property of the company for his personal gain, and therefore investigation under s. 153 of the Companies Act be instituted. The Central Government then appointed Mr. Mistry, a chartered accountant, as Inspector to investigate the affairs of the company. Pursuant to the powers conferred on him, Mr. Mistry wrote to the appellant a letter intimating to him that he would examine the appellant on oath in relation to the business of the company. The appellant was also called upon to appear on a specified date for being examined on oath relating to the affairs of the company and to produce all books of account, and papers relating to the company. He was further warned that in default of compliance with the requisition, legal steps would be taken without further reference to him. The appellant then moved this Court by a writ application and prayed that this Court should issue a writ of *certiorari* and quash this notice. The petition was dismissed and the matter went to the Supreme Court in appeal. Considering the question whether at the material time the appellant was a person accused of an offence, their Lordships at page 38 of the report observed:

"Similarly, for invoking the constitutional right against testimonial compulsion guaranteed under Art. 20(3) it must appear that the formal accusation has been made against the party pleading the guarantee and that it relates to the commission of an offence which in the normal course may result in prosecution."

Here again, the nature of accusation and the proper sequel or consequences are regarded as important. Examining the relevant provisions of the Companies Act, their Lordships further observed that the report made by the Registrar of Companies was not formal accusation against the appellant. At page 39, their Lordships observed:

"...In such a case there is no accusation, either formal or otherwise, against any specified individual; there may be a general allegation that the affairs are irregularly, improperly or illegally managed; but who would be responsible for the affairs which are reported to be irregularly managed is a matter which would be determined at the end of the enquiry. At the commencement of the enquiry, and indeed throughout its proceedings there is no accused person, no accuser and no accusation against any one that he has committed an offence. In our opinion a general enquiry and investigation into the affairs of the company thus contemplated cannot be regarded as an investigation which starts with an accusation contemplated in Art. 20(3) of the Constitution."

It appears that the observations in *Sharma's* case in respect of the clause "to be a witness" led to difference of opinion as to its import. The question was, therefore, again considered by a Bench consisting of eleven Judges, and the conclusions arrived at have been summarised by the learned Chief Justice in his leading judgment in *State of Bombay v. Kathi Kalu*.^{17a} It is not neces-

sary to reproduce all the seven conclusions for the purposes of this case. The 7th conclusion reads:

"To bring the statement in question within the prohibition of Art. 20(3), the person accused must have stood in the character of an accused person at the time he made the statement. It is not enough that he should become an accused any time after the statement has been made."

The question, therefore, that has to be considered is whether on November 26, 1961, the date on which accused No. 9 made the statement, he stood in the character of an accused person. The test laid down in the aforesaid decision of ascertaining this fact is whether there was a formal accusation on that date against him. An accusation becomes a formal accusation when there is an accuser who makes an accusation against the accused which should in normal course lead to prosecution in a criminal Court. The question to be considered is whether these circumstances existed on November 26, 1961, the date when accused No. 9 made the statement. Now, the argument had been that accused No. 9 was a person accused of an offence because the persons who had been arraigned as co-accused, and the persons who had been examined as witnesses, had, in their statements, stated the part played by accused No. 9 in the conspiracy and the overt acts of smuggling. Now, these statements have been recorded by the Superintendent and the Deputy Superintendents of Central Excise, under s. 171A of the Sea Customs Act. Having regard to the provisions of the Act, the statements recorded were in the course of ascertaining the facts in relation to contraband gold seized in the raid. None of them had made a formal accusation against any person, much less against accused No. 9, with an objective that action against any person be taken. The statements of the co-accused or prosecution witnesses can hardly be equated with a formal accusation made against any person with a view to taking action against him. We have already referred to the provisions of s. 187A of the Sea Customs Act, which prevents a criminal Court from taking cognizance of an offence under s. 167(81) save and except on a complaint in writing made by the Chief Customs Officer or a Customs Officer not below the rank of an Assistant Collector of Customs. Superintendent and Deputy Superintendents of the Central Excise are officers below the rank of an Assistant Collector of Customs. Any statement made to them cannot, in any event, be an accusation made for the purposes of taking action against the accused person. In this context, it would be useful to compare the provisions of the Criminal Procedure Code in contradistinction with the provisions of the Customs Act. It may be mentioned that in *Sharma's* case, their Lordships were dealing with a case where the first information report had been lodged to the police. Chapter XIV in Part V of the Criminal Procedure Code relates to the information to the police and their powers to investigate, and consists of ss. 154 to 176. Section 154 relates to the information in cognizable cases. The section makes it obligatory on the police officer to enter it in the book kept for that purpose. Section 156 relates to the information in non-cognizable cases. Section 196 provides that without the order of the Magistrate, an officer in charge of the police station can investigate a cognizable offence, and in case of a non-cognizable offence, on an order made by the Magistrate. Sections 157 to 168 relate to the powers of the police officers and the procedure to be followed by the police officers in making the investigation. Section 169 provides that if it appears to the investigating officer that there is no sufficient evidence or reasonable ground of suspicion to justify forwarding the accused to the Magistrate, he may release him from the custody taking a bond from him for appearance before him. On the other hand, if on the completion of the investigation, the investigating officer finds that there is sufficient evidence or reasonable ground of suspicion to justify forwarding an accused to the Magistrate, he would ordinarily forward the accused person for trial in a criminal Court before a Magistrate. The first information lodged with the police officer thus in

the ordinary course leads to prosecution in a criminal Court if the investigation discloses a case against the accused. Such, however, is not the case here in view of the provisions of the Sea Customs Act. Persons recording statements are not persons who are empowered to lodge a complaint against an accused under s. 187A of the Act. There is no provision in the Act making it obligatory on Customs Officers to forward persons to a Magistrate to stand their trial, even if the Customs Officers on investigation finds that they have committed an offence under the Act. As we have already stated, the said s. 187A prohibits a criminal Court from taking cognizance of an offence under the Sea Customs Act under s. 167(81) of the Act, save and except when a complaint has been lodged by persons authorised to lodge a complaint under the section. Thus having regard to these provisions, the formal accusation which in the normal course should result in a trial of a person in a criminal Court would be a complaint lodged by a competent officer under s. 187A when the accusation falls under item (81) of the schedule to s. 167. In the instant case, the accusation made against accused No. 9 is for an offence relating to smuggling of gold punishable under item (81) of the schedule to s. 167 of the Sea Customs Act. In our opinion, therefore, there was no formal accusation against accused No. 9 on November 26, 1961, the date on which his statement was recorded. One of the conditions required to be fulfilled thus has not been fulfilled in the instant case. The statement made by accused No. 9 on November 26, 1961, therefore, does not fall within the mischief of cl. (3) of art. 20 of the Constitution. This being our conclusion on the first part, it is not necessary to consider whether accused No. 9 was compelled to be a witness against himself because the provisions of s. 171A were explained to him before he made the statement. Mr. Pardiwalla, in support of his contention had also placed reliance on certain observations in the decision of a Division Bench of the Madras High Court reported in *Rainbow Trading Co. v. Asst. Collector of Customs*.¹⁸ The observations on which reliance has been placed are at page 441:

"...It is argued that if it were to be recognised that there is no prohibition against compelled testimony in proceedings under the Customs Act, the guarantee under Art. 20(3) itself, would become illusory as the confession can be obtained first under S. 171-A of the Sea Customs Act and then used for a prosecution. We cannot agree that it would be so. If for example a smuggler gives himself away during an examination under Section 171-A, that evidence will nevertheless constitute a compelled testimony and can neither be relied on nor used against him in any criminal prosecution, as Article 20(3) will prevent it from being so used. So much can be taken as settled by 1954 SCJ 423: (AIR 1954 S.C. 300). Therefore any incriminating answers which a person examined under Section 171-A may give, can only be used for the purpose of the departmental punishment and not for a prosecution in a criminal court."

These observations undoubtedly support the contention raised by Mr. Pardiwalla. But, with utmost respect, we find it difficult to take a similar view because, in our opinion, for the reasons stated above, a person examined under s. 171A does not stand in the character of an accused person inasmuch as there is no formal accusation made against him by any person at that time. The fact that subsequent to the making of the statement he becomes an accused person is not sufficient to bring the statement within the mischief of art. 20(3) of the Constitution.

It has also been argued on behalf of the appellants that the Customs Officer had not maintained any diary. It is, therefore, not possible to ascertain and check whether the statements said to have been recorded on a particular date are in fact recorded by the Customs Officer on that date. The Customs Officers could without detection easily anti-date the statements, which they have recorded. The argument principally is aimed at the date of accused No. 1's statement and that of the statement of Kashinath. According to the Customs Officers, their statements were recorded on August 15, 1961. No doubt accused

No. 1 in his statement has stated that his statement was not recorded on 15th but was recorded on August 22 and from 15th to 22nd August he was kept in custody and was subjected to ill-treatment and harassment and ultimately his signature was taken by force on a statement. The argument is, there being no diary, there is no check. The Court, therefore, should be circumspect in accepting that the statement of Govind was recorded on August 15, 1961. It is true that there is no diary maintained by the Customs Officers in this case. There is no provision in the Customs Act to maintain any diary, nor are the provisions of the Criminal Procedure Code relating to investigation have been made applicable to inquiries under the Customs Act. In these circumstances, it is not possible to say that the Customs Officers in not maintaining a diary have failed to follow the procedure prescribed by law. The principal object of the Customs Act is not detection of a crime. The Customs Officers are not primarily concerned with the detection and punishment of a crime; but the Customs Officers are mainly interested in the detection and prevention of smuggling of contraband articles and safeguarding recovery of customs dues. They are more concerned with the smuggled goods than the offenders who smuggle goods. A suggestion was made to Kashinath in his cross-examination that his statement was not recorded on August 15, but was recorded later, and Kashinath has denied it. The officers who have recorded the statements are responsible officers. Absence of provision in the Customs Act requiring them to maintain a diary would not by itself be a good ground for rejecting their evidence without there being sufficient reason to discard it and none has been pointed out to us. Govind appears to be a literate person. He has signed each page of his statement and at the end of his signature he has put the date on each page, and the date is August 15, 1961. There is also other evidence on record which clearly indicates that Govind's statement must have been recorded on 15th. It is not in dispute that the flat in "Avillion" was searched on August 16, 1961. It is the statement of Govind that had made mention of a flat on Little Gibbs Road in a newly constructed building. It is only Govind and not Kashinath who had been taken to the flat, and Govind had made mention thereof in his statement. In all probability, the search of the flat in "Avillion" on August 16, 1961 was made in consequence of the statement of Govind on August 15, 1961.

[The rest of the judgment is not material to this report.]

Appeals dismissed.

APPELLATE CIVIL.

Before Mr. Justice Patel and Mr. Justice Bal.

NARAYANLAL BANSILAL v. VENKATRAO ANANT PAI.*

Bombay Rents, Hotel and Lodging House Rates Control Act (Bom. LVII of 1947). Secs. 11, 5—Standard rent whether to be fixed only by apportionment of rents—"Premises", meaning of word in s. 11(1)(c).

Standard rent of a part of a building cannot exceed the standard rent of the whole building and the standard rent of the whole building cannot be more than the total of the standard rents of the different parts. Any investments made by the landlord must be considered and a fair return on such investments must be given to the landlord. If the property is wholly changed then apportionment of rent for different portions becomes a difficult problem. If it has not so changed the Court considers such apportioned rent and all such other circumstances as are brought to the notice of the Court. If no other circumstances are proved before the Court then such apportioned rent is the standard rent.

*Decided, October 8/9, 1964. Civil Revision Applications Nos. 53, 672, 1204 and 1732 of Application No. 50 of 1963 (with Civil Revision 1963).

Manekji Jivraj Bhatena v. Basantilal M. Sharma,¹ agreed with.

Dhanrajgirji v. Ward,² *Bata Shoe & Co. v. Narayan Das*³ and *Capital & Provincial Property Trust Ltd. v. Rex*,⁴ referred to.

The word "premises" in s. 11(1)(c) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, is used in the wider sense meaning the whole building of which part was let then or now. The qualifying word "separately let" in s. 5(8)(b) of the Act does not apply to it.

Manekji Jivraj Bhatena v. Basantilal M. Sharma,⁵ referred to.

Raja Bahadur Motilal Bombay Mills Ltd. (plaintiffs No. 2) owned certain property measuring about 11150 sq. yards which had in it various structures. On April 2, 1947, plaintiffs No. 2 executed a lease in favour of M/s. Venkatrao A. Pai and Sons (defendant) whereby a portion of the property admeasuring 16972 sq. feet consisting of the ground floor of the Mill was given to the defendant at a monthly rent of Rs. 2,037 for the purpose of a mill or for some manufacturing process. The lease was to run from September 26, 1946, for a period of ten years. A second lease was executed in favour of the defendant on April 11, 1947, for the first floor of the Mill and a room or a godown adjoining the building, the total area being 19660 sq. feet at a rent of Rs. 2,140 per month. This portion was to be used for office, laboratory, bleaching, dyeing and such other purposes. The defendant which was a partnership firm was on July 7, 1947, incorporated into a private limited company, the members being the self-same partners and sometime after 1950 this private limited company issued cheques from time to time towards the payment of rent, after the lease was assigned to it.

The entire property of plaintiffs No. 2 was mortgaged to an insurance company for a very large amount. The mortgagee filed a suit on the Original Side of the High Court for recovery of the amount. By consent in April 1949, the Official Receiver was appointed with all the powers under O. XL, r. 1, of the Civil Procedure Code. On March 28, 1956, the present suit was filed by the Receiver for possession and recovery of arrears of rent against the private limited company and the partners of the original firm. One Narayanlal was appointed as Receiver on April 8, 1958, and he was substituted in place of the High Court Receiver.

On April 20, 1958, the Mill building was completely destroyed by fire, the only portion intact being the extra ground floor godown or room which continued to be occupied beneficially by the defendant. After Narayanlal was appointed Receiver he repaired some windows of and removed the debris from the burnt premises and locked up that portion.

In the suit the plaintiffs claimed a sum of Rs. 4,28,392.14 nP. claiming the arrears of rent at the contractual rate and also several other increases alleged to be due under the two agreements of lease. The main defences were that the contractual rent was much more than the standard rent and that if an account were made large sums would be due to the defendants but nothing due to the plaintiffs. The defendants disputed the items of increases claimed by the plaintiffs and they also denied their liability to make the payment regarding the same.

The trial Court decreed the claim of the plaintiff's holding that the contractual rent under the Rent Act became the standard rent and the defendants had not shown that it was excessive. It also held that the plaintiffs were entitled to the extra claim and accordingly decreed the entire claim.

On appeal the Appellate Bench held that the standard rent of the premises under the first lease was Rs. 532 per month and Rs. 594 per month from February 1950 to March 1954 and April 1, 1954, to September 26, 1956, respec-

1 (1952) Civil Revision Application No. 1527 of 1951, decided by Chagla C. J. on November 10, 1952 (Unrep.).

2 (1924) 27 Bom. L.R. 877.

3 [1953] A.I.R. Cal. 234.

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4 [1952] A.C. 142.

5 (1952) Civil Revision Application No. 1527 of 1951, decided by Chagla C.J., on November 10, 1952 (Unrep.).

tively. Similarly, for the premises under the second lease the standard rent was Rs. 511 per month and Rs. 581.91 per month from February 1950 to March 1954 and from April 1954 to February 28, 1958, respectively and added the amount of additional taxes for the later period. The total liability, therefore, the Court determined to be Rs. 97,238.13 nP. It held that the rent paid by the defendants to the Receivers until February, 1952, was not appropriated towards rent. It, therefore, took accounts and made the decree accordingly. In determining the amount due it did not allow the plaintiff's claim regarding the insurance premia and costs of restoration of the premises to their original condition. It finally considered the question whether the statutory tenancy continued and if it did in respect of which lease. In the result the Court set aside the decree of the trial Court and decreed only a claim of Rs. 4,864.94 nP. plus interest at 4 per cent.

The plaintiffs applied in revision to the High Court against the decree of the Appellate Court. This application was heard along with the Civil Revision Applications filed by defendants Nos. 1, 3 to 6 and 8.

Y. S. Chitale and M. K. Shah, for the plaintiffs.

G. A. Thakkar, with *D. C. Purohit*, for defendant Nos. 2 to 5.

Venkatrao Anant Pai, defendant No. 1, in person.

PATEL J. [His Lordship after stating the facts, proceeded.] Mr. Chitale contends that (1) the Court below had no jurisdiction to fix the standard rent in the manner in which it has done having regard to the provisions of the Rent Act. (2) He contends that even if it had jurisdiction it has erred in exercising it in determining the case. (3) That it made out a new case for the defendant when it held that there was no appropriation of rent and allowed accounts, (4) that it wrongly disallowed insurance premia and restoration charges, and (5) that it was not entitled to determine the question of statutory tenancy.

The first contention is that the Court had no jurisdiction to fix the standard rent as in this case the premises leased to the defendant were not leased prior to that date. It may be mentioned that the whole compound with all the structures was leased from January, 1940, to the National Studio at a rental of Rs. 1,700 per month.

Section 5, sub-s. (8) defines 'premises' to mean (1) land... or (b) any building or part of a building let separately... including... Sub-section (10) defines 'standard' rent in respect of any premises where it is not fixed by the Court or the Controller under the Bombay Rent Restriction Act, 1939, or under the Act of 1944 to mean—(i) the rent at which the premises were let on the first day of September, 1940, or (ii) where they were not let on the first day of September, 1940, the rent at which they were last let before that day, or (iii) where they were first let after the first day of September 1940, the rent at which they were first let, or (iv) in any of the cases specified in s. 11, the rent fixed by the Court. Clause (b) of the sub-section makes the whole of it subject to s. 11. It is, therefore, argued that inasmuch as on September 1, 1940, the premises that were let were the whole compound with all buildings and now the premises let are only a portion of the same there can be no question of cl. (b)(i) of sub-s. (10) of s. 5 applying. Only cl. (b)(iii) applies and, if so, the rent charged for these premises by the leases in question became the standard rent and the Court has no jurisdiction to determine the standard rent unless the tenant proves that the rent charged is excessive. This argument cannot be accepted in view of s. 11 to which the definition is subject. It gives power to the Court by sub-s. (1) to fix the standard rent under any of the eventualities mentioned in cls. (a), (b), (c), (d) and (e) and requires the Court to fix such rent as the standard rent as it deems just having regard to the provisions of the Act and the circumstances of the case. Three of the reasons for which the standard rent may be fixed amongst others are:

(a) where any premises are first let after the first day of September 1940, and the rent at which they are so let is in the opinion of the Court excessive; or (c) where at one time the premises were let as a whole or in parts and at another time in parts or as a whole, or for any other reason where the difficulty arises in giving effect to this part and (e) where there is a dispute between the landlord and the tenant regarding the amount of the standard rent.

Considering the question, apart from authorities it would seem that the standard rent which is defined under s. 5 is the presumptive standard rent inasmuch as it is made subject to s. 11, the basic line being the rent as on September 1, 1940, fetched by the premises. We say it is presumptive, for the obvious reason that even though on September 1, 1940, the premises may have been let and were fetching rent there may yet be a dispute between the landlord and the tenant in respect of the standard rent as the rent charged may not be the economical rent of the property, but subject to such cases the rent prevailing in respect of the premises on the basic date is the standard rent. No doubt in cases where it was let for the first time after the basic date the standard rent would be the rent at which it was so let. Mr. Chitale relies on cl. (a) but then cl. (c) enables the Court in a case like the present to determine the standard rent as on September 1, 1940, the entire property was let and later on it was let in parcels. Mr. Chitale emphasized the article 'the' before the word 'premises' in cl. (c) and contends that the use of this article must show that the Legislature intended the identity of premises.

The wording no doubt leaves much to be desired but, in our view, to accept the contention that unless there is identity of premises separately let the Court has no jurisdiction to determine the standard rent cannot be accepted. It is well settled that a Court construing a document as also a statute must give it reasonable and rational meaning and that it ought not to adopt a construction which renders it ineffective or redundant. To accept the construction suggested by Mr. Chitale would render the clause meaningless. Take the case of a large house let in separate parts on the basic date and then let as a whole. The standard rent cannot be determined as there is no identity. Similarly, in the converse case where on the basic date this house is let as a whole and then in parts also the standard rent cannot be determined. Then one must ask why the provisions has been made as it has been. Though the word 'premises' is defined in s. 5 the meaning is subject to its being consistent with the context. The word 'premises' in s. 11 having regard to its context in which it is used is used in the wider sense meaning the whole building of which part was let then or now. In other words the qualifying word 'separately let' was not intended to apply, though the definite article 'the' is used in s. 11.

The question was raised before Chagla C. J. in *Manekji Jivraj Bhatena v. Basantilal M. Sharma*.¹ The Small Causes Court had taken the above view. The learned Chief Justice was inclined to take the view that cl. (c) should only be requisitioned when there was difficulty in giving effect to that part of the Act as the later words of the clause indicated. The learned Chief Justice himself recognised the difficulty of doing so. Having regard to the above discussion we prefer with respect the view which we have formulated. This contention of Mr. Chitale must, therefore, fail.

The second contention of Mr. Chitale is that in any event the lower Court has erred in the exercise of its jurisdiction while determining the standard rent by following principles alien to the Rent Act. He has referred us to the relevant portions of the judgment which give an impression that in the view of the Appellate Bench apportionment in a case like the present is the only method of determining the standard rent. He relies in support of his argument upon two decisions, one of this Court in *Dhanrajgirji v. Ward*² and the other of the Calcutta High Court in *Bata Shoe & Co. v. Narayan Das*.³ In

1 (1962) Civil Revision Application No. 1527 of 1951, decided by Chagla C.J., on November 10, 1952 (Unrep.).

2 (1924) 27 Bom. L.R. 877.

3 [1953] A.I.R. Cal. 234.

the course of his judgment in the first case the learned Judge observed (p. 879) :

"...Again, if the head lease instead of being as here the lease of one building consisting of flats had been a lease of a large number of buildings constituting a large estate, it would be almost impossible to make a correct apportionment of the rent. I do not think it was the intention of the Rent Act that landlords and tenants should be driven to do a difficult and expensive process of valuation and calculation before their rent could be ascertained."

In the second case it was held :

"That the basic rent of the premises cannot be determined on the footing of the rent which was payable for the two different portions of the said premises which were in the occupation of different tenants on that date. The Court has got to determine what rent was properly payable for the premises the rent whereof was sought to be standardised, on the material date namely 1-12-1941."

The view of the Appellate Bench cannot, however, be wholly justified. Clauses (a) to (e) of sub-s. (1) of s. 11 require the Court to determine the standard rent if any one of the conditions mentioned therein is satisfied. Once however the question falls to be decided, the Court has to fix the standard rent which appears to it to be just having regard to the provisions of the Act and the circumstances of the case. The Court, therefore, is bound to take into account all the circumstances and fix the standard rent consistent with the provisions of the Rent Act. The theory of fixing the standard rent only by apportionment adopted by the learned Judges apparently seems to have been based on the decision of the House of Lords in *Capital & Provincial Property Trust Ltd. v. Rex*.⁴ Under the English Law the provisions are contained in several statutes. Section 5 of the Act of 1938, provides that in a case of the type with which we are dealing, the standard rent shall be a standard rent ascertained by apportioning the standard rent of the dwelling house of which the premises in question form a part. In England apportionment is made because of the statutory provision.

This, however, does not mean that the prior rent of a part of the whole of the building cannot or ought not to be taken into account. It is good sense to say that if the standard rent of the whole building was a particular amount, standard rent of the part cannot exceed that amount. It is also good sense to say that standard rent of the whole building cannot be more than the total of the standard rents of the different parts. Of course if in the meantime any investments have been made by the landlord they must be considered and a fair return on such investments should be given to the landlord. It is true that if the property is wholly changed then apportionment of rent for different portions becomes a difficult problem. If it has not so changed the Court considers such apportioned rent and all such other circumstances as are brought to the notice of the Court. If no other circumstances are proved before the Court then such apportioned rent is the standard rent. In *Manekji's* case referred to above Chagla C. J. has taken this view and we agree, with respect, with the same.

The decision in *Bata Shoe & Co. Ltd.* negatives apportionment because of the particular provisions of the Act which direct that the standard rent should be fixed at an amount which would have been reasonably payable for the premises if let on December 1, 1941, as basic rent as prescribed by the schedule. It is obvious that under this provision there is no choice for the Court except to fix the rent as provided. For this reason it would seem other considerations were ruled out. *Dhanrajgirji's* case arose out of the provisions of the Bombay Rent (War Restrictions) Act of 1918 in respect of a flat in a building whole of which was let to one Dr. Billimoria. Dr. Billimoria was paying a total rent of Rs. 4,479 for it on the basic date and he had let out flats to different tenants. The defendant as a tenant of the flat was paying Rs. 75 on the basic date. Section 13(a) of the Act required the standard rent to be fixed by apportionment which the

defendant relied upon. His contention was rejected in view of the fact that the flat itself i.e. the identical premises were also let on the basic date and therefore that was the standard rent and apportionment was out of the question. The observations referred to above were made in this context and can have no application to the present case.

[The rest of the judgment is not material to this report.]

Before Mr. Justice Patel and Mr. Justice Tulzapurkar.

NAVINCHANDRA JETHABHAI MEISHERI

v.

MOOLCHAND SADARAM GINDODIYA.*

Indian Partnership Act (IX of 1932), Sec. 69—Suit for accounts of dissolved firm or realisation of property of such firm whether can be filed against partner under s. 69(3)(a)—Maintainability of suit by partner against another for damages for misconduct.

Under s. 69(3)(a) of the Indian Partnership Act, 1932, a suit for accounts of a dissolved firm or for realisation of the property of a dissolved firm can be filed against a person whether he be a partner or not.

Appaya v Subrao,¹ explained.

*Sheo Dutt v. Pushi Ram*² and *Daitari Mohapatra v. Brundaban Matia*,³ referred to.

A suit by one partner against another for damages for misconduct will fall within the exceptions contained in s. 69(3) of the Act.

*Bihari Lal v. Union of India*⁴ and *Daitari Mohapatra v. Brundaban Matia*,⁵ referred to.

ONE JETHABHAI (plaintiff), who died during the pendency of this appeal, was a resident of Bombay and did insurance business in Bombay. His son-in-law one Gulabchand Shah was doing contract work since about 1945. Until 1950, he did his own business, but from February 3, 1950, he took Moolchand (defendant) as his partner. The partnership deed was however, executed between the parties on September 4, 1950.

On September 17, 1952, the State Government invited tenders for modernising the Malegaon-Manmad Road in Nasik District, and the estimated cost was Rs. 12,50,000. The firm of Shah and the defendant submitted their tender on October 14, 1952. They also paid the earnest money required to be paid in the sum of Rs. 12,508. In the month of November, as the tender of this firm was found to be the lowest, it was accepted. The Government required Income-tax Clearance Certificates from the partners before finally sanctioning the contract. The defendant submitted his Income-tax Clearance Certificate but Shah could not, as his matter was pending in appeal before the Appellate Authority, and this fact was conveyed to the Superintending Engineer on December 6, 1952. It was also brought to his notice that the Madras High Court had taken the view that it was not within the power of the Government to insist on an Income-tax Clearance Certificate for public works contracts. On December 24, 1952, the firm of Shah and the defendant again informed the Executive Engineer that the Income-tax Clearance Certificate was not necessary and that, in the alternative, the defendant would be taking another partner and requested that the contract be given to the other firm. On February 6, 1953, the Executive Engineer wrote back to the firm asking them to name the person to be taken as a partner in the place of Shah. On February 18, 1953, the defendant forwarded his letter containing the name of the partner proposed by him, the consent of the plaintiff to become a partner and the Income-tax Clearance Certificate of the plaintiff. On March 2, 1953, the Government

*December 11, 1964. First Appeal No. 527 of 1958, against the decision of V.R. Talasikar, Civil Judge, Senior Division, at Dhulia, in Special Suit No. 564 of 1958.

1 (1937) 39 Bom. L.R. 1214.

2 [1947] A.I.R. All. 229.

3 [1959] A.I.R. Orissa 110.

4 [1960] A.I.R. Pat. 397.

5 [1959] A.I.R. Orissa 110.

accepted the tender. The Executive Engineer wrote in this connection to the defendant informing him that the tender was accepted and asked him to deposit Government Promissory Notes for security and to attend the office with the new partner to finalise the tender documents. On March 6, 1953, in Shah's car, the plaintiff, the defendant and Shah went to Nasik from Bombay. On the same day, the Government Promissory Notes were duly deposited and the defendant handed over the letter to the Executive Engineer informing him that they were depositing the Government Promissory Notes and that both the partners had come to finalise the tender documents. After complying with the formalities and depositing the documents, as the Executive Engineer was not at Nasik but at Malegaon, the party proceeded to Malegaon, and on the same day, after scoring out the name of Shah, the plaintiff and the defendant signed the document as partners. The same day, the works order was issued to both the partners, asking them to begin the work as the period was only 8 months. This was then sent to the Chief Engineer for final sanction. From March 6, 1953, preparations were being made for the execution of the work and, with that end in view, a stone crusher was sought to be purchased. The whole of the work in connection with this was substantially done by Shah. On March 20, the defendant, Shah and one Nasiruddin went to the Malegaon-Manmad Road for inspection and some notes were made by Nasiruddin at the dictation of Shah. On March 21, 1953, Shah engaged a stonebreaker for the firm of the plaintiff and the defendant. On March 25, 1953, the Executive Engineer wrote a confidential letter addressed to the defendant at his private address—though the tender contained the address of the firm—asking him to produce the partnership deed and, pending its production, to go and execute the contract in his own name. On April 20, 1953, the defendant went to the office of the Executive Engineer and signed the document of contract in his own name, superseding the earlier contract. When Shah who was all along acting for the plaintiff came to know of this, he and the plaintiff wrote several letters and telegrams to the Executive Engineer and also to the Superintending Engineer, accusing them of partiality and informing them that they would be responsible if the contract was transferred to the defendant. The matter reached the Chief Engineer, and on July 9, 1953, the Chief Engineer informed the plaintiff that necessary instructions were issued to the Executive Engineer. The Chief Engineer also wrote to the defendant on July 22, 1953, that he need not see the Chief Engineer as the decision was already communicated to the Executive Engineer. In spite of this, it was only on September 17, 1953, that the Executive Engineer informed the partnership of the defendant and the plaintiff that the contract belonged to the partnership firm and that the works order of March 6, 1953, stood. Then on September 24, 1953, the Executive Engineer informed the plaintiff of the same, as in the meantime the plaintiff, through Shah, was clamouring for his rights. The matters dragged on, and the defendant refused to co-operate with the plaintiff or Shah. For the first time on September 28, 1953, in answer to the letter of the Deputy Engineer, inquiring as to the programme of the further work, the defendant gave his reply protesting against the Executive Engineer's letter dated September 17, 1953, and telling him that there was no partnership as there was no agreement on several terms of partnership. In the meantime, the plaintiff had called upon the defendant to carry on with the work with the assistance of Shah, and he told him that he was ready to supply capital for the business. On October 4, 1953, the defendant for the first time replied to the letter of the plaintiff alleging that the terms of the partnership were the same as between him and Shah but that an attempt was made by Shah to introduce a new term to the effect that Shah would work in the place of the plaintiff, and to this term he did not agree; and, therefore, there was no partnership deed. He expressed his willingness to take the plaintiff as a partner provided he agreed to work in person. In the meantime, the Executive Engineer went on writing letters by the firm name and the defendant went on writing to the Executive

Engineer protesting against the recognition of the firm. On October 19, 1953, the Executive Engineer wrote to both the partners that seven months had already passed and very little progress was made and, therefore, the firm would be liable to penalty under clause 2 of the contract. The defendant received this letter and he accused the Executive Engineer of not co-operating with him by recognising the firm. Again, by letter dated November 14, 1953, which was posted on December 8, 1953, and received by the plaintiff on December 9, 1953, the Executive Engineer informed the plaintiff and the defendant that they would be liable to penalty. Again, by letter dated November 23, 1953, the Executive Engineer informed the firm that the time expired on November 5, 1953, and that they were liable to pay the penalty of Rs. 12,500 per day. The plaintiff sent a copy of this letter to the defendant with a forwarding letter. On December 15, 1953, the Executive Engineer issued exh. 165 imposing the penalty of Rs. 500 per day on the firm. The Executive Engineer enquired of the plaintiff for the first time on December 16, 1963, whether he had authorised Shah to correspond with the department, in reply to which the plaintiff wrote enclosing therewith a copy of the power-of-attorney in favour of Shah. On February 16, 1954, the defendant gave notice to the Government calling upon them to return the Government Promissory Notes of Rs. 25,000 deposited by the firm of the plaintiff and the defendant and to pay the sum of Rs. 75,000 alleged to be the expenses incurred by him and also a sum of Rs. 1,80,000 as damages for loss of the contract to the defendant. On March 12, 1954, he informed the Superintending Engineer that he was prepared to accept the contract in his own name at 5 per cent. less and asked him that the sum of Rs. 25,000 already deposited be returned to him for depositing the same under the new contract and that one year's time be given to complete the contract. On April 6, 1954, the Superintending Engineer wrote to the defendant to the effect that it was decided to take a negotiated tender from him and that he should see the Executive Engineer at Nasik. The plaintiff came to know of the same almost immediately. He, therefore, sent telegrams both to the Executive Engineer and the Chief Engineer on April 9, 1954. In the meantime, on the same day, the Executive Engineer wrote to the defendant asking him to attend the office to complete the tender documents and informing him that the security deposit of Rs. 25,000 would be transferred to the new work of the defendant, and he forwarded a copy to the Superintending Engineer. Another letter was issued by the Executive Engineer to the firm informing them that their contract was rescinded as they failed to complete the work. On April 22, 1954, the defendant executed a fresh contract and on April 28, the works order was issued to the defendant giving time for 12 months from April 30, 1954. The plaintiff after giving notice filed the present suit, and he prayed for the sum of Rs. 70,000 or such other amount as the Court may decide as and by way of damages or compensation, in the alternative, for an account under the directions of the Court in respect of the profits made by the defendant in carrying out the work and the share of profits which would have accrued to him by honest, efficient and diligent conduct of the business which was taken by the partnership of the plaintiff and the defendant, and for the return of the sum of Rs. 7,100 and costs.

The defendant *inter alia* contended that there was no partnership, that the suit was barred under s. 69 of the Indian Partnership Act and that it was also barred under the provisions of the Limitation Act.

The trial Judge dismissed the plaintiff's suit and held that the suit of the plaintiff was barred by s. 69 of the Partnership Act and also by s. 159 of the Limitation Act.

R. B. Kotwal, with M. R. Kotwal, for the appellants.

K. J. Abhyankar, for the respondent.

PATEL J. [His Lordship after setting out the facts and considering points not material to this report, proceeded.] The next question is whether the suit

is barred by time. The Court below has applied art. 115 of the Limitation Act which is for compensation for the breach of any contract, express or implied, not in writing registered and not therein specially provided for. If the suit were only for damages for the breach of contract of partnership, this article would indeed apply, though the important question would be that of the starting point of the period. The third column which relates to the starting point provides that the time shall run from the date the contract is broken and in the case of successive breaches when the breach finally ceases. A suit for accounts and share of profits of a dissolved partnership is governed by art. 106 which provides a period of three years from the date of dissolution of the partnership.

The learned Judge in para. 43 of his judgment has observed that the time commenced to run from April 28, 1953, because the plaintiff admitted in his cross-examination—

“Matters went wrong between us since 28th April 1953. Since the said date disputes arose between the parties. Since the end of April 1953 Gulabchand was not allowed to take part in the doings of the firm.”

He also relies on the admission of Shah in his cross-examination in para. 4 that the defendant told him at the end of April 1953 that he did not want to talk to him, and by about April 25, he learnt that attempts were being made to have the tender in the defendant's name only. If in this case there was a contract of partnership between the plaintiff and the defendant, the mere refusal of the defendant to associate the plaintiff's agent with the partnership work would not determine the starting point of limitation. The plaintiff need not, merely because of this dispute, terminate the contract and sue for damages for breach of the contract. Section 39 of the Indian Contract Act enables the plaintiff to terminate the contract or to continue it by his acquiescence. In the present case, in spite of the defendant's refusal to associate the plaintiff's agent with the work of the contract, the plaintiff insisted on the continuance of the contract and this he did by protesting to the officers regarding the transfer of the contract to the name of the defendant, and ultimately he got it transferred in favour of the firm as late as July in the sense that he got it decided that the contract belonged to the firm. In this case, having regard to the fact that the partnership was for a particular venture, as long as the venture did not end, the plaintiff was in a position to continue the contract and sue for its breach if he was otherwise entitled to sue on that basis. We may also point out that the defendant had, in fact, never denied the existence of the partnership except on October 4, 1953, in reply to the plaintiff's notice. If a suit for damages could lie for breach of the contract, then the plaintiff's suit having been filed on October 1, 1956, was within three years from the date of the denial of the plaintiff's right. We asked Mr. Abhyankar to show us any denial on the part of the defendant of the plaintiff's right prior to that date, but he was not able to show any. He referred us to the evidence of the defendant at pages 57 and 58 of the Paper Book, but it shows that he only refused to execute the deed. There is nothing to show that he ever denied the existence of the partnership. Similarly, the plaintiff's admission at page 21 of the Paper Book does not show that any denial of the partnership was made to him prior to that date. Reliance was also placed by Mr. Abhyankar to support his contention on exh. 139 dated September 28, 1953, which his client wrote to the Executive Engineer wherein he alleged that several terms were not settled and, therefore, the partnership deed could not be executed. Even here there is no clear-cut denial of the existence of the partnership. Secondly, a copy of the letter was not sent to the plaintiff, and thirdly even this letter reached the Executive Engineer's office on October 1, 1953, as shown by the Inward No. written in red ink on that letter. The suit having been filed on October 1, 1956—even under the assumption that this letter furnished a cause of action to the plaintiff, of which he knew nothing—it would be within time. We hold

that even if the suit were for compensation for breach of the contract of partnership, it would not be barred by time firstly because there was no denial of the partnership till October 4, 1953, even if new denial furnished the only cause of action though, in our view, the period commenced on the date on which the Government terminated the contract.

The question is whether the suit can be regarded as barred under art. 106 of the Limitation Act. Having regard to what we have stated above, it is clear that the partnership would stand dissolved when the contract was rescinded by the Government, since admittedly the partnership was for this particular venture. The defendant himself admits that the partnership was in respect of this venture only. If, therefore, it is a suit for accounts of a dissolved firm, then since the dissolution could be only on April 9, 1954, by reason of exh. 180, the period of limitation will start from that date, and the suit would evidently be in time. Further discussion will show that this is a suit of such nature. We must, therefore, hold that the suit is within time.

The next question is whether the suit is barred by reason of s. 69 of the Indian Partnership Act. It is an admitted position that the partnership between the plaintiff and the defendant was not registered under the Partnership Act, and, therefore, s. 69 of the Act must govern the case. The section is divided into four sub-sections. Sub-section (1) prevents a person from suing as a partner in a firm either the firm or a person who is alleged to be a partner in the firm, in respect of any right arising out of a contract of partnership or any other rights conferred by the Act, unless the firm is registered. Sub-section (2) prevents a similar suit against a third party in respect of any contract by the firm unless it is registered and it is shown that the persons suing on behalf of the firm are partners in the firm. Sub-section (3) provides that sub-ss. (1) and (2) would also apply to a claim of set-off or other proceeding to enforce a right arising from a contract, but it proceeds to carve out exceptions by cls. (a) and (b) in two cases—(a) the enforcement of any right to sue for the dissolution of a firm or for accounts of a dissolved firm, or any right or power to realise the property of a dissolved firm, and (b) the powers of an official assignee, receiver or Court under the two Insolvency Acts for realisation of the property of an insolvent partner. The exceptions to the section created by sub-s. (4) have no application to the present case, and we need not consider them. Clauses (a) and (b) of sub-s. (3) which provide exceptions clearly enable a suit to be filed either for dissolution of a firm or for accounts of a dissolved firm or for realisation of the property of a dissolved firm. An argument was made that the last portion of cl. (a) applies only to a suit against a third person. But then it is extremely difficult to hold that the provision which is made as an exception to both sub-ss. (1) and (2) should be split up in such a way that one portion of it should be applied to sub-s. (1) and the other portion to sub-s. (2), without even adding the word “respectively” by the Legislature. To do so would appear to be adding some words which are not to be found in the clause or re-drafting the statute. If the Legislature really intended to create an exception in this limited form, then to each of the sub-sections, a proviso could have been added—making an exception only to that sub-section. Giving a natural meaning to the provisions of cl. (a) which are applicable in the present case, in our view, a suit for accounts of a dissolved firm or for realisation of the property of a dissolved firm from any person, whether he be a partner or not, can be filed. This view was taken in the case of *Sheo Dutt v. Pushi Ram*¹ and it was subsequently followed in the case of *Daitari Mohapatra v. Brundaban Matia*.² Mr. Abhyankar relied on the observations of Sir John Beaumont in the case of *Appaya v. Subrao*³ where the learned Chief Justice appeared to be of the view that the first sentence of sub-cl. (a) should be read as creating exceptions from sub-s. (1), the excep-

¹ [1947] A.I.R. All. 229.

³ (1937) 39 Bom. L.R. 1214.

² [1959] A.I.R. Orissa 110.

tions being enforcement of a right to sue for dissolution or accounts of a dissolved firm, and the last sentence of that sub-clause should be read as creating an exception to sub-s. (2) in respect of a suit to enforce any right to realise property of a dissolved firm. The question arose in a suit by the plaintiffs who were partners of the defendant for the recovery of an amount due to the partnership by the defendant after the partnership was dissolved. Now, if really the learned Chief Justice had laid down the rule purported to have been formulated by him, the suit would have been dismissed. In that case, the trial Court had dismissed the suit on this ground, but the learned Chief Justice in a Revision Application allowed the suit and decreed the plaintiffs claim. The learned Chief Justice held that the suit in question fell within the exception and, therefore, setting aside the decree of the trial Court, decreed the plaintiffs' suit. It is obvious from the reasoning of the learned Chief Justice that he did not limit the exception to suits against third parties only; and, if this is so, with respect, it would seem it does not matter whether the exception is to sub-s. (2) or sub-s. (1). This case, therefore, is really not against the conclusion at which we have arrived.

Even a suit by one partner against another for damages for misconduct, in the ultimate analysis, must fall within the exceptions. When a partner claims damages on the ground of the misconduct of his partner, what he really means is that the partner must make good the loss sustained by the partnership by his misconduct and the amount so brought into the partnership should be divided between the partners. The amount brought into the partnership is, of course, the realisation of the properties of the partnership. One must notice in this connection that the Partnership Act imposes no disability on the partners of an unregistered firm entering into contracts either with third parties or amongst themselves. The prohibition is only in respect of either the partners or the firm being able to file suits during the continuance of the partnership. Suits, however, of the nature referred to in the exceptions could be filed. In *Bihari Lal v. Union of India*⁴ a suit for damages against a third party was held maintainable. In *Daitari Mohapatra v. Brundaban Matia*, referred to earlier, a suit for money due from a partner of a dissolved firm to another was held to be maintainable. It is not necessary to state what kind of suit may not be maintainable as between partners. Suffice it to say that the present suit, even as a suit for damages, is maintainable.

[The rest of the judgment is not material to this report.]

[NAGPUR BENCH]

Before Mr. Justice K. K. Desai and Mr. Justice Wagle.

NAVA SAMAJ LIMITED, NAGPUR

v.

THE REGISTRAR OF COMPANIES.*

Companies Act (1 of 1956), Secs. 89, 87-90, 16, 17, 31, 106, 107—General Clauses Act (X of 1897), Secs. 21, 14—Exemption granted by Central Government under s. 89(4) of Companies Act—Whether Central Government can revoke such exemption under s. 89(4).

The power of exemption created under s. 89(4) of the Companies Act, 1956, can be exercised by the Central Government once and finally only, and there is no right of revocation of exemption once granted under it.

Jwan Sinhji v. Balbhadrasinhji,¹ dissented from.

⁴ [1960] A.I.R. Pat. 397.

*Decided, December 9, 1964. Special Civil

Application No. 244 of 1962.

¹ [1963] A.I.R. Guj. 209.

*State of Bihar v. D. N. Ganguly,*² *Bhola Prasad v. U. A. Goswami,*³ *K. P. Khetan v. Union of India,*⁴ *Rambhau v. D. G. Tatke,*⁵ *Parthasarathy Mudaliar v. State of Madras*⁶ and *Kedar Nath v. Kishan Lal,*⁷ referred to.

THE facts appear in the judgment.

M. N. Phadke, K. Venkoba Rao, V. B. Mandpe, M. W. Puranik and V. M. Golwalkar, for the petitioners.

K. H. Bhabha and D. B. Padhye, Assistant Government Pleader, for respondent No. 1.

K. H. Bhabha, for respondent No. 2.

INTERVENERS:

Civil Application No. 899 of 1964.

B. A. Masodkar, A. S. Bobde, V. R. Manohar and P. R. Mridul, for interveners Nos. 1 to 4.

Civil Application No. 1553 of 1964.

K. H. Deshpande, for interveners Nos. 1 to 11.

Civil Application No. 1571 of 1964.

W. K. Sheoray, for interveners Nos. 1 to 7.

K. K. DESAI J. This is a petition under art. 226 of the Constitution challenging the validity of an order of the Central Government dated March 24, 1962, purported to have been passed under sub-s. (4) of s. 89 of the Companies Act, 1956 (I of 1956) (hereinafter referred to as the Act). The order that was passed is annexed as document No. 7 to the petition. The substance of the order is:

"...in exercise of the powers conferred by sub-section (4) of section 89 of the said Act the Central Government hereby rescinds its Order No. 3(1)-CL. VI/57, dated 29-7-1957."

The previous order was passed also under sub-s. (4) of s. 89 of the Act. That was an "exemption order" granting the petitioner-Company an exemption from the requirements of sub-ss. (1), (2) and (3) of s. 89.

The facts leading to the filing of this petition are shortly as follows: The petitioner-Company is a joint stock company registered on May 5, 1947, under the Indian Companies Act, 1913 (VII of 1913). The memorandum of association and the articles of association of the petitioner-Company are annexed as document No. 2 to the petition. It appears that the authorised capital of the Company is Rs. 10 lakhs divided into (a) 38,000 Ordinary shares of Rs. 25 each, and (b) 25,000 Deferred shares of Rs. 2 each. The issued and subscribed capital of the Company is Rs. 7,88,175 divided into 31,527 ordinary shares of Rs. 25 each and Rs. 50,000 divided into 25,000 deferred shares of Rs. 2 each. Admittedly, the Table A in the First Schedule to the Indian Companies Act, 1913, was adopted in a large way, and as regards the voting rights in respect of these shares, the result was that each holder of an ordinary share of Rs. 25 and each holder of a deferred share of Rs. 2 was entitled to the same voting rights, namely, one vote for each share owned by him. The whole of the deferred share capital of Rs. 50,000 was owned by five persons. In anticipation of the coming into force of the Companies Act, 1956, the petitioner-Company made an application to the Central Government in connection with a situation which was likely to arise by reason of the present provisions in ss. 87 to 90 of the Act. In pursuance of what transpired in correspondence between the petitioner-Company and the Central Government, the five share-holders

² [1959] A.I.R. S.C. 1018.

³ [1963] A.I.R. Pat. 437.

⁴ [1967] A.I.R. S.C. 676.

⁵ [1959] A.I.R. Bom. 538, s.c. 61 Bom.

L.R. 148.

⁶ [1957] II M.L.J. 300.

⁷ [1952] A.I.R. All. 500.

being the owners of the deferred shares of the capital of Rs. 50,000 executed a deed of trust transferring all the deferred shares to the trustees of the trust who now own these shares. The managing agency rights were also made property and subject matter of this trust. After the present Companies Act came into force in April 1956, the Central Government, in pursuance of the powers reserved to it under sub-s. (4) of s. 89, passed an order dated March 30, 1957, exempting the petitioner-Company from the requirements of sub-ss. (1), (2) and (3) of s. 89, in respect of the above 25,000 deferred shares for a period of three months with effect from April 1, 1957. The recitals in the order refer to the application made by the petitioner-Company for exemption and also to the fact that the Central Government was of the opinion that the exemption was "required in the public interest". By a further order of exemption also passed under sub-s. (4) of s. 89 of the Act on July 29, 1957, the Central Government again exempted the petitioner-Company from the requirements of sub-ss. (1), (2) and (3) of s. 89 in respect of the above 25,000 deferred shares. There are no conditions attached to the above exemption order as regards the period or any other matter. In this order also, one of the recitals is that the Central Government was of the opinion that the exemption was "required in the public interest."

It appears that in February 1960 and thereafter representations were made to the Central Government making certain allegations regarding the management of the Company and requesting the Central Government to withdraw the exemption. In response to the correspondence addressed, the petitioner-Company gave detailed replies regarding all these representations and submitted the same to the Central Government. Ultimately, by the impugned order dated March 24, 1962, it was recited that sufficient time to consolidate its position had been given to the petitioner-Company and that the exemption was no longer required in the public interest; and on the basis of these recitals and in purported exercise of the powers reserved to it under sub-s. (4) of s. 89, the Central Government rescinded the order of exemption dated July 29, 1957. Certain correspondence and representations on behalf of the petitioner-Company were thereafter addressed to the Central Government details of which it is unnecessary to refer here. Having not succeeded in its representations, the petitioner-Company ultimately filed this petition on July 4, 1962, challenging the validity of the above order of rescission of exemption dated March 24, 1962.

The substance of the main contention made in the petition is as follows: There is no power under sub-s. (4) of s. 89 of the Act in the Central Government to revoke and withdraw an exemption granted under that sub-section. Having regard to the time-limit mentioned in sub-ss. (1) and (3) of s. 89 and in respect whereof exemption could be granted under sub-s. (4) upon expiry of the time-limit specified in sub-s. (1) there can be no power, express or implied, to revoke orders of exemption previously made. The order of revocation having been passed long after the expiry of the time-limit specified in sub-s. (1) a situation had been created which resulted into impossibility of carrying out the obligations mentioned in sub-ss. (1) and (3). The order, therefore, is arbitrary and without jurisdiction. The petitioners have also made certain other contentions in the petition; but in the view which we are taking we find it unnecessary to recite those contentions here.

After the Fifteenth Amendment to the Constitution was passed, the Union of India was joined in this petition as respondent No. 2. The Union of India has not filed separate return in reply to the contentions made in the petition. The case of respondents Nos. 1 and 2 is to be found in the return filed by respondent No. 1. In his return respondent No. 1 has denied the contentions raised by the Petition. Apart from certain preliminary contentions, the reply of the respondents as appearing in the return filed by respondent No. 1 is that the power to grant exemption under sub-s. (4) of s. 89 of the Act implied the power to withdraw that exemption and also obviously the order of exemption. Reliance is strongly placed in that connection on the provisions in ss. 14 and 21

of the General Clauses Act. Respondent No. 1 also contends that the exemption having been withdrawn, the petitioner-Company is now bound to comply with the substantive requirements of sub-ss. (1) and (3) of s. 89 within a reasonable time. He denies that the order of withdrawal is a quasi-judicial order as alleged by the petitioner-Company. He also denies the petitioner's contention that the deferred shares are protected by the provisions of s. 90 read with s. 106 of the Act. The main defence to the petition is that having regard to the provisions in ss. 14 and 21 of the General Clauses Act, there was implied power in the Central Government to withdraw the exemption granted under sub-s. (4) of s. 89. It is admitted that express power was not given by sections of the Act then existing to the Central Government to withdraw or cancel exemptions granted under sub-s. (4) of s. 89.

[His Lordship after dealing with some preliminary contentions raised by respondent No. 1, proceeded.]

Counsel for both sides have developed their arguments in connection with the contentions made in the petition on the footing of the contents of ss. 85 to 90 of the Act. The arguments advanced have all been about the true effect and construction of the provisions in s. 89. It is, therefore, convenient to refer to these sections first before mentioning how the arguments were developed. These sections fall in Part IV of the Act relating to "Share Capital and Debentures". This part begins with s. 82. The first three sections relate to the nature of shares, numbering of shares and certificate of shares. The heading of the portion beginning with s. 85 is "Kinds of share capital". Section 85 defines "preference share capital" and "equity share capital". Section 86 provides that the share capital of a company limited by shares formed after the commencement of this Act, or issued after such commencement, shall be of two kinds only, namely: (a) equity share capital; and (b) preference share capital. Sections 85 to 89 have a bearing and affect voting rights attached to, *inter alia*, deferred shares, issued i.e. brought into existence prior to the date of the commencement of the Act. These voting rights are specifically referred to in s. 90 which mentions the extent to which voting rights attached to these shares would continue to be protected. For that reason, in s. 90 it is provided that nothing in ss. 85 to 89 shall affect these rights "except as otherwise provided in section 89". Section 87 relates to voting rights and provides by sub-s. (1) as follows:

"87. (1) Subject to the provisions of section 89...

(a) every member of a company limited by shares and holding any equity share capital therein shall have a right to vote, in respect of such capital, on every resolution placed before the company; and

(b) his voting right on a poll shall be in proportion to his share of the paid up equity capital of the company."

It is not necessary to refer to the further sub-sections of that section. It is sufficient to emphasise that the intent and purpose of s. 87 is that every shareholder holding equity share capital should be entitled to have a vote, and on a poll should be entitled to voting right in proportion to his share of and/or contribution to the paid up equity capital of the company. This section further deals with preference share capital and holders of preference shares, with which subject we are not concerned in this petition. Section 88 provides, *inter alia*, that no company shall issue any shares which carry voting rights or rights as to dividend, capital or otherwise which are disproportionate to the rights attaching to the holders of other shares.

The relevant parts of s. 89 run as follows:

"89. (1) If at the commencement of this Act any shares, by whatever name called, of any existing company limited by shares carry voting rights in excess of the voting rights attaching under sub-section (1) of section 87 to equity shares in respect of which the same amount of capital has been paid up, the company shall, within a period of one year from the commencement of this Act, reduce the voting rights in respect of the shares first mentioned so as to bring them into conformity with the

voting rights attached to such equity shares under sub-section (1) of section 87.

(2) Before the voting rights are brought into such conformity, the holders of the shares in question shall not exercise in respect thereof voting rights in excess of what would have been exercisable by them if the capital paid up on their shares had been equity share capital, in respect of the following resolutions placed before the company,..."

[The resolutions mentioned relate to the appointment of a director or of a managing agent or secretaries and treasurers and agreements in respect of these matters; to the appointment of buying or selling agents; and to the grant of loans and such other matter.]

"(3) If by reason of the failure of the requisite proportion of any class of members to agree, it is not found possible to comply with the provisions of sub-section (1), the company shall, within one month of the expiry of the period of one year mentioned in that sub-section, apply to the Court for an order specifying the manner in which the provisions of that sub-section shall be complied with; and any order made by the Court in this behalf shall bind the company and all its shareholders.

If default is made in complying with this sub-section, the company, and every officer of the company who is in default, shall be punishable with fine which may extend to one thousand rupees.

(4) The Central Government may, in respect of any shares issued by a company before the 1st day of December, 1949, exempt the company from the requirements of sub-sections (1), (2), and (3), wholly or in part, if in the opinion of the Central Government the exemption is required either in the public interest or in the interests of the company or of any class of shareholders therein or of the creditors or any class of creditors thereof.

Every order of exemption made by the Central Government under this sub-section shall be laid before both Houses of Parliament as soon as may be after it is made."

Section 90 is in the following terms:

"90. Nothing in sections 85 to 89 shall,—

(a) in the case of any shares issued before the commencement of this Act, affect any voting rights attached to the shares save as otherwise provided in section 89, or any right attached to the shares as to dividend, capital or otherwise; or

(b) apply to a private company, unless it is a subsidiary of a public company."

The main question that arises in this petition is whether under sub-s. (4) of s. 89 of the Act there is power in the Central Government to revoke, rescind and/or withdraw an exemption order once made. Mr. Phadke for the petitioner has submitted that on a true construction of the provisions in ss. 87 to 90, it is clear that once exemption is granted from the obligations created under sub-s. (1) of s. 89 there is no power left in the Central Government to withdraw the exemption. The exemption must always in his submission refer to all the liabilities and obligations created under sub-ss. (1), (2) and (3) of s. 89. The nature of the obligations is such that it could only be discharged in the manner and within the time prescribed in sub-ss. (1) and (3). The manner and time prescribed is such that exemptions once granted cannot be withdrawn. The power to exempt as contained in sub-s. (4) relates to property rights, being voting rights in this case of deferred share-holders. The power once exercised affects and deals with the share-holders and the company in general permanently. The exemption once granted so affects this property and alters the situation in such a manner that it cannot be permissible to retrace the step of exemption once taken. The power is to be exercised on the fulfilment of the conditions mentioned in sub-s. (4). These conditions, if once fulfilled, apply to the facts and circumstances of a company "at the date of the commencement of the Act". These circumstances cannot be reconsidered after the exemption is granted. He submitted at one stage that the orders of exemption would be quasi-judicial orders but has at a later stage of the proceedings not pressed that contention. His submission is that the power of exemption vested under sub-s. (4) in the Central Government is to be exercised for the reasons of (i) public interest, or (ii) the interests of the company, or (iii) of any class of share-holders, and this power when exercised decides finally matters which cannot be re-

considered. These adjudications and opinions deal, finally and once for all, with rights to property and for that reason there can be no warrant for revoking and/or rescinding them. In developing his arguments, he has mainly emphasised the consequence of the period of one year mentioned in sub-ss. (1) and (3). He relied upon the fact that the orders made under sub-s. (4) are directed to be placed on the Table of the Parliament. He relied upon the provisions in ss. 25(3)(b) and 250(5) of the Act. He has relied upon s. 637A which was pointed out in reply by Mr. Bhabha for the respondents. His further contention was that the mischief that is sought to be dealt with by the provisions in s. 87 relates to oppression of minority by majority. It relates to mismanagement by minority of the affairs of the company. There are other alternative provisions like ss. 397 and 408 which are available to deal with such mischief. He again laid great emphasis on the language of the provisions in s. 90, which, according to him, saved voting rights of previously existing deferred share-holders.

Mr. Bhabha for the respondents has contended that some of the arguments made on behalf of the petitioner are not relevant. He also mainly relied upon the provisions in ss. 87 to 90. The burden of his contention was that the only substantive provision which governed the rights of all share-holders from the date of the commencement of the 1956 Act was contained in s. 87(1)(a) read with s. 9 of the Act. According to him, after the date of the coming into force of the Act, having regard to the provisions in s. 87, it was not possible for any company to have any shares by way of equity capital wherein the voting rights were not in proportion to share-holders' paid up equity capital of the company. Basing his further arguments on the above contention, he submitted that the provisions in sub-ss. (1) and (3) of s. 89 are merely "machinery sections" to bring the constitution of all the companies into conformity, as regards the voting rights of the share-holders, with the provisions in s. 87. His contention was that there is no fresh obligation of any kind created against any company under sub-ss. (1) and (3) of s. 89. Developing his argument, he stated that each of the sub-sections must be construed as a whole and each throwing light on the other. He had to make this submission having regard to the difficult language regarding time-limit in sub-ss. (1) and (3). His further argument was that having regard to the well-established principle that power to do anything must include power to revoke that thing, and under the provisions in ss. 14 and 21 of the General Clauses Act it was permissible at all times for the Central Government to withdraw exemptions granted under sub-s. (4). Towards this submission he contended that the phrase in sub-s. (3) "shall, within one month of the expiry of the period of one year mentioned in that sub-section, apply to the Court" meant and should be read as "within one month of the expiry of the period of one year from the date of revocation and/or rescission of the order of exemption". He developed this contention by referring to some authorities where the phrase "the commencement of this Act" had been considered. We will presently refer to these authorities. His case was that having regard to the provisions in s. 14 of the General Clauses Act, the power contained in sub-s. (4) could from time to time be exercised and that under s. 21 of the same Act there was implied right to withdraw orders made previously. It is not necessary that the conditions of the time-limit contained in sub-s. (1) of s. 89 should continue to exist for exercising the powers of exemption under sub-s. (4). He denied that the provisions of s. 637A were helpful to the petitioner.

The clients of Mr. Bobde being a group of shareholders had applied to be made parties to this petition on September 8, 1964. That application was first made in August 1964 and the consideration of the application was adjourned to hearing of this petition. His clients wanted to raise several controversial facts in connection with the management of the petitioner-Company, and also as regards the controversial question of rights of different groups of share-holders of the Company. We have refused that application as, in our view, it is impossible

that such controversies can be decided in writ jurisdiction. Even so, we have permitted Mr. Bobde to advance arguments in connection with the questions raised by the petitioner and the respondents. Mr. Bobde submitted that on a true construction of sub-s. (1) of s. 89, it is not possible that during the one year mentioned in that sub-section any order of exemption can become necessary or be made by the Central Government. He has made certain submissions regarding the true construction and effect of s. 87(1)(a), which we will deal with while discussing that section.

In connection with the questions raised by the parties, it has appeared to us that the real question is about the true construction and effect of the provisions in ss. 87 to 90. In connection with the question of implied powers and the application of s. 21 of the General Clauses Act, it is first necessary to mention that in the case of *State of Bihar v. D. N. Ganguly*¹ the same question arose. In that case, in the first instance references to arbitration had been made by the Government of Bihar under s. 10(1) of the Industrial Disputes Act, 1947. By a subsequent notification also purported to have been made under the very same provisions the Government purported to supersede the prior notifications of reference to arbitration. This action of the Government was challenged by the petitions filed before the High Court at Patna under arts. 226 and 227 of the Constitution. The contention of the petitioners was that the Government of Bihar had no power or authority to supersede the earlier notifications. The petitioners succeeded in the High Court and the matters were taken in appeal by the State Government to the Supreme Court. Dr. Bannerjee for the appellant urged before the Supreme Court that in dealing with the question about the powers of the appropriate Government under s. 10(1) of the Act, the relevant facts which transpired between the parties must be borne in mind. He also argued that the power to cancel a reference made under s. 10(1) of the Act must be held to be implied, and in support of his argument he relied upon s. 21 of the General Clauses Act. It is convenient to quote the section here:

"Where, by any Central Act or Regulation, a power to issue notifications, orders, rules or bye-laws is conferred, then that power includes a power, exercisable in the like manner and subject to the like sanction and conditions (if any), to add to, amend, vary or rescind any notifications, orders, rules or bye-laws so issued."

Now, in connection with this contention, the Supreme Court observed (p. 1021):

"...It is well settled that this section embodies a rule of construction and the question whether or not it applies to the provisions of a particular statute would depend on the subject-matter, context, and the effect, of the relevant provisions of the said statute. In other words it would be necessary to examine carefully the scheme of the Act, its object and all its relevant and material provisions before deciding whether by the application of the rule of construction enunciated by Sec. 21, the appellant's contention is justified that the power to cancel the reference made under Sec. 10(1) can be said to vest in the appropriate government by necessary implication. If we come to the conclusion that the context and effect of the relevant provisions is repugnant to the application of the said rule of construction, the appellant would not be entitled to invoke the assistance of the said section."

The contention of the petitioner before us is that the context and effect of the relevant provisions of the Act is such that it would be repugnant to apply the above rule of construction to the power of exemption created in favour of the Central Government under sub-s. (4) of s. 89. Having regard to the observations of the Supreme Court in the above case it will be necessary to examine the scheme of the Act, its object and all relevant and material provisions. If on such examination it appears to us that the power of revocation claimed by way of implication would be repugnant to the provisions, object and/or the scheme

of the Act, we would be justified in holding that the contentions made by the respondents are not tenable.

Reference has been made to other authorities where the effect of s. 21 of the General Clauses Act is discussed. In view of the above complete observations of the Supreme Court regarding the true effect of s. 21 in the above decision, we do not deem it necessary to refer to those authorities.

We will now consider the question of the true effect and construction of the above sections of the Companies Act relied upon by the parties.

It is clear on a reading of ss. 87 and 88 of the Act that the intent of the provisions of these sections was that every shareholder of equity capital must on a poll have voting right in proportion to his share of contribution to the paid up equity capital of the Company. The Legislature disapproved of all the previously existing disproportion as regards voting rights of parties holding equity capital. The intention of the Legislature was that the disproportion previously existing must not continue. Provision about this matter having been made in ss. 87 and 88, provision was made for protecting the existing disproportionate voting rights of parties holding shares issued before the date of the commencement of the Act. It is clear on a reading of s. 90 that nothing in the above two sections or even s. 89 could affect any voting rights attached to shares-issued before the commencement of the Act "save as otherwise provided in section 89". This provision in s. 90 is clear and unambiguous. In considering the rights of deferred share-holders of any company the Court would be bound to give effect to the above saving provisions in s. 90. Now, it is also clear on a reading of s. 90 that voting rights of the deferred share-holders of the previously existing companies are liable to be altered in the only prescribed manner, that is, in accordance with the provisions in s. 89 and not otherwise. If the above is the effect of the provisions in s. 90, it is difficult to appreciate the argument that the provisions in sub-ss. (1) and (3) of s. 89 do not create any fresh obligations and are merely "machinery sections". It is difficult to accept this contention that the rights of deferred share-holders are not protected by s. 90 and that they are in fact and for all purposes having regard to the provisions in ss. 87 and 89 of the Act, governed by s. 87. The contention that there is no new obligation created under s. 89, seems to us not justified having regard to the language of sub-ss. (1) and (3) of s. 89. The provision in sub-s. (1) which creates (fresh) obligation is in the phrase—

"...the company shall...reduce the voting rights in respect of the shares first mentioned so as to bring them into conformity with the voting rights attached to such equity shares under sub-section (1) of section 87."

As the provisions in s. 90 exclude altogether the application of s. 87 so as to affect voting rights attached to the share issued before the commencement of the Act, we would not be justified in holding that to such voting rights or to the shares carrying such voting rights, the provisions in s. 87 are directly applicable. On the contrary, it requires to be repeated that though the policy of the law is clear as regards the voting rights in respect of the equity share capital and is contained in ss. 87 and 88, because of the protection granted to the holders of shares issued before the commencement of the Act by s. 90, the voting rights attached to such shares can only be affected by and in the manner prescribed under sub-ss. (1), (2) and (3) of s. 89 and not otherwise.

The true effect, therefore, of the provisions in sub-ss. (1) and (3) of the s. 89 is that there was an obligation on all previously existing companies to reduce the voting rights of the deferred shareholders with disproportionately excessive voting rights so as to bring them into conformity with sub-s. (1) of s. 87 within one year from the date of the commencement of the Act. Mr. Bhabha contended that the importance in sub-s. (1) of s. 89 is to the period. According to him, there is no emphasis in this section on the obligation to reduce. This was so, according to him, because this must be held to be a "machinery section". Having regard to the construction which we have

arrived at about the provisions in s. 90 read with sub-s. (1) of s. 89, we are unable to accept this contention.

In connection with the construction which we have arrived at, the reference to the period of time mentioned in sub-s. (3) is relevant. This sub-section refers (i) to the failure of the requisite proportion of any class of members to agree, and (ii) to the reduction mentioned in sub-s. (1). For that reason, if it is found impossible to comply with the provisions in sub-s. (1), it is provided that the company must make an application within one month of the expiry of the period of one year mentioned in that sub-section. The question is: Is it permissible to construe this provision to read 'within one month of the expiry of the period of one year from the date of revocation of exemption granted under sub-section (4)' as suggested by Mr. Bhabha? The language of the sub-section is clear. The obligation that is cast on the defaulting companies is to make the application mentioned in the sub-section within one month of the expiry of the period of one year. That provision has relation with the next sub-paragraph in the sub-section which makes it an offence not to make such an application. This phrase in the sub-section directly refers to the period of one year mentioned in sub-s. (1). That period, as we have already pointed out, is of one year from the commencement of the Act. Obviously, the date of the commencement of the Act must for all purposes remain the same. In this case, it was April 1, 1956. The application to Court must therefore be made on or before May 1, 1957. That date is not liable to be extended. Having regard to the clear language in these sub-sections, we are unable to accept this contention made by Mr. Bhabha.

The power of exemption referred to in sub-s. (4) must of necessity relate to obligations mentioned in sub-ss. (1), (2) and (3). That is apparent on a reading of the language of sub-s. (4). If our construction of sub-s. (1) is correct, the exemption must relate to the obligation of the petitioner-Company to so alter its memorandum of association and articles of association that the deferred share-holders who contributed Rs. 2 each per share should not have one vote per share. The right of vote of other share-holders who contributed Rs. 25 per share to the equity capital would have to be altered so that the proportion of the voting rights would be equalized in proportion to the capital contribution by each shareholder to the whole of the capital of the company. In substance, the company had to alter its memorandum and articles so that the share-holders had voting rights in accordance with and in proportion to their contribution to the capital of the Company. This change in the memorandum and articles was to be brought about in accordance with the powers reserved to the company and share-holders under the articles of association and the relevant provisions in the Act. It is for this reason that reference is made in sub-s. (3) to "If... it is not possible to comply with the provisions of sub-section (1)" because of "the requisite proportion of any class of members not agreeing" to the resolution proposed for amending the company's memorandum of association and articles of association to bring the voting rights in conformity with the provisions in s. 87. It is necessary to remember in this connection that it is not the attempt of the Parliament to change the memoranda of association and articles of association of different companies. The Act provides about the manner and method in which these deeds of constitution of companies can be altered. The Legislature did not forget while enacting the provisions of ss. 87 to 90 that the matter of alteration to be made in these documents would require to be carried out in accordance with the usual procedure. It is for that reason that in spite of having made provision relating to voting rights in ss. 87 and 88, by s. 90 protection was given in respect of the previously existing companies and the direct application of these sections was specifically avoided. It was for this reason that in sub-s. (3) Courts were invested with powers which are altogether new. The memorandum of association and articles of association were not sought to be altered by any provisions of law at all. In

regard to companies which defaulted in carrying out the obligations created by s. 89, provision was made in sub-s. (3) to empower the Court to get the memorandum and articles altered, and in that connection, to make orders specifying the manner in which the same had to be done. In other words, the Court was empowered to overlook, if necessary, the relevant provisions in the memorandum and articles of different companies as also the scheme of the Act for the alteration of these documents. It is thus clear that the provisions in s. 87 were not made (directly) applicable so as to affect voting rights of the shareholders in respect of the shares issued before the commencement of the Act.

What we have discussed above goes to emphasise the fact that on a true construction of sub-s. (4) of s. 89 the exemption that can be granted under that sub-section must of necessity be related to the obligations created under sub-s. (1) and (3) and the consequential matters referred to in sub-s. (2). This exemption has no relevance to the period of one year mentioned in sub-s. (1). To accept the contention that this has only relevance and bearing on the period of one year would result into the absurd position that by executive action of exemption, the period prescribed by statute in sub-s. (1) could be altered. The contention that the exemption related only to the period of one year mentioned in sub-s. (1) appears to us to be far-fetched and involving the proposition that executive orders could be made to enlarge the time prescribed by statute.

The obligations cast on companies under sub-ss. (1) and (3) could be carried out only once and relate to the circumstances of a company as at the commencement of the Act. For the purposes of the time of one year prescribed by sub-s. (1) the only material date is the date of the commencement of the Act. If examination is granted in connection with these obligations at any time, it is difficult to see what other obligations can thereafter survive. Obviously, after the expiry of one year mentioned in sub-s. (1) no obligation can survive. Of necessity, by executive action of withdrawal of exemption once granted, a second and new obligation of the same nature as mentioned in sub-s. (1) cannot be created. The nature of the obligation being of the above kind, it appears to us that the scheme of this section is such that an exemption once granted cannot be withdrawn at any stage whatsoever. The withdrawal of exemption after the period of one year in sub-s. (1) would of necessity result into creation of a new obligation by executive action. This circumstance appears to us to be of such importance that we must come to the conclusion that exemptions once granted under sub-s. (1) cannot be revocable at all.

In connection with the argument that the provisions in s. 21 of the General Clauses Act would apply to the power of exemption it is relevant again to notice that the matter of voting rights was, up to the date of the commencement of the 1956 Act, wholly governed in respect of each company by the provisions in its memorandum of association and articles of association. The Act makes specific provision relating to the method and manner of alteration of memorandum of association and articles of association. Reference in this connection can be made to ss. 16 and 17, as also s. 31. It is necessary to remember that where rights of different classes of share-holders are to be affected, the provisions for alteration of articles are more stringent as can be ascertained by reading ss. 106 and 107. Indirect reference to these sections is contained in sub-s. (3) of s. 89 when it states "If, by reason of the failure of the requisite proportion of any class of members to agree it is not found possible to comply with the provisions of sub-section (1)..."

The right of voting is an important right and by a study of the various relevant sections of the Act, it can with ease be ascertained that protection of such right is the subject-matter of diverse sections of the Act. There is provision for exercising right of vote so as to affect the whole administration of companies.

The consequence of the provisions in the Act relating to general meetings of the shareholders and the right of voting of the shareholders at these meetings

and the right of the general meeting to appoint directors and managing agents and to decide other matters is that a group of shareholders controlling a majority of votes controls business, management, and finance of the whole company. This is often done through elected directors. The result of provisions relating to the right of sale of shares and having the transfer of shares registered is that by sale of the controlling block of shares, control of business, management, and finance of a company could be completely transferred in favour of the new purchasers of that block of shares. It is not convenient to refer here in that connection to all the provisions and sections of the Act. It appears to us that these are well-established consequences of the provisions of the Act. It is also permissible to take judicial notice of the fact that in the context of the modern times, large industries and businesses requiring large finances cannot be carried on in private sector except through the machinery of incorporated companies. It is in the context of these provisions, objects and scheme of the Act that we are called upon to construe the provisions in sub-s. (4) of s. 89. It is in this context that we have to find whether it can justifiably be held that the rule of construction as contained in s. 21 of the General Clauses Act is applicable to the power of exemption created in favour of the Central Government under this sub-section. The more relevant provisions in this context are obviously the provisions in ss. 87 to 90. If the construction which we have arrived at as regards the true effect of sub-s. (1) of s. 89 is true, apparently, the exemption that could be given under sub-s. (4) relates to the obligation of the companies existing prior to the date of the commencement of the Act to amend their memoranda of association and articles of association, so as to bring the right of vote in the shareholders into conformity with the provisions in s. 87. It is obvious that that obligation as against the companies existing, at the date of the commencement of the Act, can only be found to exist in the provisions in sub-s. (1) of s. 89. That, as we have already said, is the result of the phrases "Subject to the provisions of section 89" in s. 87, and "Nothing in sections 85 to 89" in s. 90, in the first part of the section. The obligation created against these companies under sub-s. (1) of s. 89 was apparently to deal with the mischief of disproportionately excessive voting rights held by shareholders in proportion to the capital contributed by them as against other shareholders who made excessive and larger contribution to the capital of the company. Even so, under sub-s. (4) of s. 89 a right has been conferred on the Central Government to exempt the previously existing companies from the obligation created under sub-s. (1) of s. 89. The opinion, therefore, that the Central Government has to form under sub-s. (4) primarily relates to the question as to whether for any of the reasons mentioned in sub-s. (4), it was desirable, in spite of the provisions in s. 87, that the previously existing companies should carry on the management and business of the company under the control of a few shareholders having disproportionately excessive voting rights as compared to the proportion of their capital contribution as against the other shareholders. The obvious result of the exemption granted under sub-s. (4) in the case of the petitioner-Company was that a few shareholders owning the 25,000 deferred shares continued to control, by exercise of their single vote in respect of each share, the whole of the business, management, and finances of the petitioner-Company. The question that the Central Government had, therefore, to consider and in fact considered was desirability for one or more of the reasons mentioned in sub-s. (4) to allow that situation to continue by granting exemption from the obligations created against the company under sub-s. (1). The opinion had to be based on one of the four reasons mentioned in sub-s. (4), namely: (i) public interest, (ii) interests of the company, (iii) interests of any class of shareholders therein, and (iv) interests of the creditors or any class of creditors thereof. The question had, in view of the language of sub-s. (4), to be decided on the facts which must exist on the date when the obligation mentioned in sub-s. (1) arose and continued to exist against the petitioner-Company. It

should have been apparent to the Central Government having regard to the above general scheme of the Act that in the event of exemption being granted, the obligation under sub-s. (1) would cease to exist altogether, and as from the date of exemption the company and its shareholders would proceed to deal with their rights as regards the management, business and finances of the company and their shares as if there was no obligation of any kind against the Company to bring the voting rights of its deferred shareholders into conformity with the provisions in s. 87. It is needless to state that these are extremely important and serious consequences as regards the property rights of the company on the one hand and its shareholders on the other.

In addition, it is necessary to repeat that the period of time mentioned in sub-s. (1) was not liable to be extended by any executive action taken under sub-s. (4). The intention of the Legislature was that the obligation must be carried out in the manner prescribed under sub-ss. (1) and (3). The question is whether having regard to the above circumstances, it is permissible to hold that the rule of construction as contained in s. 21 of the General Clauses Act was intended to be applicable to the power created under sub-s. (4). In our view, the situation that would be created by holding that the exemptions granted under sub-s. (4) could be revocable would be entirely contrary and repugnant to the whole of the scheme of the Act. As the administration, management and affairs of a limited company are liable to be controlled by a group of shareholders owning majority of votes it appears to us that it was never intended that the rule of construction in s. 21 of the General Clauses Act should be applicable to the power of exemption vested in the Central Government under sub-s. (4). It is difficult to find that it was permissible for the Central Government, having regard to the provisions in s. 14 of the General Clauses Act, from time to time to pass and revoke orders of exemption under sub-s. (4).

It needs to be repeated that the circumstances on the basis whereof the Central Government is to form its opinion that exemption be granted under sub-s. (4) will be circumstances existing during the period in which the obligation cast under sub-s. (1) commenced and continued to exist. That period must expire within one year from the date of the commencement of the Act. It is necessary to state that we do not want to express any opinion as regards the question of the right of a Court to make orders under sub-s. (3), to enable a company to bring its memorandum of association and articles of association into conformity with the provisions in s. 87 even after the expiry of the above period. It is quite possible that the Court would continue to have such powers continuously and at all times. We are, however, not called upon to decide that question.

It is necessary to refer here to the case of *Juvan Sinhji v. Balbhadrasinhji*.² Having regard to the facts involved it became necessary in that case for Mr. Justice Bhagwati to consider the true effect of the provisions in ss. 87 to 90 of the Act. The relevant observations in para. 6 at page 215 are as follows:

“...Whatever inequality in respect of voting rights existed under the Articles of Association would have come to an end immediately on the coming into force of the Companies Act, 1956, by reason of the combined operation of Sections 87 and 9 and the new structure of voting rights prescribed by Section 87 would have become operative immediately on the commencement of the Act. Section 90, however, provides that nothing in Secs. 85 to 89 shall, in the case of any shares issued before the commencement of the Act, affect any voting rights attached to the shares save as otherwise provided in Section 89. There is thus an express provision in the Act that the provisions of Section 87 shall not in the case of any shares issued before the commencement of the Act, affect any voting rights attached to the shares save as otherwise provided in Section 89. The new structure of voting rights prescribed by Section 87 would not, therefore, apply to the shares issued before the commencement of the the Companies Act, 1956, save to the extent provided in Section 89.”

In further considering the true effect of these sections in para. 14 at page 221 the learned Judge observed:

"...it is obvious that the Company failed to bring the voting rights of the shares into conformity with the voting rights prescribed by Section 87(1) within the period of one year prescribed by Section 89(1) but that cannot make any difference. Even if the Company did not bring the voting rights of the shares into conformity with the voting rights prescribed by Section 87(1) as required by Section 89(1), the voting rights could not be exercised by the members of the Company in accordance with the old Articles of Association after the expiration of the period of one year from the date of commencement of the Companies Act, 1956, in view of the provisions of Section 9. The Company could not by refusing to carry out the provisions of Section 89(1) perpetuate the disproportionate voting rights provided under the old Articles of Association. It was only for a period of one year from the date of commencement of the Companies Act, 1956, that the old voting rights could continue and thereafter the voting rights had to be exercised in accordance with the provisions of Section 87."

With respect, we regret that we are unable to agree with the observations in the last quoted passage. The Court has not given due effect to the provisions in s. 90 that the voting rights attached to the shares issued prior to the commencement of the 1956 Act could not be affected except in the manner prescribed by s. 89. The Court has not considered the fact that voting rights could not be affected without necessary alterations in the articles of association of the company by resolutions passed in that connection in accordance with the procedure prescribed by the Act.

Reliance has been placed in connection with the true effect of the provisions in s. 21 of the General Clauses Act on the case of *Bhola Prasad v. U. A. Goswami*.³ The observations in that case are to the effect that the provisions of s. 21 contain a rule of construction relating to powers exercised by executive authority under what is described as "delegated legislative powers". This rule of construction is not applicable to orders of administrative nature. The contention on behalf of the respondent is that the powers to give exemption as contained in sub-s. (4) of s. 89 are of the nature of "delegation of legislative powers" and/or "subordinate legislation". The rule of construction contained in s. 21 is, therefore, applicable to these powers. We have in this connection already considered all relevant matters and find it unnecessary to further discuss the question.

Reference has also been made to the case of *K. P. Khetan v. Union of India*.⁴ In this case also the Supreme Court came to consider the true effect of the provisions in s. 21 of the General Clauses Act. The observations in this case are of the nature similar to the observations in the subsequent case of *State of Bihar v. D. N. Ganguly*, which we have referred to.

On behalf of the respondents reference has been made to the case of *Rambhau v. D. G. Tatke*⁵ and *Parthasarathy Mudaliar v. State of Madras*.⁶ These cases relate to withdrawal of exemptions once granted. In the first case, the observations relate to the withdrawal of exemption granted under the Minimum Wages Act, 1948. In the second case, they relate to the withdrawal of exemption granted under the Madras General Sales Tax Act, 1939. There is no dispute between the parties that exemptions granted for non-application of Minimum Wages Act and Sales Tax Act can always be withdrawn. The reason for this is that the context of the legislative provisions in the cases referred to above clearly indicates the policy to be enforced by executive authority. The context also indicates that the executive authority must have from time to time a right to include and exclude certain industries and goods from the applicability of these Acts. The question in all cases must be, as observed by the Supreme Court in the case of *State of Bihar v. D. N. Ganguly*, to find out upon

3 [1963] A.I.R. Pat. 437.

L.R. 148.

4 [1957] A.I.R. S.C. 676.

6 [1957] II M.L.J. 300.

5 [1959] A.I.R. Bom. 538, s.o. 61 Bom.

examination of the scheme and object of the relevant Act and the context in which the powers are conferred if the rules of construction as contained in ss. 14 and 21 are applicable or repugnant.

In connection with the true construction of the phrase "at the commencement of this Act" as contained in s. 89, Mr. Bhabha relied upon the case of *Kedar Nath v. Kishan Lal*.⁷ The question before the Court in that case related to the provisions in s. 15 of the U.P. Temporary Control of Rent and Eviction Act, 1947. Section 15 of that Act provided:

"In all suits for eviction of a tenant from any accommodation pending on the date of the commencement of this Act, no decree for eviction shall be passed, except on one or more of the grounds mentioned in section 3."

The Act provided for the extension of applicability of the provisions of the Act to the areas notified under the provisions of the Act. The suit for ejectment related to property situate in the area to which the Act had not been applied. Much subsequent to the date of the institutions of the suit by a notification issued under the Act the provisions of the Act were made applicable to the area in question. The question that arose before the Court was whether the suit was pending on the date of the commencement of the Act. On behalf of the plaintiff, it was contended that the suit was not pending "on the date of the commencement of the Act". In that connection, the Court observed:

"There is no valid ground to make any distinction between 'the date of the commencement of the Act' in section 15 and 'the date when the Act is applied to a particular area'".

On the footing of the above construction, the contention made on behalf of the plaintiff was rejected. We do not see how the observations made in that case can affect the true construction and effect of the phrase "at the commencement of this Act" as contained in s. 89 of the Companies Act. In the context in which the phrase is used in s. 89, it is abundantly clear that it is meant to indicate the date from which the obligation mentioned in sub-s. (1) attaches and is created against all the previously existing companies. This date must for all purposes continue to remain April 1, 1956.

The result of the above discussion is that in our view the rule of construction as contained in s. 21 of the General Clauses Act is not applicable to the provisions in sub-s. (4) of s. 89 of the Act. The power of exemption created under sub-s. (4) can be exercised once and finally only, and there is no right of revocation of exemption once granted.

[His Lordship after dealing with a point not material to this report, concluded.]

In that view of the matter, we find it unnecessary to discuss the various arguments advanced in connection with the true construction of s. 637A on behalf of the petitioner-Company and the respondents. As we are in favour of the petitioner on the main ground of the true construction and effect of sub-s. (4) of s. 89 and/or ss. 87 to 90 of the Companies Act, we deem it unnecessary to decide the further questions raised on behalf of the petitioner-Company.

The result is that we must strike down and we hereby declare the impugned order of revocation of exemption dated March 24, 1962, as invalid and of no effect. There shall be a *mandamus* against the respondents restraining them from enforcing that order of revocation. The respondents will pay the costs of the petitioner-Company.

Order accordingly.

APPEAL FROM ORIGINAL CIVIL.

Before Mr. Justice Patel and Mr. Justice Chitale.

EXTRUSION PROCESSES PRIVATE LTD.

v.

JIVABHAI MARGHABHAI PATEL.*

Companies (Court) Rules, Rule 96—Companies Act (I of 1956), Secs. 439, 442, 443—Whether Company should be heard before admission of petition for its winding up.

Under rule 96 of the Companies (Court) Rules, 1959, there is no right in a company to be issued a notice before a petition for winding-up is admitted nor before the Court fixes the date of hearing of the petition. There can, therefore, be no question of hearing the company at the stage of admission. As to giving of notice to the Company before giving directions regarding advertisements there is a discretion left in the Court.

Mere admission of a petition for winding-up will not necessarily mean that a Provisional Liquidator should follow as a matter of course.

*Western India Theatres v. Ass. B'bay Cinemas,*¹ referred to.

THE facts appear in the judgment.

M. R. Parpia, instructed by *Kanga & Co.*, for the appellants.

M. R. Mody, with *Booch* instructed by *Bhaishankar Kanga & Girdharlal*, for the respondent.

Madhukar H. Kania, for Kashibhai Patel and Dinubhai Patel, in support of winding-up petition.

PATEL J. The present appeal comes up from the order of Mr. Justice Kantawala in a winding-up petition.

The respondent in this appeal had filed a winding-up petition against the Extrusion Processes Private Ltd., the appellant company. It is a private limited company and a substantial portion of the shares is held by the Managing Director and his relations and friends. In the petition for winding-up serious allegations were made to show that it was proper and fit that the company should be wound up. It came first before Mr. Justice K. K. Desai for preliminary orders under Rule 96 of the Companies (Court) Rules framed under the Companies Act. Desai J. dismissed the petition *in limine*. Against his order an appeal, being Appeal No. 32, of 1963, was filed and that appeal was heard by us on November 5, 1963. After hearing counsel on both the sides we made the following order:

"In the result, we allow the appeal, admit the petition, give a notice to the company and postpone the giving of the advertisement until after it is heard. The trial Court will hear the matter hereafter..."

Before the matter came on board affidavits were filed on behalf of the company to show cause. Affidavits in rejoinder were filed by the petitioning share-holder and also the other share-holders including a Director who was according to his allegation excluded from management. Mr. Justice Kantawala felt that we had heard the company and that we had already admitted the petition. He, therefore, directed advertisements. It is against this order that the present appeal is brought.

Mr. Parpia argues that by our order we only accepted the petition and that before it is admitted it should be heard on merits, i.e. the company ought to be heard and as Mr. Justice Kantawala did not hear all the arguments of the company before admitting the petition, the order is bad. In support Mr. Parpia relies upon *Western India Theatres v. Ass. B'bay Cinemas*,¹ a decision regard-

*Decided, February 5, 1965. O.C.J. Appeal No. 94 of 1964: Company Petition No. 47 of 1963.

1 (1956) 60 Bom. L.R. 1240.
1 (1956) 60 Bom. L.R. 1240.

ing the practice followed in such matters by this Court before the Act was amended and new rules were made.

The question is of importance for obvious reasons. If the contention is accepted it would mean that there would be appeal from order admitting a petition, appeal from an order of advertisement and appeal from the final order. In between there may be other appeals. We must, therefore, carefully examine the provisions of the Act and the rules.

Section 439 relates to the making of the winding-up petitions and enumerates the persons or classes of persons who are entitled to make a petition. Section 442 relates to the powers of the Court in a winding-up petition to stay any proceedings pending in any other Court. Section 443 defines the powers of the Court on hearing the petition. There is no provision in the Act dealing with procedural matters in relation to winding-up petitions. This is left to rules to be made under s. 643 of the Act to which we must now turn.

Part I of the Company (Court) Rules deals generally with applications. Rule 11 requires that applications made under the sections there referred to shall be made by petition, one of the sections being s. 439. Rule 27 relates to the form and time of service of the notice. Rule 28 requires in case a petition is presented against a company that it shall be accompanied by a notice in the prescribed form together with a copy of the petition and a stamped envelope addressed to the company and that

"the Registrar shall immediately on the admission of the petition send the notice together with the copy of the petition to the company by registered post."

Part III deals with winding-up petitions. Rule 95 relates to the form of the petition and rule 96 relates to admission of petition and directions as to advertisement. Rule 99 requires that subject to the directions of the Court, the petition shall be advertised as provided by Rule 24 in Form No. 48. Rule 96 directs that after the petition is filed, it shall be posted before the Judge in Chambers for admission of the petition and fixing a date for the hearing thereof and for directions as to the advertisements to be published and the persons, if any, upon whom copies of the petition are to be served and the Judge may, if he thinks fit, direct notice to be given to the company before giving directions as to the advertisement of the petition. A plain reading of the rule indicates that there is no right in a company to be issued a notice before a petition is admitted nor before the Court fixes the date of hearing. As to giving of notice to the company before giving directions regarding advertisements there is a discretion left in the Court. It is true that if the Judge is not satisfied on reading the petition itself regarding the grounds for winding-up he would be entitled to reject the same. There can, however, be no question of hearing the company at the stage of admission.

In response to the notice under Rule 96 the company may show cause why the petition should not be proceeded with or rejected. But then this could only be on grounds which do not involve facts. In the case referred to, at p. 1242 the learned Chief Justice says while considering Rule 733 of the old rules:

"...In the winding-up of a company the creditors are interested, the share-holders are interested, and therefore it is but right that before the Court makes a final order on the petition these parties should be heard. But that does not mean that the discretion of the Court is taken away to dismiss a petition at an early stage if no answer is called for on the merits of the petition. If this is clearly borne in mind, then the practice followed by this Court is a perfectly proper practice...."

The subsequent observations of the Court have to be read in the light of this principle. It is possible, therefore, that in response to such a notice the company may be able to show that the application does not lie or that without going into the merits the application ought to be dismissed and this is what is pointed out by the learned Chief Justice in next paragraph of the judgment. He says (p. 1242):

"...In answer to the notice all that the respondent is entitled to urge is that for any justifiable reason the petition should not be proceeded with and further steps should not be taken."

Mr. Parpia's contention that before admission of the petition the company ought to be heard cannot possibly be supported. Our order, therefore, rightly admits the petition. We had only postponed the advertisement until after the company was heard on the question of advertisement.

As the petition is admitted and the advertisement is issued, the matter will have to be heard on merits. The learned Judge will be free on the materials before him to come to his own conclusion as to the allegations made in the petition and he would be free to exercise any of the powers as are vested in him under s. 443 of the Companies Act necessitated by his own conclusions on facts. We have disposed of all legal contentions on law by our previous judgment. We may also make it clear that the mere admission of a petition would not necessarily mean that a Provisional Liquidator should follow as a matter of course. Both the parties are agreed that the matter should be heard as expeditiously as possible. Both the parties will have liberty to file further affidavits if they so choose within such time as the trial Judge may allow. The matter should be heard as early as possible. Costs of the appeal would be costs in the petition.

Order accordingly.

APPELLATE CIVIL.

Before the Hon'ble Mr. H. K. Chaitani, Chief Justice, and Mr. Justice Gokhale.

SHIVSHANKAR RAMKRISHNA KINI

v.

ANNA BALA GAWAD.*

Bombay Village Panchayats Rules, 1959. Rules 8, 7—Nomination paper presented through representative of candidate—Authority authorising representative to present nomination paper not produced along with nomination paper—Validity of nomination paper.

Under rule 8(1) of the Bombay Village Panchayats Election Rules, 1959, in cases in which a nomination paper is not presented personally by the candidate, the requirements of the rule will be complied with, if the authority authorising the representative to present the nomination paper on behalf of the candidate is given in writing before the nomination paper is presented, and it is immaterial whether such authority is produced or not at the time when the nomination paper is presented. It must, however, be produced before the nominations are scrutinised so as to enable the returning officer to decide whether the nomination paper was presented properly. The question whether the representative had been given the authority before the nomination paper was presented will have to be decided in each case on the facts of that case.

THE facts appear in the judgment.

V. M. Limaye, with *N. M. Konkar*, for the petitioner.

M. A. Rane, Assistant Government Pleader, for respondents Nos. 3 and 4.

CHAITANI C. J. The petitioner was one of the candidates at the election which was to be held for electing members of the Gram Panchayat of Nirmal in Bassein Taluka from Ward No. 3-C. Under rule 7 of the Bombay Village Panchayats Election Rules, 1959, the Mamlatdar had fixed the time between

*Decided, February 11, 1965. Special Civil Application No. 158 of 1965.

11 a.m. and 3 p.m. on January 4, 1965, for filing nomination papers. Respondents Nos. 1 and 2 also filed their nomination papers, but these were not presented by them personally but through their agent. The agent did not have with him the authority in writing authorising him to present the nomination papers at the time when these were presented. This authority was produced by him on the same day at 5.45 p.m. after the time for presenting nomination papers had expired. At the time of scrutiny of nominations, which was held on the following day, the Returning Officer rejected the nomination papers of respondents Nos. 1 and 2 on the ground that the authority authorising their agent to present the nomination papers had not been produced within the time prescribed for filing the nominations. Against the order made by him respondents Nos. 1 and 2 appealed to the Mamlatdar. The Mamlatdar took the view that it was not necessary to produce the authority along with the nomination papers and that since the authority had been produced subsequently the agent must be held to have been authorised in writing to present the nomination paper as required by rule 8. The Mamlatdar, therefore, directed that the nominations of respondents Nos. 1 and 2 should be accepted. That order is being challenged in the present application.

Mr. Limaye, the learned advocate for the petitioner, has contended that the view taken by the Mamlatdar is erroneous. He has argued that the authority in writing which is required by rule 8 must be produced at the time when the nomination paper is presented. Mr. Rane, who appears on behalf of respondents Nos. 3 and 4, has, on the other hand, contended that rule 8 does not require that the authority to present the nomination paper must be produced at the time when the nomination paper is presented and that consequently the view taken by the Mamlatdar is correct. In order to decide which one of these views is correct it is necessary to refer to the relevant provisions of the rules.

Sub-rule (1) of rule 7 states that the Mamlatdar shall appoint the date, the hours and place or places for the following stages of an election, namely, (i) the nomination of candidates, (ii) the scrutiny of nominations, (iii) the recording of votes and (iv) the counting of votes. The date and the hours for the nomination of candidates are, therefore, fixed by the Mamlatdar under this rule. Sub-rule (3) of rule 7 states that the dates, hours and place or places appointed under sub-rule (1) shall not be changed except with the sanction of the Collector, unless there is not sufficient time for obtaining the previous sanction of the Collector to such change. Sub-rule (1) of rule 8 provides that on the day appointed for the nomination of candidates, and during the hours appointed by the Mamlatdar under rule 7 in this behalf, each candidate shall make an application in writing in Form A signed by him and present it either in person or through a representative authorised in writing in this behalf by such candidate to the Returning Officer signifying his willingness to serve as a member of the Panchayat. This rule, therefore, requires that the nomination paper shall be presented by the candidate personally or through a representative authorised in writing in this behalf by the candidate. The rule gives an option to the candidate. He may present the nomination paper personally or he may present it through another person whom he has authorised in writing in this behalf. The rule does not require that where a candidate does not present a nomination paper personally but through another person, the authority authorising that person to present the nomination paper must also be produced along with the nomination paper. All that is required by the rule is that the person who presents the nomination paper must possess an authority in writing from the candidate authorising him to do so. The authority must, therefore, be in existence before the nomination paper is presented. It cannot be given after the nomination paper is presented, because, in that case, the nomination paper cannot be said to have been presented by a person who at that time had the authority to present such nomination paper. If, however, the authority in writing is given before the nomination paper is presented, then

the mere fact that it is not produced along with the nomination paper will not make the nomination paper invalid. In cases in which, therefore, a nomination paper is not presented personally by the candidate, the requirements of the rule will be complied with, if the authority authorising the representative to present the nomination paper on behalf of the candidate is given in writing before the nomination paper is presented and it is immaterial whether such authority is produced or not at the time when the nomination paper is presented. It must, however, be produced before the nominations are scrutinised so as to enable the returning officer to decide whether the nomination paper was presented properly. The question whether the representative had been given the authority before the nomination paper was presented will have to be decided in each case on the facts of that case.

In the present case, the authority authorising the agent of respondents Nos. 1 and 2 to present the nomination papers was produced on the same day at 5.45 p.m. It is, however, not clear from the papers whether this authority was given before or after the nomination papers were presented. The Mamlatdar has not recorded a finding on this question. Since, however, the Mamlatdar has already accepted the nominations of respondents Nos. 1 and 2 and since we do not think that it would be desirable to postpone the election for a further period, we have decided not to remand the matter to the Mamlatdar for an inquiry on the above point. If it is the case of the petitioner that the agent, who had presented the nomination papers of respondents Nos. 1 and 2, did not possess the requisite authority at the time when these nomination papers were presented, it will be open to him to file an election petition, if so advised, after the election has been held.

Rule discharged. No order as to costs.

Rule discharged.

Before Mr. Justice Tambe and Mr. Justice Naik.

MRS. DAMAYANTI G. CHANDIRAMANI v. S. VANEY.*

Contempt of Court—Contempt by defendant appearing in person—Defendant at hearing threatening plaintiff's advocate with prosecution for defamation for statements made by advocate at hearing—Whether such threat amounts to contempt of Court.

In the course of the hearing of a case in Court the defendant, who appeared in person, gave a threat to the plaintiff's advocate suggesting that prosecution for defamation would be launched against him in respect of statements made by him against the defendant which were supported by unimpeachable evidence. One prosecution for defamation for similar statements was launched by the defendant against the advocate before the threat was administered and a second prosecution for defamation against the advocate for statements made by the advocate in the aforesaid litigation was subsequently started by the defendant. On the question whether the threat held out by the defendant amounted to contempt of Court:—

Held, that the threat held out by the defendant was intended to operate upon the mind of the advocate so that he should flinch from performing his duties towards his client, the plaintiff, and

that, therefore, it amounted to contempt of Court.

A piece of conduct intended or calculated to bring pressure upon a party, which must necessarily include his advocate, not to pursue the matter according to his choice, would amount to an attempt to interfere with the administration of justice. The threat need not be direct, in the sense that the contemner specifically asserted that he would take such action. It is sufficient if the context showed that the action contemplated was the action of the contemner himself.

The question as to whether the words amounted to a threat is not of the essence of the matter. What is of the essence of the matter is the course of conduct adopted

*Decided, September 15/16, 1964. Miscellaneous Civil Application No. 21 of 1963.

by the contemner, and if, on the whole, the conduct has a tendency to interfere with the course of administration of justice or subvert the course of justice, it would amount to contempt of Court. The nexus between the threat and the demand for doing something or refraining from doing something need not be express or need be expressly stated. It is enough if from the context the link between the two is apparent.

Telhara Cotton Ginning Co. v. Kashinath,¹ *Rajendra Singh v. Uma Prasad*,² *Smith v. Lakeman*,³ *Thirumalaiappa v. Kumaraswami*,⁴ *French v. French*,⁵ *Nand Lal Bhalla v. Kishori Lal*,⁶ *Kamta Prasad v. Ram Agyan*⁷ and *Pratap Singh v. Gurbaksh Singh*,⁸ referred to.

THE facts are stated in the judgment.

V. K. Punwani, for the plaintiff.

S. Vaney, defendant, in person.

V. S. Deshpande, Assistant Government Pleader, for the State.

NAIR J. This proceeding for contempt of Court has been initiated by the High Court on the report submitted by Mr. Vimadalal, Judge, City Civil Court, Bombay, (as he then was), in respect of an incident which took place in his Court on March 4, 1963. The facts leading up to the incident on March 4, 1963, may be briefly outlined as follows: The plaintiff, Mrs Damayanti G. Chandiramani, filed a suit against the defendant, S. Vaney, for recovery of possession and arrears of compensation on the basis that the defendant was a licensee and that the licence was revoked. That suit was filed on October 26, 1962. After the service of the summons, the defendant attended the office of advocate Punwani, who appeared on behalf of the plaintiff in the suit, for inspection of the documents. This was on November 10, 1962. On January 10, 1963, the defendant started prosecution under s. 24 of the Rent Control Act against the plaintiff, her parents and advocate Punwani on the basis that the plaintiff had withheld essential services in respect of the flat which he had taken from the plaintiff. The Presidency Magistrate, before whom the prosecution was launched, issued process only against the plaintiff and not against the rest. The plaintiff then took out a notice of motion in the suit for possession asking for temporary injunction restraining the defendant from proceeding with the prosecution launched by him under s. 24 of the Rent Control Act. The mother of the plaintiff, who held the power-of-attorney for the plaintiff, put in an affidavit in support of the notice of motion. The notice came up for hearing on March 4, 1963, and it is in the course of the arguments on the notice of motion that the incident, from which this proceeding has arisen, took place. Before dealing with the happenings of March 4, 1963, in the Court of Judge Vimadalal, it is necessary to set out a few more facts.

On January 10, 1963, the defendant launched a prosecution against advocate Punwani for defamation. This complaint arose in the following circumstances: The defendant had started a criminal case (No. 588/S of 1962) on October 23, 1962, against the members of the managing committee of Bela Housing Society for defamation. It may be mentioned that the flat in respect of which the plaintiff had asked for possession in the suit in the City Civil Court was a part of the building known as Bela Court, which belonged to Bela Co-operative Housing Society. In Criminal Case No. 588/S of 1962 advocate Punwani appeared for the accused, i.e., the members of the managing committee. Mr. Punwani argued that the defendant who complained of a libel against himself, had no reputation to defend. It was the case for the defendant that the statements made by Mr. Punwani in the course of the argument amounted to defamation and that is why he started prosecution against advocate Punwani on January 10, 1963, under s. 500, Indian Penal Code. On February 26, 1963,

1 [1940] A.I.R. Nag. 110.

2 (1934) I.L.R. 57 All. 573.

3 (1856) 26 L.J. Ch. 305.

4 [1956] A.I.R. Mad. 621.

5 (1824) 1 Hog. 138.

6 (1946) 48 Cr. L.J. 757.

7 [1950] All. 530.

8 [1962] A.I.R. S.C. 1172.

the defendant started a criminal case against the plaintiff's father, her mother, members of the managing committee and advocate Punwani for intimidation and insult and abetment of the said offence. It may be mentioned at this stage that advocate Punwani happens to be the legal adviser of the Bela Co-operative Housing Society. The defendant had refused to become a member of the said Housing Society. Because of his refusal to become a member of the said society, the managing committee passed a resolution that the use of the lift should be refused to the occupants who were not members of the Housing Society. A notice was put up in that regard. The defendant alleged that the two lift-men and advocate Punwani actually prevented him from using the lift and in that way insulted him. It is on that basis that he lodged the complaint on February 26, 1963, for insult and intimidation. It would thus be seen that the two cases launched by the defendant against advocate Punwani were pending on the day, when the notice of motion came up for hearing before Judge Vimadlal on March 4, 1963. It appears that the criminal case launched by the defendant on February 26, 1963, was dismissed on March 13, 1963, without issuing process against any of the accused.

Let us now turn to the happenings of March 4, 1963. Advocate Punwani, in the course of his arguments, referred to the contents of para. (6) of the affidavit put in by the plaintiff's attorney in support of the notice of motion. Paragraph (6) of the affidavit runs thus:

"I say that the defendant seems to be a notorious litigant. He has been convicted four times for offences under the Indian Penal Code, the last of which was for assaulting a lady (Case No. 135/P of 1951) for which he was sentenced to rigorous imprisonment for three months, as recorded in the judgment dated 3-10-1952 of the 8th Court, Esplanade, Bombay. He has filed many cases against the owners of the Guest Houses or Hotels, where he used to reside before shifting to the suit premises..."

The apparent object of advocate Punwani in referring to the contents of para. (6) of the said affidavit was to show that the defendant was in the habit of launching upon vexatious cases and complaints and the complaint lodged by him under s. 24 of the Rent Control Act against the plaintiff stood in the same category. It may be recalled that by the notice of motion, the plaintiff had asked for a temporary injunction restraining the defendant from proceeding with the criminal complaint lodged by him under s. 24 of the Rent Control Act. The learned City Civil Court Judge asked the defendant as to whether he had to say anything with regard to the allegations contained in para. (6) of the affidavit. The defendant stated that he would see to it that the plaintiff's advocate, Mr. Punwani, would go to jail; that two criminal cases had already been filed by the defendant himself against the plaintiff's advocate, the said Mr. Punwani and that he would file two more criminal cases against him shortly. It appears that Judge Vimadlal made a note of these statements on the docket sheet and asked the defendant to explain as to why he should not be proceeded with for contempt of Court. The defendant did not offer any explanation and on March 12, 1963, Judge Vimadlal submitted a report to the High Court requesting that action for contempt of Court should be taken against the defendant. On the same day, he disposed of the notice of motion and made the rule, which was already granted restraining the defendant from proceeding with the criminal case under s. 24 of the Rent Control Act, absolute.

It is also necessary to refer to certain events, which took place after March 4, 1963, because one of the contentions raised by Mr. Punwani in the course of these proceedings was that, the threat given by the defendant was not just a piece of bravado, but he actually carried that threat into action. We will consider the question as to whether and how far these happenings are relevant for deciding the present case, at a later stage of this judgment. For the time being, we will proceed to narrate the events as have taken place after March 4, 1963. On March 6, 1963, the defendant started prosecution against the plaintiff's father, members of the managing committee, two lift-men and advocate Punwani for insult and intimidation in respect of an incident which took place on March

5, 1963, in which, according to the defendant, he was refused the use of the lift. On March 7, 1963, the criminal case No. 588/S of 1962, to which a reference has already been made, was taken up for hearing. Advocate Punwani was appearing on behalf of the accused in that case. The defendant made an application requesting that advocate Punwani should be made a co-accused on the ground that he had instigated the managing committee to pass the resolution refusing the services of the lift to the defendant. Notice was issued to advocate Punwani and on his showing cause, Mr. Punwani was discharged on June 26, 1963. The defendant went in appeal from the order in the notice of motion passed on March 12, 1963. He obtained an interim stay order on March 30, 1963. On April 3, 1963, he launched a second prosecution under s. 24 of the Rent Control Act against the plaintiff, her parents, members of the managing committee, the two lift-men and advocate Punwani. The plaintiff appeared in the appeal before the High Court and eventually, the stay was vacated. The High Court passed an order restraining the defendant from starting fresh proceedings under s. 24 of the Rent Control Act pending the hearing of the appeal. The High Court, however, refused to pass any stay order in respect of the prosecution already launched by the defendant on April 3, 1963, and suggested that the plaintiff may approach the Magistrate for such relief. On May 9, 1963, the defendant started another prosecution for defamation against the plaintiff's mother and advocate Punwani in regard to the contents of para. (6) of the affidavit put in by the plaintiff's mother in support of the notice of motion.

The defendant has appeared in answer to the notice and put in his affidavit showing cause as to why he should not be punished for contempt of Court. He has given his own version as to what transpired on March 4, 1963, and denied some of the statements attributed to him by Judge Vimadalal in his report. The defendant has complained that Judge Vimadalal did not allow him to read his affidavit. At para. (8) of the affidavit, the defendant has set out a lengthy conversation, which, according to him, took place between him and Judge Vimadalal. He has suggested that it was only after the Judge asked him as to what was his occupation that he told him that he was engaged in writing a book about the administration of justice and when the Judge further asked him as to what he was doing prior to his engagement of writing the book, the defendant told the Judge that he could have become a Judge if he wanted to. When further asked as to what Government posts were offered to him, the defendant told the Judge that he was offered a nomination to the Indian Civil Service and if he had accepted the same, he would have started as an Assistant Judge and in that case, he would have become senior to the present Chief Justice of Bombay in the Civil Service Cadre. At para. (11) he has explained as to how advocate Punwani has gone on making defamatory statements about him wherever he appeared against the defendant. According to him, Mr. Punwani made some defamatory statements on December 10, 1962, at the hearing of the notice of motion before Judge Walavalkar; that again he made the same statements before the Court of the 16th Presidency Magistrate on January 10, 1963, and that he repeated the same statements on March 4, 1963. He has admitted that he filed a criminal case for defamation against advocate Punwani (No. 101/S of 1963) which is pending in the 28th Presidency Magistrate's Court in regard to the defamatory statements made by Mr. Punwani on January 10, 1963, in the Court of the 16th Presidency Magistrate. He has then referred to the incident, which took place in the Court of Judge Vimadalal and according to the defendant, this is what has happened:

"In this Court the learned Judge Vimadalal himself asked me, if I had anything to say regarding the allegations made against me. I replied, 'Yes, a good deal, Sir'. Then the learned Judge asked, 'Have you suffered imprisonment for three months?' I replied, 'These are false allegations. I have never suffered any sentence of imprisonment at any time. But, apart from that your Honour would appreciate that even if it were true that I had spent a number of years in prison, there is no occasion or justification for the plaintiff's advocate to make that fact known here as it has no bearing on the

issues before the Court. I respectfully submit that the purpose of this Advocate in making these statements is to defame me and create an atmosphere of prejudice and provoke me to make a brawl in Court or indulge in violence and, therefore, he is guilty of contempt of Court, and I request that the Court will be pleased to take action against him...' I thereupon continued, '...If the certificate granted to the Society is cancelled, this advocate stands to lose his job. He, therefore, bears me great malice and everywhere he goes, he makes defamatory statements about me. Already I have filed a complaint of defamation against him which is case No. 101/S of 1963 in the 28th Presidency Magistrate's Court. Also he is an accused in another criminal case in his capacity of an employee of the said Housing Society. And in a day or two, I intend to file two more criminal cases in which this Advocate will be one of the accused for his 'wrong doing'. I have also made an application to the Bar Council for suspending him on account of his professional misconduct on five counts, one being that he has been an employee of the Housing Society for more than two years, and the President of the Bar Council informed me that my application would be kept pending and action will be taken when the Chapter V of the Advocates Act comes into force. I am hoping that there would be a conviction in each of the four cases in which he will appear as an accused, and that there will be a jail sentence'".

The defendant has denied that he gave any threat or intimidated the advocate. He has also denied that he uttered the words 'I would see to it that the plaintiff's advocate would go to jail'. He has argued that he has no power of sending anybody to jail and, therefore, it is unlikely that he would utter any such words towards the advocate. In short, his contention is that he warned the advocate of the consequences of his own 'wrong doing' and what he contemplated was to take action against the advocate to vindicate his own legal rights.

It is also necessary to refer to certain stages through which the contempt proceedings have gone on in this Court. The proceedings came up for hearing before a Division Bench comprising Patel and Kantawala JJ. on August 7, 1963. It appears that the defendant was then represented by Mr. K. L. Gauba, a senior advocate of this Court. After some brief discussion, the Division Bench adjourned the case and gave a direction to the City Civil Court Judge to expedite the suit filed by the plaintiff against the defendant. It appears that thereafter the suit was heard and disposed of in March 1964. On April 15, 1964 this case came up for hearing before another Division Bench comprising the Chief Justice and Gokhale J. It was adjourned and then it was placed before the Division Bench comprising Kotwal and Palekar JJ. This was on June 25, 1964. At that time, the defendant put in a written affidavit stating that Patel J. had expressed the view that the statements attributed to the defendant, even if true, would not amount to contempt. The Division Bench felt that in view of the various allegations contained in the affidavit put in by the defendant against Judge Vimadalal, it would be more appropriate if a report was called for from Judge Vimadalal. Accordingly, a report was called for from Judge Vimadalal, who submitted the report on August 26, 1964. In May 1964, the defendant launched another prosecution against the plaintiff, her parents, advocate Punwani and certain lift-men.

In the affidavit put in by the defendant, in order to show that the case was part-heard and that certain views were expressed by the Division Bench comprising Patel and Kantawala JJ., the defendant has formulated four propositions as follows:

"(a) Whether the report against me which is made by a senior Judge of the Bombay City Civil Court bears a semblance of correctness?

(b) Whether the alleged vague statements amount to contempt?

(c) Whether if the statements amount to contempt, they fall within the mischief of s. 228 I.P.C. and the jurisdiction of this Court is excluded by s. 3(2) of the Contempt of Courts Act?

(d) Whether s. 3(1) of the Contempt of Courts Act offends article 14 of the Constitution and is invalid."

The defendant, who has himself argued his case in detail, has developed his arguments on the basis of the four propositions formulated by him in his affidavit dated June 22, 1964.

The defendant has strenuously contended that the version set out by Judge Vimadalal as to what transpired on March 4, 1963, is not correct. He has argued that there is intrinsic evidence in the report to show that some of the statements attributed to him could not possibly be true. In that connection, he pointed out that he is a man of good education; that he knows English very well and that he has also considerable experience about the working of Courts. In these circumstances, it is unimaginable that he would make a statement to the effect that he would see to it that advocate Punwani would go to jail. He has pointed out that he has no powers to send even a thief or a murderer to jail and all that he can do is to make a report in regard to the offence of theft or murder. That being the case, it is unlikely that he would utter the said words as regards advocate Punwani. It is necessary to note that Judge Vimadalal has made the following note on the docket sheet presumably on the day of the argument on March 4, 1963:

"The defendant states that the advocate would go to jail. Two cases already filed and two more proceedings".

The defendant has argued that assuming that the learned Judge made the said note at the time of the argument in his Court, even so, the note does not say that he (defendant) uttered the words 'He would see to it that advocate Punwani would go to jail'. There is undoubtedly slight difference in the wording of the report on this point and the wording in the note made on the docket sheet. But the distinction is without difference and no importance can be attached to the small hair-splitting distinction, which the defendant has ingeniously pointed out to us. The version that the defendant has set out in great detail at para. (11) of his affidavit is not also materially different from the one which the learned Judge has set out in his report. The defendant has admitted in the affidavit at para. (11) that he has lodged a complaint for defamation against advocate Punwani and has gone a step further and stated that advocate Punwani bears malice towards him. This complaint of defamation relates to the statements made by advocate Punwani in the course of his arguments in criminal case No. 588/S of 1962. The statements made by Mr. Punwani were similar to the statements which he made in the course of the arguments in support of the notice of motion in the City Civil Court. The defendant has also admitted that advocate Punwani is an accused in another criminal case, which was filed against the members of the managing committee of the Housing Society. He has also admitted that he stated that he intended to file two more criminal cases in which advocate Punwani would be an accused. He has then proceeded to say, 'I am hoping that there would be a conviction in each of the four cases in which he will appear as an accused and that there will be a jail sentence'. This is what he stated before Judge Vimadalal on his own admission in this affidavit. Therefore, whether the version set out by Judge Vimadalal is accepted as true in its entirety,—and we see no reason as to why we should not accept the same,—or not, on his own admissions contained in the affidavit, it is quite clear that the defendant did say in the course of his arguments in respect of the notice of motion that he had already launched a criminal case for defamation against advocate Punwani in respect of the statements made by the advocate to the effect that the defendant is a notorious litigation-monger and that he has been convicted four times. On his own admission, the defendant also gave a threat that he intended to file two more criminal cases for what he calls the advocate's 'wrong doing'. Of course, in this affidavit, he does not admit that he told the Court that he would launch a prosecution for defamation against advocate Punwani for the defamatory words uttered by him on March 4, 1963. At the same time, taking the context into account, it is clear that what the defendant hinted was that, he would launch such a prosecution and that too in respect of the statements made

by the advocate in the course of the arguments. According to the defendant, the statements made by him do not amount to threat and what he stated was that he would take such legal action as he would be entitled to take on the basis of the wrong deeds committed by advocate Punwani. The question as to whether the statements made by the defendant amounted to threat or not would be considered by us at a later stage of this discussion. We will also consider the question as to whether, assuming that the statements do not amount to threat, they amounted to a conduct, which would interfere with or subvert the administration of justice. For the time being, we are only considering the two rival versions that have been placed before us and on a due consideration of the two versions, we have no hesitation in preferring the version put forward by the learned Judge Vimadalal, particularly, when the admissions contained in the affidavit of the defendant support the version of the learned Judge in its broad outline. It may be pointed out that advocate Punwani also has put in his affidavit fully supporting the version set out by Judge Vimadalal.

The next point that was urged by the defendant was that he had sufficient justification to make the comments which he made. According to him, the statements made by advocate Punwani were entirely irrelevant and beside the point, which was being considered by the City Civil Court. The defendant suggested that advocate Punwani went out of his way to make these defamatory statements so that he would be provoked into engaging himself into a brawl with the advocate. In the course of his arguments, he went so far as to say that had he been a little younger, he would perhaps have engaged himself in a brawl with the advocate on account of the highly provocative statements made by him. We are unable to accept that advocate Punwani's statements were beside the point or that they were provocative. Advocate Punwani was within his rights in referring to the past history of the defendant, and in particular, his conduct in launching upon unwarranted prosecutions and indulging in frivolous litigation. Mr. Punwani wanted to suggest that the defendant's action in launching the prosecution under s. 24 of the Rent Control Act was a piece of his general conduct. In other words, his argument was that the action of the defendant in going to the criminal Court under s. 24 of the Rent Control Act was utterly vexatious and made with a view to bring pressure upon the plaintiff to withdraw the suit. Nor do we think that the reference made by advocate Punwani in regard to the previous convictions of the defendant was beside the point. In the first place, these statements were based on the contents of the affidavit sworn to by the attorney of the plaintiff. In the second place, Mr. Punwani says that not only he was instructed by his client but that he tried to ascertain the truth of these statements and that he was supplied with a copy of the judgment in criminal case No. 135/P of 1951, which was pronounced on October 3, 1952. That was a prosecution under s. 323, Indian Penal Code, against the defendant initiated by the Colaba Police Station, in which the defendant was sentenced to undergo three months' rigorous imprisonment and to pay a fine of Rs. 150 or in default to undergo further three months' rigorous imprisonment. The defendant admitted in the above case that he had three previous convictions to his credit. In view of these circumstances, advocate Punwani was fully justified and enjoyed a privilege in making the statements, which he made in the course of his arguments. It is significant to note that in his affidavit the defendant has not denied the fact of any of these four previous convictions. He has only stated that these statements were defamatory. In the course of his arguments before us, the defendant asserted with considerable vehemence that he had preferred an appeal or a revision (he said, he did not remember which) from the conviction and sentence in criminal case No. 135/P of 1951 and that the conviction and sentence were quashed by the higher authorities. He has gone to the length of adding that the higher authorities had passed strictures against the Magistrate, who recorded the conviction. We repeatedly asked the defendant to give us the number

of the appeal or revision or at least the year in which these proceedings were instituted. He told us frankly that he did not know either the number or the year when he preferred the appeal or revision. He has, however, advanced a somewhat ingenious argument before us in this respect. He quoted the maxim 'every saint has a past and every sinner a future'. He pointed out that the convictions to which reference was made is a matter of past history and that many developments had taken place since 1952 and there has been no conviction against him since then. It is not necessary for us to pursue this line of reasoning any further. It is sufficient for us to observe that it is implicit in the argument advanced by the defendant himself that he does not dispute the factum of previous convictions. If that is so, advocate Punwani would be within his rights to make that statement.

In the course of his arguments, the defendant also made reference to the fact that he had made applications to the Bar Council for starting proceedings for misconduct against advocate Punwani. It is not disputed that the defendant has made an application on April 20, 1963, to the High Court for starting proceeding for misconduct in respect of certain acts committed by advocate Punwani between April 1963 and April 1964. It is not necessary for us to enter into the details of this question. The defendant however contended that this was not the first application made by him, but that he had made applications earlier, one in December 1962 and another in February 1963. Whatever that may be it is quite clear that he has made these applications against advocate Punwani after the institution of the suit by the plaintiff against the defendant for eviction. We have referred to the multiplicity of the proceedings, which the defendant had started against advocate Punwani. We have to see in perspective as to whether the object of the defendant in launching these cases was to deter advocate Punwani from appearing on behalf of the plaintiff in the said suit or at least preventing him from discharging his duties fearlessly and impartially towards his client. The answer to this question will depend upon the answer to another question viz., whether the statements attributed to the defendant by Judge Vimadalal amount to threat or, at any rate, amount to a course of conduct motivated with the object of frightening the advocate from discharging his duties towards his client. One of the arguments advanced by the defendant was that, assuming that all the statements attributed to him are true, still they do not amount to any kind of threat.

We will first consider the effect, in law of the words uttered by the defendant. In the present case, the defendant has not been accused of having committed any act of contempt, disregard or defiance or disobedience to the Judge. He has been accused of having made statements in respect of an advocate of the opposite party, and the point for consideration is, whether the statements amount to interference with the administration of justice. Oswald in his book on Contempt of Court, 3rd edn., page 6, says:

"To speak generally, contempt of Court may be said to be constituted by any conduct that tends to bring the authority and administration of law into disrespect or disregard, or to interfere with or prejudice parties litigant or their witnesses during the litigation".

At p. 91 of 'Contempt, Committal & Attachment' by Oswald, occurs the following passage:

"An insult to counsel may be punished as contempt. All publications which offend against the dignity of Court or are calculated to prejudice the course of justice will constitute contempt."

It is settled law that disrespect or disregard to an advocate in certain circumstances so as to deter him from discharging his duties would amount to contempt of Court. The decision very much to the point was given by Niyogi J. in *Telhara Cotton Ginning Co. v. Kashinath*.¹ In that case, the defendant

had addressed a notice to the advocate of the plaintiff demanding that certain allegations in the written statement of his client should be withdrawn unconditionally and an apology tendered on pain of legal proceedings being taken against him. Another letter was sent by the defendant or somebody interested in him to the plaintiff complaining against the counsel for his refusal to withdraw the allegations described as foolish. It was held:

"In sending the notice containing threats to the counsel, the defendant made a clear invasion of the counsel's right to represent his client's case loyally and properly and further interfered with the due performance of his duty towards his client. The addressing of notice and the letter was calculated to interfere with and to obstruct or divert the course of justice. Hence, he was guilty of contempt of Court".

In the course of his judgment, Niyogi J. observed (p. 112):

"...The law of contempt covers the whole field of litigation itself. The real end of a judicial proceeding, civil or criminal, is to ascertain the true facts and dispense justice. Various persons have their respective contributions to make in the proper fulfilment of that task. They are necessarily the Judges or the Magistrates, the parties to the proceeding, or their agents or pleaders or advocates, the witnesses and the ministerial or menial staff of the Court. All these persons can well be described as the limbs of the judicial proceeding. For proper administration of justice it is essential that all these persons are, in the performance of their respective duties, ensured such fullness of freedom as is fair and legitimate. Anything that tends to curtail or impair the freedom of the limbs of the judicial proceeding must of necessity result in hampering the due administration of law and in interfering with the course of justice. It must therefore be held to constitute contempt of Court".

The view taken by the Nagpur High Court has been endorsed by the Allahabad, Madras and Lahore High Courts. In *Rajendra Singh v. Uma Prasad*² during the pendency of the suit a notice was sent on behalf of the plaintiff through his advocate to the defendant, threatening him that unless he withdrew the plea and paid a certain sum as damages he would be criminally prosecuted for defamation of the plaintiff's deceased father. Proceedings for contempt were taken out on this notice. It was held:

"Interference with the administration of justice is one of the well recognized heads of contempt of Court. In the present case the notice was undoubtedly intended to put extraneous pressure on the defendant in order to compel him, under threat of drastic action being taken against him, to withdraw the plea which had been taken by him specifically in the written statement. It amounted to a direct interference with the administration of justice in preventing or attempting to prevent the defendant from pressing the plea, which might prove to be a very substantial and legitimate defence; and in that way an indirect attempt was made to exclude that plea from the consideration of the court".

In the course of the judgment, the learned Judges relied upon the decision in *Smith v. Lakeman*³ in which an unsigned letter had been sent by the plaintiff to the defendant with a view to intimidating him in the conduct of his defence. The letter warned the defendant that he had a suit pending in Chancery and should it go up for judgment, he would at once be indicted for swindling, perjury and forgery and thus bring disgrace on his family. It was not mentioned who would start such prosecution, but the threat was that certain legal action in Court would be taken if the matter was pressed to final conclusion. Stuart, V.C., in committing the plaintiff for contempt remarked that the letter amounted to a threat for the purpose of intimidating him as a suitor, and therefore, whether it had had that effect or not, was unquestionably a contempt of Court. It would be clear from the above decisions that a piece of conduct intended or calculated to bring pressure upon a party, which must necessarily include his advocate, not to pursue the matter according to his choice, would amount to an attempt to interfere with the administration of justice. Secondly, the threat need not be direct, in the sense that the contemner specifically

asserted that he would take such action. It is sufficient if the context showed that the action contemplated was the action of the contemner himself. A similar question arose in *Thirumalaiappa v. Kumaraswami*.⁴ The Madras High Court referred to the leading case of *French v. French*,⁵ which formed the basis of the statement on this subject contained in Oswald's Contempt of Court. The passage in Oswald (part of which has already been quoted) runs thus:

"An insult to counsel may be punished as a contempt. All publications which offend against the dignity of the Court, or are calculated to prejudice the course of justice, will constitute contempts. Offences of this nature are of three kinds, namely, those which (1) scandalise the Court, or (2) abuse the parties concerned in causes there, or (3) prejudices mankind against persons before the cause is heard. Under the first head fall libels on the integrity of the Court, its Judges, officers or proceedings; under the second and third heads anything which tends to excite prejudice against the parties or their litigation, while it is pending. For example, attacks on or abuse of a party, not amounting to an interference with the course of justice, does not amount to contempt, the party being left to his remedy by action".

In *French v. French* an insult was given to a counsel while he was attending in the Master's office, which was situated within the precincts of the Court. It was held (p. 623):

"...Advocates who appear for the parties being officers of Court, any abuse or insult or aspersions cast on them, which would interfere with the course of administration of justice, must necessarily be held to amount to contempt of Court".

Reference was made by the Madras High Court to the Nagpur case and the observations of Niyogi J. have been cited with approval. At the same time, the Madras High Court did not take any action in regard to the insult levelled against the counsel, because the incident took place two days after the termination of the case.

In *Nand Lal Bhalla v. Kishori Lal*,⁶ the Inspector of Police issued threats and used insulting language towards an advocate. It was held that the advocate was threatened in the performance of his duties, and although there was no contempt of the Court directly, there was contempt inasmuch as an officer of the Court such as an advocate appearing in his professional capacity was threatened and insulted while in the performance of his professional duties in the Court.

In this background, let us now examine some of the arguments that were advanced by the defendant-contemner. The defendant referred to the meaning of the word 'threat' contained in the concise Oxford Dictionary. Several meanings of that word are mentioned. The defendant wanted to rely on the first and second meaning viz., 'Declaration of intention to punish or hurt'; 'such menace of bodily hurt or injury to reputation or property as may restrain person's freedom of action.' The third meaning of that word as given is, indication of coming evil and the fourth meaning is, threat of calamity. Even under the second meaning, it is quite clear that the language in order to amount to a threat need not necessarily be aimed at causing bodily injury or hurt. It is enough if it is calculated to cause injury to the reputation so as to restrain the freedom of action of that person. On examining the words used by the defendant, we feel no hesitation in holding that in effect the words amounted to a threat. As stated above, the question as to whether the words amounted to a threat is not of the essence of the matter. What is of the essence of the matter is the course of conduct adopted by the contemner, and if, on the whole, the conduct has a tendency to interfere with the course of administration of justice or subvert the course of justice, it would amount to contempt of Court. The defendant also argued that unless the threat is accompanied by a demand that the party or the counsel should not proceed with his action, the threat does not amount to contempt of Court. We do not think

4 [1956] A.I.R. Mad. 621.

5 (1824) 1 Hog. 138.

6 (1946) 48 Cr. L.J. 757.

that the nexus between the threat and the demand for doing something or refraining from doing something need be express or need be expressly stated. It is enough if from the context the link between the two is apparent. In the present case, it is necessary to note that the threat was issued in the presence of the Court and in the course of the arguments before the Judge. It is quite clear that the object of the defendant was to bring undue pressure upon the advocate not to perform his duties in a fearless and proper manner. As we have already mentioned, the defendant had started a prosecution for defamation against advocate Punwani on account of similar statements made by him in the course of his arguments in criminal case No. 588/S of 1962. He also expressly stated that he would start two more prosecutions against the advocate and actually, he did start a prosecution on May 9, 1963, in connection with the arguments advanced by Mr. Punwani on March 4, 1963. The subsequent conduct of the defendant in so far as it relates to the prosecutions having been started against advocate Punwani is concerned, would, in our view, be relevant, and taking an overall view of the matter and having regard to the entire conduct of the defendant and further taking into account the circumstance that the threat was uttered in the course of the arguments and in the presence of the Judge, we feel no hesitation in holding that the threat was intended to operate upon the mind of the counsel so that he should flinch from performing his duties towards his client.

The defendant relied upon a decision of the Allahabad High Court in *Kamta Prasad v. Ram Agyan*.⁷ In that case, the party to the dispute had made an offer for settlement of the dispute between the parties out of Court and as part of the settlement he suggested that the pending litigation should be withdrawn. He suggested that failing this, he would take legal proceedings open to him under the law. It was held that the party could not be said to be interfering with the course of justice, because all that he suggested was that if the suggested terms were not accepted, he would take such proceedings as were open to him to take in the matter. We are unable to understand how the decision of the Allahabad High Court, which proceeded on the peculiar facts of that case would in any way help the defendant in the arguments, which he is advancing. We notice that the Allahabad High Court referred to its earlier decision in *Rajendra Singh's* case and expressed its approval of the view taken in that case. It also referred to the decision in *Smith v. Lakeman* and pointed out that in the circumstances of that case, the threat issued by the party amounted to contempt of Court. The Allahabad High Court explained that in the notice merely an offer for compromise of a pending dispute was made and that offer was coupled with a warning that proceedings which were open in law to the opposite parties would be taken in case the offer was rejected. At pages 541 and 542 the learned Judges have set out five propositions, and it was the contention of the defendant, in the present case, that these propositions assist him in the argument, which he is advancing. Now, the first proposition was based on the decision of *Smith v. Lakeman*, and, in our view, the present case would fall within the ambit of the first proposition laid down in the said case. The other propositions enunciated in that case have no relation to the facts of the present case. Some of the propositions were not necessary even for the decision of the case and, therefore, will have to be treated as *obiter dicta*. The facts of the present case are particularly strong, as we have repeatedly pointed out, because unlike in most of the cases referred to above wherein the threats were given outside the Court, in the present case, the threat was given in the presence of the Court and in the course of the hearing of the case, and one prosecution for defamation was launched before the threat was administered and again a second prosecution for defamation against the advocate Punwani, for the arguments advanced by him in the present case, was actually started by the defendant and in that way, the threat was carried out.

It may be pointed out that just as the statements made by advocate Punwani viz., that the defendant was an ex-convict, was supported by the judgment, a certified copy of which was with him, in the same way, his statement that the defendant was a notorious litigant was also supported from the observations made by Stone C. J. in *Emperor v. Jehangir Jassawalla*.⁸ It is not necessary to refer to the facts of that case and it is enough to point out that the defendant had started as many as twenty prosecutions against one Jassawalla, who in his turn had also started some prosecutions against the defendant restraining him from starting subsequent prosecutions against the same party and it was in that connection that the learned Chief Justice observed:

"... in Mr. Vaney's case there is no doubt that he is a vexatious litigant".

Now, to give a threat to an advocate suggesting that prosecution for defamation would be launched against him in respect of the statements made by him against the defendant which were supported by unimpeachable evidence, is certainly to try to bring pressure on the advocate with the object of deterring him from performing his duties towards his client. It is established law that a statement made by an advocate on the basis of instructions taken from the client and after verifying that it is well-founded, is privileged and protected. It is in respect of a privileged statement that the defendant had taken the extraordinary step of launching prosecution for defamation. Again, it is in respect of a similar statement made in support of the notice of motion that the defendant brandished a threat of prosecution. Later on, he has implemented that and started a second prosecution. And in his affidavit in this Court, he has repeatedly stated that the statements of the advocate are *per se* defamatory. The course of conduct on which the defendant had launched himself will have to be taken into account for the purpose of finding out whether it was the object of the defendant to pressurise advocate Punwani into withdrawing from the case so as to avoid further harassment or, at any rate, to deter him from discharging his duties to his client, honestly, efficiently and fearlessly, by keeping the sword of prosecution hanging over his head.

The law on this question has been clarified in a recent judgment of the Supreme Court in *Pratap Singh v. Gurbaksh Singh*.⁹ In that case, after citing the passage from Oswald's Contempt of Court, which has already been quoted by us above, their Lordships referred to the facts of the case and observed that although departmental proceedings were started against the officer in accordance with the directions contained in the circular still the launching of these proceedings would have a deterring effect upon the officer, who had already filed a suit to ventilate his grievances. At page 1177, their Lordships observed:

"...What would be the effect of these proceedings on the suit which was pending in the Court of the Senior Subordinate Judge, Amritsar? From the practical point of view, the institution of the proceedings at a time when the suit in the Court of the Senior Subordinate Judge, Amritsar, was pending could only be to put pressure on the respondent to withdraw his suit, or face the consequences of disciplinary action. This, in our opinion, undoubtedly amounted to contempt of Court. There are many ways of obstructing the Court and 'any conduct by which the course of justice is perverted, either by a party or a stranger, is a contempt; thus the use of threats, by letter or otherwise, to a party while his suit is pending; or abusing a party in letters to persons likely to be witnesses in the cause, have been held to be contempts'. ...The question is not whether the action in fact interfered, but whether it had a tendency to interfere with the due course of justice. The action taken in this case against the respondent by way of a proceeding against him can, in our opinion, have only one tendency, namely, the tendency to coerce the respondent and force him to withdraw his suit or otherwise not press it. If that be the clear and unmistakable tendency of the proceedings taken against the respondent, then there can be no doubt that in law the appellants have been guilty

of contempt of Court, even though they were merely carrying out the instructions contained in the circular letter".

It may be noted that in the above case, there were no threats issued by the Government. What the Government did was that it started departmental disciplinary action against the respondent, and it was this action which was taken by the Government in accordance with a circular issued by it which raised the question as to whether it amounted to contempt. Their Lordships held that launching of departmental proceedings itself amounted to contempt of Court, because it would exert pressure upon the respondent either to withdraw from the case or at any rate not to press it. Their Lordships have considered the question from the practical point of view and have considered the possible effect of the institution of the proceedings upon the respondent. In the present case also, advocate Punwani would be placed on the horns of a dilemma either to withdraw from the case or face the consequences of multiplicity of criminal proceedings and all these in respect of the statements made by him in the discharge of his duties as a counsel. We, therefore, feel no hesitation in holding that judged, as a whole, the words used by the defendant and his conduct amounted to contempt of Court.

We may consider one more argument that was urged by the defendant. The defendant contended that since the words, which, according to the Judge, amount to contempt, were uttered in his presence, the matter can be dealt with under s. 228, Indian Penal Code, and, therefore, the High Court cannot take cognizance of that matter in view of the provisions of s. 3(2) of the Contempt of Courts Act. Sub-section (2) of s. 3 of the said Act runs thus:

"No High Court shall take cognizance of a contempt alleged to have been committed in respect of a Court subordinate to it where such contempt is an offence punishable under the Indian Penal Code".

Section 228, Indian Penal Code, runs thus:

"Whoever intentionally offers any insult, or causes any interruption to any public servant, while such public servant is sitting in any stage of a judicial proceeding, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both".

The offence under s. 228, Indian Penal Code, can arise only in the case of a public servant, while he is sitting in a judicial proceeding. In the present case, the threat has not been addressed to the Judge, but it has been addressed to the advocate. Although the advocate is a part of the machinery of the administration of justice, he is not a public servant within the meaning of that expression in s. 228, Indian Penal Code. It is on this short ground that the argument advanced by the defendant can be disposed of. But the matter does not rest there. In order that the proceedings are barred under s. 3(2) of the Contempt of Courts Act, it is further necessary to establish that the offence committed by the contemner in the presence of the Court is such as can be punished as contempt. It is not enough that the offence is punishable under any other law. This position is clear from the wording of s. 3(2) of the Contempt of Courts Act. There is also ample authority in support of the said proposition, vide *Ramakrishna Reddy v. State of Madras*¹⁰ and *State of M. P. v. Revashankar*.¹¹ As against this, the defendant relied upon a decision of the Allahabad High Court in *Emperor v. Alla*.¹² We, however, notice that the learned Judge (it was a decision of a single Judge) has not discussed the question at all and since the conclusion is stated without any discussion or reasoning, we do not think that that conclusion is entitled to much weight. Although the defendant had urged as one of the points in the affidavit that s. 3 of the Contempt of Courts Act was *ultra vires* the Constitution, in the course of his arguments however he fairly conceded that that would not be the position and did not press the matter further.

10 [1952] A.I.R. S.C. 149.

11 [1959] A.I.R. S.C. 102.

12 (1922) I.L.R. 45 All. 272.

Before concluding, we may refer to one more circumstance and it is this. We are told at the bar that when this matter came up before the Division Bench comprising the Chief Justice and Gokhale J., and when it was suggested that the defendant should offer an apology, the defendant told the Court that he would offer an apology if he was convinced that he had committed a wrong. The defendant accepted the above statement made by advocate Punwani at the bar. When the matter came up before the Division Bench comprising Patel and Kantawala JJ. the defendant told us that he did offer an apology, but he added that the Government Pleader as also the plaintiff's advocate objected to accepting his apology and requested that the matter should be proceeded with. When the defendant started his arguments before us, he began by asking us as to what would happen if he were to tender an apology. We told him that if he thought it proper, he may tender an unconditional apology, because after all, the apology should be born out of repentance or remorse. We also pointed out to him that he could not enter into any kind of stipulation with the Court. The matter rested at that.

We have now to consider the quantum of punishment to be imposed on the defendant. We asked the learned Assistant Government Pleader as also the defendant as to what should be the proper punishment for this offence. The learned Assistant Government Pleader pointed out that this is a third contempt committed by the defendant. The first contempt committed by the defendant appears to have taken place before 1947. Reference to the same is to be had at p. 395 in *Emperor v. Jehangir Jassawalla* where Stone C. J. during the course of the narration of the antecedents of the defendant observed:

"...Mr. Vaney was fined for his contempt of Court".

The learned Assistant Government Pleader also drew our attention to a recent case, wherein the defendant was charged with the same offence by this Court. That was in Miscellaneous Civil Application No. 188 of 1960. That matter came up before the Chief Justice and one of us viz., Tambe J., on January 9, 1961. The defendant having tendered an unconditional apology the proceedings were dropped. It, therefore, appears that the defendant has been in the habit of making reckless allegations against the Court or the officers of the Court. Ordinarily, we would have awarded a sentence which would have deterred him from taking similar action in future. When we asked the defendant as to what he has to say about the punishment, he stated that the matter is left in our hands. In the course of his arguments, the defendant told us that he was suffering from low blood pressure and he found it difficult to argue the matter beyond the first part of the day on the 14th. He, therefore, requested that the matter should be adjourned to the next day. The defendant also appears to be an old man. In view of his age and the condition of his health, we feel averse to sending him to jail. In our view, the ends of justice would be met if we direct him to pay a fine of Rs. 1,000. We hope that the imposition of the said punishment, which errs on the side of leniency, would have a sobering effect upon the defendant. We also direct that the defendant should pay the costs of these proceedings. We grant two months' time from today to the defendant to pay the amount of fine.

INCOME-TAX REFERENCE:

Before Mr. Justice Tambe and Mr. Justice V. S. Desai.
M/S. S. F. ENGINEER, F. E. DOCTOR AND VAZIFDAR

v.

THE COMMISSIONER OF INCOME-TAX, BOMBAY CITY I, BOMBAY.*

Indian Income-tax Act (XI of 1922), Sec. 10(2)(xv)—Loan secured by assessee by mortgage of land and building constructed for sale—Expenditure incurred over execution of mortgage—Whether such expenditure a deductible revenue expenditure.

The assessee firm which was brought into existence solely for the purpose of constructing a building and selling it, not having sufficient funds for the construction of the building secured a loan from some persons. This loan was secured by executing mortgages of the land and the building under construction in favour of the creditors. The firm incurred a certain expenditure over the execution of the mortgages and in its assessment proceedings for the year 1956-57 it claimed this amount as an admissible deduction against the profits which it had made from the construction and sale of the building. The Tribunal disallowed the claim on the ground that the said expenditure was incurred solely for the purpose of raising capital and not for the purpose of the running of the assessee's business or for acquiring the stock-in-trade:—

Held, that the expenditure incurred by the assessee for executing the mortgage in favour of the mortgagee-creditors for obtaining monies for construction and completion of the building was an expenditure not of a capital nature but wholly laid out in the business of the assessee for obtaining profits and gains therefrom, and

that, therefore, the said sum could be claimed by the assessee as a deductible revenue expenditure under s. 10(2)(xv) of the Indian Income-tax Act, 1922.

Western India Plywood Ltd. v. Commr. of Inc.-tax,¹ explained.

*Commr. of Inc.-tax v. India Cements Ltd.*² and *Shri Annapurna Cotton Mills Ltd. v. Commr. of Inc.-tax*,³ distinguished.

Commissioner of Income-tax, Bombay v. Tata Sons, Ltd.,⁴ *Dharmavir Dhar v. Commr. of Inc.-tax*,⁵ *Texas Land and Mortgage Co. v. Holtham*,⁶ *Scottish North American Trust v. Farmer*,⁷ *State of Madras v. G. J. Coelho*,⁸ *Countess Warwick Steamship Co. v. Ogg*,⁹ *Benarsidas Jagannath, In re*,¹⁰ *Assam Bengal Cement Co. Ltd. v. Commr. of Inc.-tax*,¹¹ and *Bombay Steam Navigation Co. Ltd. v. Commissioner of Income-tax, Bombay*,¹² referred to.

THE facts are stated in the judgment.

N. A. Palkhivala, with F. N. Kaka, instructed by Mulla & Mulla & Craigie Blunt & Caroe for the applicants.

G. N. Joshi, with R. J. Joshi, for the respondent.

V. S. DESAI J. The question, which the Income Tax Appellate Tribunal has referred to us under s. 66(I) of the Indian Income-tax Act, 1922, is:—

“Whether in the computation of its business profits under Sec. 10, the assessee firm is entitled to a deduction of the sum of Rs. 15,172/-?”

The assessee firm consists of three partners and was brought into existence solely for the purpose of constructing a building and selling the same. The firm acquired a piece of land, on which the building was to be constructed, in September 1946. Immediately after its construction, it let it out to the Government of India with effect from November 15, 1954, and ultimately sold it

*Decided, January 11, 1965. Income-tax Reference No. 63 of 1961.

1 (1960) 38 I.T.R. 533.

2 (1961) 47 I.T.R. 438.

3 (1963) 54 I.T.R. 592.

4 (1938) 41 Bom. L.R. 302, s.o. 7 I.T.R. 195.

5 (1961) 42 I.T.R. 7, S.C.

6 (1894) 3 T.C. 255.

7 (1911) 5 T.C. 693.

8 (1964) 53 I.T.R. 186, S.C.

9 [1924] 2 K.B. 292.

10 (1946) 15 I.T.R. 185, F.B.

11 (1954) 27 I.T.R. 34, S.C.

12 (1964) 54 I.T.R. 21 [Short Notes].

to the Government in September 1955. This business venture of the assessee firm resulted in some profit, which came to be assessed in the assessment year 1956-57 on the assessee in the status of an unregistered firm. Now, the assessee firm having started with an initial capital of Rs. 60,000 had not sufficient funds for the construction of the building, which it was going to construct. It, therefore, secured a loan to the extent of Rs. 2,50,000 from two persons, borrowing 2 lakhs from one of them and Rs. 50,000 from the other and secured the said loans by executing mortgages of the land and the building under construction in favour of the creditors. It incurred a total expenditure of Rs. 15,172 over the execution of the mortgages and in its assessment proceedings it claimed this amount as an admissible deduction against the profits from the construction and sale of the building. The Departmental authorities held that the amount was not deductible either under s. 10(3)(iii) or under s. 10(2)(xv) as the expenditure was incurred not on the building but for acquiring loans for financing the building. In the appeal before the Income-tax Appellate Tribunal, the assessee contended that the building, for the construction of which the money was obtained, was the stock-in-trade and the amount taken by way of loan was actually expended on the construction of the building; that no capital asset was brought into existence, as the building constituted the assessee-firm's stock-in-trade and the money having been obtained for the acquisition of the stock-in-trade, the expenditure incurred in obtaining the loan was revenue expenditure and not an expenditure of a capital nature. The Tribunal negatived the assessee's contention by holding that the expenditure was incurred solely for the purpose of raising capital and not for the purpose of running of the assessee's business or for acquiring the stock-in-trade. It observed:

"It was not an expense incurred for the purpose of the assessee's business but for the purpose of enabling it to obtain capital, with which the business was to be run. Whether the capital so raised was spent over the stock-in-trade of the assessee or over its capital assets is not at all material for determining the admissibility of this expense, the expense having been incurred solely for the purpose of running capital and not for the purpose of the running of the assessee's business or for acquiring the stock-in-trade."

In other words, the view taken by the Tribunal was that the expenditure incurred in raising the loan was not a part of the activity of the assessee in running the business, though the loan itself was used for the purposes of the business, the expenditure incurred for raising the loan, therefore, could not be regarded as expenditure for the running of the business and for the purpose of obtaining profits and gains, and could not, therefore, be regarded as a deductible expenditure under s. 10(2)(xv). The Tribunal was of the opinion that the view that it was taking was supported by a decision of the Kerala High Court reported in *Western India Plywood Ltd. v. Commr. of Inc-tax*.¹

In our opinion the view taken by the Tribunal is not correct. In *Commissioner of Income-tax, Bombay v. Tata Sons, Ltd.*,² the assessee who were the managing agents obtained finances for the managed companies by entering into an agreement with a stranger, who agreed to lend a crore of rupees to the managed company on condition that the assessee gave and assigned to him a share of six annas in the rupee in the commission and other remuneration, which the assessee might be entitled to recover from the managed company. "The share of the commission, which was paid to the stranger under the said arrangement was claimed to be deducted in computing the profits and gains of the assessee on two grounds: firstly, that the agreement operated as an assignment of the portion of the commission to the stranger and in that view the share assigned had ceased to be income of the assessee, and secondly, that the share of the commission given to the stranger was an expenditure incurred by the assessee solely for the purpose of earning profits and gains in the conduct

¹ (1960) 38 I.T.R. 533.

195.

² (1938) 41 Bom. L.R. 362, s.c. 7 I.T.R.

of their business and was, therefore, an expenditure of a revenue nature. Both the contentions of the assessee were accepted in that case. Now, the commission, which was agreed to be paid to the stranger, was clearly for the purpose of obtaining finances to the managed company. The finances, however, were used for the purposes of earning profits and gains in business and the expenditure, which was incurred for raising the said finances, was regarded as an expenditure for the purpose of earning profits and gains in the course of the business. It would, therefore, appear that in order to determine whether the expenditure incurred in borrowing the loans would be a part of the expenditure for running the business would depend upon the nature and purpose of the borrowed money. In *Dharamvir Dhir v. Commr. of Inc.-tax*³ the assessee not having requisite funds for its business, entered into an agreement with a public charitable trust for the advance to him of funds upto 1½ lakhs of rupees on payment of interest at 6 per cent. per annum and 11/16ths of the profits of the business. The share of the profits paid under this agreement was claimed as a revenue expenditure and the claim was allowed by the Supreme Court, which held that in the commercial sense the payments were an expenditure wholly and exclusively laid out for the purpose of the assessee's business and they were, therefore, deductible revenue expenditure. Here again the agreement to give 11/16ths of the profits was an expenditure incurred for the purpose of raising the monies. But since the purpose of raising the monies was wholly for the running of the business of the assessee, the expenditure incurred in raising the monies was also regarded as an expenditure of the business and not an expenditure, which was unconnected with it, but solely related to the transaction of borrowing.

Under the English Income-tax Act, there are prohibitions against allowing interest or other expenditure connected with capital employed or intended to be employed in the business of the assessee. There are, however, provisions, which allow the deduction of revenue expenditure wholly laid out for the purpose of assessee's business. In several cases of loans borrowed, the interest paid or the other expenditure incurred for obtaining the loans has been claimed on the basis of permissible revenue expenditure on the ground that the loans obtained were of short duration or in the nature of temporary or day to day accommodation by way of banking or over-draft facilities, which could not be regarded as capital employed or intended to be employed in the business of the assessee and the expenditure incurred for raising such loans would, therefore, be deductible as revenue expenditure incurred wholly for the purpose of earning profits or gains of the business. The decisions, in these cases, have turned upon the question as to whether the loans borrowed constituted capital employed or intended to be employed in the business of the assessee and in cases where it was held that it could not be so regarded, the interest paid or the other expenditure incurred in raising the loans has been allowed on the ground that it is an expenditure of a revenue nature. Thus in *Texas Land and Mortgage Co. v. Holtham*,⁴ the assessee company increased its capital by raising money on debentures and claimed the commission for raising the money as deductible revenue expenditure. The claim was considered on the footing as to whether the raised money was capital of the company and having held that it was the capital of the company, the claim was disallowed. It may be pointed out that the disallowance of the claim was on the ground that the expenditure incurred was solely connected with the raising of the capital and not for the purposes of running the business.

In *Scottish North American Trust v. Farmer*⁵ the assessee, who were a company and whose main business was to buy and sell investments, having found that the value of their purchases of investments abroad exceeded the amounts of their available cash, pledged certain of their securities with their

³ (1961) 42 I.T.R. 7, S.C.

⁵ (1911) 5 T.C. 693.

⁴ (1894) 3 T.C. 255.

bankers in New York to obtain a fluctuating overdraft, on which interest was charged at current rates from day to day. Subsequently, in addition to the overdraft, the Bank granted the company a loan with a fixed maximum for six months at 6 per cent., which was renewed for a further six months and then terminated. A question arose as to whether the interest that was paid to the bankers in New York, was deductible as an outgoing for the purpose of the business, in computing the liability of the company for assessment. It may be remembered that if the borrowings constituted capital employed or intended to be employed in the business of the assessee, the interest would not be deductible in view of the prohibitions contained in the English Income-tax Act. If, however, the borrowings did not constitute capital employed or intended to be employed in the business of the company, the interest paid on the borrowings could be regarded as an expenditure incurred for the purpose of obtaining the borrowed money for the purpose of the business and could be claimed as a revenue deduction. Lord Atkinson observed after having considered several authorities as follows (p. 707):

"These authorities show that money borrowed by such a Company as the Appellant Company in this case in the fluctuating temporary manner in which it has been borrowed by them—the daily borrowing and lending of money being part of their trade and business—is not to be treated under the Joint Stock Companies Act as 'capital'. There is nothing to show that that word should bear a different meaning in the Income Tax Acts when applied to the proceedings of Joint Stock Companies. The interest is, in truth, money paid for the use or hire of an instrument of their trade as much as is the rent paid for their office or the hire paid for a typewriting machine. It is an outgoing by means of which the Company procures the use of the thing by which it makes a profit, and like any similar outgoing should be deducted from the receipts, to ascertain the taxable profits and gains which the Company earns. Were it otherwise they might be taxed on assumed profits when, in fact, they made a loss".

In a recent case of the Supreme Court, *State of Madras v. G. J. Coelho*,⁶ under the Madras Plantations Agricultural Income-tax Act, 1955, the assessee claimed in computing his agricultural income from his plantations, the entire interest paid by him on monies borrowed for the purpose of purchasing the plantations as expenditure laid out wholly and exclusively for the purpose of the plantations under s. 5(e) of the said Act. It may be pointed out that in the Madras Plantations Agricultural Income tax Act there was no provision corresponding to s. 10(2)(iii) of the Indian Income-tax Act, which allowed the deduction of interest on borrowed capital. The provision of s. 5(6) of the said Act was identical with the provisions of s. 10(2)(xv) of the Indian Income-tax Act. It was held that the payment of interest on the amount borrowed for the purchase and the working of the plantations viewed as an integrated whole was so closely related to the plantations that the expenditure could be said to be laid out or expended wholly and exclusively for the purpose of the plantations.

In view of these authorities, in our opinion, the short work, which the Tribunal has made of the question which was before it by holding that the expenditure was solely for the purpose of raising capital and not for the purpose of running the assessee's business or acquiring the stock-in-trade, will not be permissible, and it will have to be further seen, having regard to the nature and the purpose of the loan, the manner in which it was raised and the manner in which it was used, whether the expenditure incurred in raising the loan was an expenditure not in the nature of a capital expenditure or personal expenses and wholly laid out for the purpose of the assessee's business within the meaning of s. 10(2)(xv) of the Act.

Now, "capital expenditure" has not been defined in the Act, and it has often been said that it is difficult to lay down a general test, which is both sufficiently accurate and sufficiently exhaustive to cover all or even a great number of

possible cases (Rowlatt J. in *Countess Warwick Steamship Co. v. Ogg*.⁷). In *Benarsidas Jagannath*, In re.⁸, Justice Mahajan of the Lahore High Court, as he then was, observed (p. 197):

"In order to distinguish between a revenue expenditure ... which is deductible in assessing income-tax and a capital expenditure, which is not so deductible, one must carefully consider the nature of the concern, the ordinary course of business usually adopted by a manufacturer in that concern and the object with which an expense is incurred by him and then decide the category under which it falls."

The learned Judge also observed (p. 198):

"...It is not easy to define the term 'capital expenditure' in the abstract or to lay down a general and satisfactory test to discriminate between a capital and a revenue expenditure. Nor is it easy to reconcile all the decisions that were cited before us for each case has been decided on its peculiar facts. Some broad principles can, however, be deduced from what the learned Judges have laid down from time to time."

He then formulated three tests, which will be helpful in determining whether a given item of expenditure was a capital or a revenue expenditure. These three tests are as following (p. 198):

"(1) Outlay is deemed to be capital when it is made for the initiation of a business, for extension of a business, or for a substantial replacement of equipment;

(2) Expenditure may be treated as properly attributable to capital when it is made not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, and

(3) Whether for the purpose of the expenditure, any capital was withdrawn, or, in other words, whether the object of incurring the expenditure was to employ what was taken in as capital of the business. Again, it is to be seen whether the expenditure incurred was part of the fixed capital of the business or part of its circulating capital. Fixed capital is what the owner turns to profit by keeping it in his own possession. Circulating or floating capital is what he makes profit of by parting with it or letting it change masters. Circulating capital is capital which is turned over and in the process of being turned over yields profit or loss. Fixed capital, on the other hand, is not involved directly in that process and remains unaffected by it."

These tests were approved of and accepted by the Supreme Court in *Assam Bengal Cement Co. Ltd. v. Commr. of Inc-tax*.⁹ Bhagwati J. after having enumerated the said tests observed (p. 45):

"This synthesis attempted by the Full Bench of the Lahore High Court truly enunciates the principles which emerge from the authorities. In cases where the expenditure is made for the initial outlay or for extension of a business or a substantial replacement of the equipment, there is no doubt that it is capital expenditure. A capital asset of the business is either acquired or extended or substantially replaced and that outlay whatever be its source whether it is drawn from the capital or the income of the concern is certainly in the nature of capital expenditure. The question however arises for consideration where expenditure is incurred while the business is going on and is not incurred either for extension of the business or for the substantial replacement of its equipment. Such expenditure can be looked at either from the point of view of what is acquired or from the point of view of what is the source from which the expenditure is incurred. If the expenditure is made for acquiring or bringing into existence an asset or advantage for the enduring benefit of the business it is properly attributable to capital and is of the nature of capital expenditure. If on the other hand it is made not for the purpose of bringing into existence any such asset or advantage but for running the business or working it with a view to produce the profits it is revenue expenditure. If any such asset or advantage for the enduring benefit of the business is thus acquired or brought into existence it would be immaterial whether the source of the payment was the capital or the income of the concern or whether the payment was made once and for all or was made periodically. The aim and object of the expenditure would determine the character of the expenditure whether it is a capital expenditure

⁷ [1924] 2 K.B. 292, at p. 293.

⁸ (1946) 15 I.T.R. 185, F.B.

⁹ (1954) 27 I.T.R. 34, S.C.

or a revenue expenditure. The source or manner of the payment would then be of no consequence. It is only in those cases where this test is of no avail that one may go to the test of fixed or circulating capital and consider whether the expenditure incurred was part of the fixed capital of the business or part of its circulating capital. If it was part of the fixed capital of the business it would be of the nature of capital expenditure and if it was part of its circulating capital it would be of the nature of revenue expenditure. These tests are thus mutually exclusive and have to be applied to the facts of each particular case in the manner above indicated. It has been rightly observed that in the great diversity of human affairs and the complicated nature of business operations it is difficult to lay down a test which would apply to all situations. One has therefore got to apply these criteria one after the other from the business point of view and come to the conclusion whether on a fair appreciation of the whole situation the expenditure incurred in a particular case is of the nature of capital expenditure or revenue expenditure in which latter event only it would be a deductible allowance under section 10(2)(xv) of the Income-tax Act."

These tests have again been referred to as the principles formulated in determining the question as to whether a given item of expenditure is a capital or a revenue expenditure in *State of Madras v. G. J. Coelho* already referred to. In a still more recent decision of the Supreme Court given in the case of *Bombay Steam Navigation Co. Ltd. v. Commissioner of Income-tax, Bombay*¹⁰ decided on October 21, 1964 (not yet fully reported), it has been observed:

"The question whether a particular expenditure is revenue expenditure incurred for the purpose of the business must be viewed in the larger context of business necessity or expediency. If the outgoing or expenditure is so related to the carrying on or conduct of the business that it may be regarded as an integral part of the profit-earning process and not for acquisition of an asset or a right of a permanent character, the possession of which is a condition to the carrying on of the business, the expenditure may be regarded as revenue expenditure."

What will have to be seen, therefore, is whether on the application of those tests the expenditure in the present case is an expenditure in the nature of a capital expenditure or in the nature of a revenue expenditure. As we have already pointed out earlier, the nature of the expenditure incurred in raising a loan will depend upon the nature and purpose of the loan. In the present case, the assessee had embarked upon a single venture, which was obtaining a land and construction of a building on it and selling the same after construction and make profits in the transaction. It is undisputed that the land and the building constructed on it was the stock-in-trade of the assessee, and the entire venture consisted of acquiring the stock-in-trade and disposing it off. The assessee had no fixed assets and did not require any fixed assets for its business. Its asset was the only trading asset or the stock-in-trade, which it proposed to acquire and dispose off. It had commenced its venture in the year 1946 with the funds of Rs. 60,000, which it possessed. In the course of acquiring the stock-in-trade, viz. the building to be constructed, it required monies, which were to be spent solely for the purpose of the construction of the building. The whole purpose of the loans, which it borrowed, was for completing the acquisition of the stock-in-trade and it is not contended that the amount has not been utilised solely for that purpose. Applying the tests, we find that the amount of Rs. 2,50,000, which was borrowed by the assessee, did not form its initial outlay because it was obtained not at the initiation of the business but during the course of it. It was not for the expansion of the business or for the replacement of any equipment. The business of the assessee was the single venture of the assessee of constructing only one building and selling it off after its completion. This business was never expanded by the assessee. No equipments in the nature of fixed assets were also required by the assessee and no part of the loan borrowed was utilised for any such purpose. Applying the second test, the expenditure incurred did not bring into existence any fixed

asset or advantage of the nature of an enduring benefit to trade. The amount obtained was wholly spent on the construction of the building, which was the stock-in-trade itself. It was contended that the expenditure was incurred for obtaining a facility of money, which endured for the entire duration of the venture by providing money for the business of the assessee. It was, therefore, argued that the expenditure incurred was for the purpose of obtaining something more than mere finances for the acquisition of the stock-in-trade, viz. a right or facility to carry on or continue the business. In our opinion this argument cannot be accepted. Every time money is borrowed for the purpose of business it undoubtedly helps or facilitates the business and thus allows it to continue to run, which, but for the help of the finance, would ultimately cripple and stop. That, however, would not necessarily give the borrowed money the status of capital of the assessee. As observed by Lord Atkinson in *Scottish North American Trust Ltd. v. Farmer*, already referred to, the borrowed monies may be as well an instrument of the trade, and the expenses of borrowing, the hire for the instrument, as much as is the rent paid for the office or the hire paid for a type-writing machine. There is no doubt in the present case that building was the circulating capital or the stock-in-trade of the assessee. The monies, which were borrowed went towards the circulating capital and did not form any part of the fixed capital of the assessee, which, as we have already pointed out, was not there altogether. The three tests, therefore, which were laid down by the Full Bench of the Lahore High Court and subsequently adopted by the Supreme Court, when applied to the present case, would show that the monies borrowed by the assessee in the present case were for the purpose of being employed as circulating capital to earn profits and gain and could not be regarded as on account of capital and consequently the expenditure incurred in connection with the borrowing could not be regarded as an expenditure of a capital nature. The tests given by the Supreme Court in the last decision referred to, viz. the decision in *Bombay Steam Navigation Co. Ltd. v. The Commissioner of Income-tax, Bombay*, would also, when applied to the borrowing in the present case, show that it was a borrowing on account of revenue. Viewed in the larger context of business necessity or expediency of the assessee's business, the borrowing in the present case was so related to the carrying on or conduct of the business that it could be regarded as the integral part of the profit-earning process and not for the acquisition of an asset or a right of permanent character, the possession of which was a condition to the carrying on of the business. The expenditure, therefore, incurred in obtaining the borrowed money must be regarded as a revenue expenditure. In *State of Madras v. G. J. Coelho*, which we have already referred to above, the assessee purchased an estate of tea, coffee and rubber plantations for a sum of Rs. 3,10,000 and for the purpose of the said purchase, borrowed a sum of Rs. 2,90,000 at interest varying from 7 to 8 per cent. per annum. The annual interest paid by the assessee to the creditors was sought to be deducted by the assessee from the profits and gains of his business for the year under a provision of the Madras Plantations of Agricultural Income-tax Act, which was identical with the provision of s. 10(2)(xv) of the Indian Income-tax Act. After having applied the tests the Supreme Court held that the payment of interest was a revenue expenditure because no new asset was acquired with it, no enduring benefit was obtained and the expenditure incurred was a part of the circulating or floating capital of the assessee.

In our opinion, therefore, the expenditure incurred by the assessee for executing the mortgages in favour of the mortgagee-creditors for obtaining monies for construction and completion of the building was an expenditure not of a capital nature but wholly laid out in the business of the assessee for obtaining profits and gains therefrom.

The Income-tax Appellate Tribunal, for the view that it has taken, has relied on *Western India Plywood Ltd. v. Commissioner of Income-tax, Madras*. In that case the assessee was a company carrying on business of manufacture of

plywood and plywood articles. It raised a loan of Rs. 3 lakhs by way of first mortgage debentures redeemable in three successive years at Rs. 1 lakh a year to be utilised towards the working capital of the company. A major part of the borrowed amount was paid for the purchase of raw materials. Some part was expended for discharging loans on suspense account and a part was deposited in a separate account for the payment of dividends. The assessee had incurred an expenditure of Rs. 12,924 in issuing the debentures by way of expenses towards the purchase of stamp paper for the trust deed, under-writing, commission and registration and lawyer's fees. The question was whether the sum of Rs. 12,924 was a business expenditure and allowable under s. 10(2) (xv) of the Indian Income-tax Act as a deduction. On the facts of the case, the Court held that the raising of money by debentures or mortgages by the company could not be regarded as an ordinary incident in carrying on the business, or be treated as on a par with trading or banking facilities, but must *prima facie* and in the absence of other indications, be considered to affect the capital of the concern and its profit-making structure. The learned Judges proceeded to consider the question before them by finding out whether the money raised by debentures could be regarded as having been received by the assessee as a capital receipt and took the view that the manner in which the money had been raised by the company, viz. by issuing mortgage debentures showed that it was not raising money as by way of temporary or day to day accommodation as an ordinary incident in carrying on the business but that it was raising it with a view to affect its capital and profit-making structure. According to them, the monies having been borrowed with this object and purpose the subsequent utilisation of the part of the money borrowed for the stock-in-trade did not affect the character of the borrowing, which was of a capital nature. They pointed out that the company in the resolution of its Board of Directors had referred to the loan that they were raising as the working capital of the company and the expenses incurred in raising the said capital, therefore, was an expenditure of a capital nature. It was argued before the Court that the borrowing was for the purpose of augmenting the circulating capital of the company, if not wholly, at least to the extent of a major part of it and to the extent to which the borrowed money was used as a circulating capital or for the acquisition of the raw material for the business, the expenditure *pro tanto* should be considered as a revenue expenditure. The argument, however, was not accepted. The learned Judges held that the money was borrowed for the purpose of enlarging or extending the business, if it was paying its way, or was by way of establishing its business, if it was not: in either of which case the borrowed money must be taken to have been obtained on capital account.

As to the utilisation of part of the money for the stock-in-trade, they observed that in the first place the nature of the receipt of borrowing, whether capital or revenue, was not to be judged solely by the use, which the assessee had found for it subsequently and, secondly, the argument that a part of the borrowed money was utilised for purchasing the stock-in-trade conceded a dual character to the borrowing and involved a notional splitting of the borrowed amount and the expenses, for which there was no rational basis and besides it was also contrary to the prescription in s. 10(2) (xv), which was implicit in the expression "laid out or expended wholly and exclusively".

In our opinion, this decision cannot be said to be an authority for the view, which has been taken by the Tribunal that the expenses incurred for raising capital can never be regarded as expenses for the running of the business. The view taken in this case was that on the facts and in the circumstances of the case, the borrowing by the company was for the purposes of enlarging and extending its business and the borrowed money affected the capital of the company and entered the capital structure of the company. It was for that reason that the Court held that the expenses incurred for raising the loan, which

was on capital account, could not be treated as a revenue expenditure deductible under s. 10(2)(xv) of the Act.

In two other cases, which were referred to us in the course of the arguments, where money was borrowed by a company on the security of the company's assets, the expenses of the borrowing were regarded as on capital account. In *Commr. of Inc.-tax v. India Cements Ltd.*¹¹, which is a case of the Madras High Court, the assessee company obtained a loan of Rs. 40 lakhs from a Finance Corporation on the mortgage of the company's assets agreeing to pay the loan in 10 annual instalments of Rs. 4 lakhs each. It incurred an expenditure of Rs. 84,633 for acquiring the loan by way of stamp duty, counsel's fee, etc. and claimed that amount as business expenditure. It was admitted that out of the amount of Rs. 40 lakhs, 25 lakhs were used for repaying a loan, which had been utilised for capital assets, and there was no material to show that the balance of Rs. 15 lakhs was incurred wholly and exclusively for the purposes of the business and was not used for capital purposes. It was held, in view of these facts, that the amount was not a revenue expenditure and could not be allowed under s. 10(2)(xv) on the ground that the loan was incurred for securing an enduring benefit to the assessee and the expenditure was incurred once and for all. It was further held that the fact that the loan was to be repaid within ten years could not affect the nature of the loan, which was raised on capital account. This case, in our opinion, would not help the Department. It would be seen that the nature and purpose of the loan in that case to the extent to which it could be determined on the facts of the case, was that it was obtained for bringing into existence an advantage of an enduring nature to the company. The purpose of the loan, therefore, being that the amount borrowed was to be spent on capital account, the expenses incurred for the borrowing was an expenditure in the nature of capital expenditure.

In *Sri Annappurna Cotton Mills Ltd. v. Commr. of Inc.-tax*¹² the assessee company by a debenture trust deed raised a loan of Rs. 10 lakhs, the debentures being redeemable in 10 annual instalments. The loan was secured by the mortgage of movable and immovable properties of the company and carried interest at 7 per cent. per annum. The company also agreed to pay to the brokers in perpetuity a commission of 1 per cent. on the gross sales of the assessee's products. Pursuant to this agreement the assessee paid the assignees of the brokers a sum of Rs. 21,798 during the relevant previous year, for which it claimed deduction under s. 10(2)(xv) of the Indian Income-tax Act. It was held that the sum was capital expenditure and, therefore, not an allowable deduction under s. 10(2)(xv). This conclusion was arrived at on the ground that having regard to the long term of the loan and having regard to the nature and purpose of the loan and the manner of raising it, the loan formed a part of the capital assets of the company and the commission paid in connection therewith was an expenditure of a capital nature and not allowable as a revenue expenditure under s. 10(2)(xv) of the Indian Income-tax Act. In our opinion, this case also cannot help the Department. In the case before us the loan was only for the duration of the acquisition and disposal of the stock-in-trade of the single venture of the assessee. The purpose for which it was raised was only for the acquisition of the stock-in-trade and the manner in which it was raised was the ordinary commercial manner, where a trader for the purpose of acquiring its stock-in-trade borrows monies and utilises them for the acquisition of the stock-in-trade of the business and after disposal of the stock-in-trade repays the borrowed money to the creditor. The manner of raising the loan, therefore, was as an ordinary incident of the trade, where circulating capital or stock-in-trade is held by borrowing temporary loans.

In our opinion, therefore, the sum of Rs. 15,172 could be claimed by the assessee as a deductible revenue expenditure under s. 10(2)(xv) of the Act

and the Departmental authorities and the Income-tax Appellate Tribunal were in error in not allowing the said deduction.

Our answer, therefore to the question referred to us is in the affirmative. The assessee will get his costs from the Department.

Answer accordingly.

Before Mr. Justice Tambe and Mr. Justice V. S. Desai.

M/S. A. PHIROZ & CO.

v.

THE COMMISSIONER OF INCOME-TAX, BOMBAY CITY I.*

Indian Income-tax Act (XI of 1922), Sec. 26A—Indian Stamp Act (II of 1899), Sec. 2(4)—Requisites of instrument of partnership—Whether such instrument must be in existence in relevant account year—Mere record of some terms of partnership whether sufficient to constitute such instrument—Document coupled with other evidence whether will constitute such instrument—"Instrument," meaning of word.

What is required under s. 26A of the Indian Income-tax Act, 1922, is a single document or a number of documents all existing in the relevant account year which will together form an instrument of partnership. If the documents by themselves do not have that effect, then there is no instrument of partnership as required under s. 26A of the Act.

Under s. 26A the instrument has to be an instrument not of any partnership, but of the partnership of certain specified individuals. A mere record of some terms of partnership will not make the document an instrument of partnership of certain specified individuals.

Under s. 26A it must be the document itself which must constitute the instrument of partnership and not the document coupled with certain other evidence.

The word "instrument" as used in s. 26A means a document of a legal nature, by which any right or liability is or purported to be created, transferred, limited, extended, extinguished or recorded.

THE facts appear in the judgment.

S. P. Mehta, with *Y. P. Trivedi*, *U. T. Shah* and *S. J. Mehta*, for the applicant.

G. N. Joshi, instructed by *P. G. Gokhale*, for the respondent.

V. S. DESAI J. On a requisition by the High Court under s. 66(2) of the Indian Income-tax Act, 1922, the Income-tax Appellate Tribunal has drawn up a statement of the case referring the following question which it was directed to refer:

"Whether on the facts and in the circumstances of the case, was the Tribunal justified in holding that the application for registration was rightly rejected by the Income-tax authorities on the ground that there was no instrument of partnership?"

The question arises out of the proceedings relating to the assessment of the assessee for the assessment year 1950-51, for which the relevant accounting year was the year ended on December 31, 1949. The business of the assessee was of exporting raw wool procured in Rajasthan to England and America. It also owned a factory for ginning and pressing wool, an ice factory and a flour mill at a place in the erstwhile Indian State of Palanpur. The States in which the assessee was carrying on its business merged in the Indian Union, and from August 1, 1949, the Indian Income-tax Act, 1922, became applicable to the area. For the purpose of the assessment of the assessee for the year 1950-51, it applied for registration under s. 26A of the Indian Income-tax Act, on February 20, 1953. That application was signed by two persons as the

*Decided, January 21, 1965. Income-tax Reference No. 74 of 1961.

partners of the assessee firm, namely, Mohanbhai Devjibhai Hiraji and R. M. Dave. The partnership was alleged to have come into existence from January 1, 1946. The Income-tax Officer came to the conclusion that Dave was not a partner of the alleged partnership firm, because there was no regular deed of partnership; secondly, the Bank declarations of three banks showed that Dave was not a partner; and there were also certain other documents which showed that Dave was only a manager. The Income-tax Officer, therefore, refused registration. In the appeal to the Appellate Assistant Commissioner, he held that Dave was associated with the partnership and there was evidence showing that he was a working partner. He, however, held that there was no instrument of partnership under which the assessee firm was constituted within the meaning of s. 26A of the Act, and the Income-tax Officer, therefore, was right in refusing registration. In the second appeal before the Tribunal, the Tribunal confirmed the decision of the Departmental authorities, holding that the partnership was not constituted under an instrument of partnership within the provisions of s. 26A of the Act.

Admittedly no properly executed partnership deed was produced before the Income-tax Officer. What was produced before him was an alleged draft of the partnership deed which was said to have been written up late in 1949. The assessee's case was that Mohanbhai Devjibhai, one of the partners, had gone to Pakistan and was unable to return to India for reasons of health. When the Indian Income-tax Act became applicable in August 1949, the partners wanted to have a deed of partnership executed. A draft was accordingly prepared which was taken by the other partner Dave to Pakistan, where it was shown to Mohanbhai Devjibhai, and was approved of by him. It was also agreed to between the partners that the regular deed of partnership should be executed in India on the return to India of Mohanbhai. Mohanbhai, however, could not return to India, and the draft therefore remained un-executed. In addition to this document, the assessee also relied on certain other documents, which were: an order of the Custodian of Evacuee Property, Bombay, passed on September 30, 1950, relating to the right, title and interest of Mohanbhai Devjibhai in the wool ginning and pressing factory, the ice factory and the flour mill, etc. In this order, it was observed by the Custodian that there was evidence to support the view that Dave was accepted as a working partner by Mohanbhai for a period up to 1956 with eight annas share in the profits. The next document was a copy of the writ application made by Dave in the High Court against the order of the Custodian of the Evacuee Property. This application was made on January 2, 1951. The allegations in this application were to the effect that there was a partnership between him and Mohanbhai which had commenced from 1946 and in which each of them had an eight annas share. This application also made reference to the draft deed of partnership which was alleged to have been made late in 1949 and approved of by both the partners. In these writ proceedings, an affidavit was put in by Mohanbhai in February 1951, in which he stated that the draft deed of partnership referred to by Dave in the petition was prepared in the circumstances set out in the writ petition, and it was agreed that he would execute the said deed of partnership on his return to India from Karachi. A copy of the consent terms alleged to have been agreed to by the parties to the writ proceedings was also produced. The date on which these consent terms appear to have been agreed upon was November 21, 1951, and were to the effect that all properties including lands, buildings, structures, machinery and plant, acquired or brought or bought with the capital property by the evacuee for the partnership were to be deemed his exclusive property and all such property bought or acquired with the profits accrued during the partnership was to be deemed the partnership property in which Dave was to have eight annas share. It was contended on behalf of the assessee that the draft deed of partnership along with other documents formed an instrument constituting a partnership and specifying the individual shares of the partners.

Now, under s. 26A, in order to obtain registration, the firm must be constituted under an instrument of partnership which specifies the individual shares of the partners. It is now well-settled that the instrument of partnership may be a single document, or may be spelt out of several documents. It is, however, necessary that the single document or the several documents, constituting the partnership instrument, must be in existence in the year of account. Now, in the present case all the other documents excepting the alleged draft of partnership deed were not in existence in the relevant accounting year which is the year ended on December 31, 1949, because all of them have come into existence after that date. The only document, which is said to have been in existence in the relevant accounting year is the draft of the partnership agreement, which is said to have been prepared late in 1949. Now, the said document itself is undated and unsigned, and there is nothing in the document itself to show that it was in existence in 1949. Moreover, it is difficult to see how the said document could qualify to be an instrument. The expression "instrument" imports a document of a formal legal kind. In Stroud's Judicial Dictionary, an "Instrument" is stated to be a writing generally importing a document of a formal legal kind. In the Dictionary of English Law by Earl Jowitt, pages 984-985, it is stated that an "Instrument" is a writing and generally means writing of a formal nature. The Shorter Oxford English Dictionary gives the meaning in law of the word "Instrument" as a formal legal document whereby a right is created or confirmed or a fact recorded; a formal writing of any kind, as an agreement, deed, charter or record, drawn up and executed in technical form. The Indian Stamp Act, s. 2(14) defines an instrument as including every document by which any right or liability is or purported to be created, transferred, limited, extended, extinguished or recorded. The word "instrument", therefore, as used in s. 26A of the Indian Income-tax Act will mean a document of a legal nature, by which any right or liability is or purported to be created, transferred, limited, extended, extinguished or recorded. The alleged draft which has been produced on behalf of the assessee could not be regarded as having created rights or liabilities or even forming a record of the same. A document, in order to create rights or liabilities or even to record rights and liabilities, must be executed by the parties, whose rights or liabilities the document creates, or whose rights and liabilities it records. A mere piece of a paper on which appears a recital of certain rights and liabilities could not by itself be able to fasten the said rights and liabilities to any particular person. Mr. Mehta has argued that although the document by itself would not be sufficient to show that it is the record of the rights and liabilities of certain specified persons, the said document along with further evidence showing that the contents of the documents relate to the rights and liabilities of certain specified individuals, and that the said certain specific individuals have agreed to and accepted the said contents, would make it an instrument recording the said facts. We are afraid, the argument even if it were sound, does not avail Mr. Mehta in the present case. What is required under s. 26A is a single document or a number of documents all existing in the relevant account year which will together form an instrument of partnership. If the documents by themselves do not have that effect, then there is no instrument of partnership as is required under s. 26A. In the present case the only document alleged to have been in existence in the relevant account year is the draft and that by itself cannot show that it is the instrument of partnership of certain specified individuals namely Mohanbhai and Dave. Under s. 26A, the instrument has to be an instrument not of any partnership, but of the partnership of certain specified individuals. A mere record of some terms of partnership will not make the document an instrument of partnership of certain specified individuals. On the argument advanced by Mr. Mehta, what may make it a document relating to the partnership of certain specified individuals is not the document itself but the document coupled with certain other evidence. Under s. 26A, however, it must be the document itself which

must constitute the instrument of partnership. In our opinion, therefore, the draft of partnership deed produced on behalf of the assessee will not be sufficient to constitute an instrument of partnership. The other documents, as we have already pointed out, will not avail, because they were not in existence in the year of account, and cannot, therefore, form part of the instrument of partnership.

The result, therefore, is that the Tribunal was right in the view it took that there was no instrument under which the partnership was constituted within the meaning of s. 26A of the Indian Income-tax Act, 1922.

Therefore, the question must be answered in the affirmative. The assessee will pay the costs of the Department.

Answer accordingly.

GIFT-TAX REFERENCE

Before Mr. Justice Tambe and Mr. Justice V. S. Desai

THE COMMISSIONER OF GIFT-TAX, BOMBAY CITY I

v.

G. G. MORARJI.*

Gift-tax Act (XVIII of 1958), Secs. 5, 2(xii) (xxii) (xxiv), 6—Indian Trusts Act (II of 1882), Sec. 3—Assessee executing deed of settlement under which his wife receiving income of trust fund during her life—Whether transfer of such interest in fund a gift—Assessee whether entitled to exemption under s. 5(1) (viii) of Gift-tax Act—Practice—Reference—Larger relief claimed by assessee before Tribunal—Whether assessee in reference to High Court precluded from claiming smaller relief on same provision of law.

Under a deed of settlement executed in 1958 the wife of the settlor-assessee acquired the beneficial interest to receive interest and income of the trust fund during her life-time. Thereafter the property was to go to his children and others as provided in the deed. On the question whether the assessee was entitled to exemption under s. 5(1) (viii) of the Gift-tax Act, 1958, to the extent of the value of the gift to his wife if any:—

Held, that by creating the settlement the assessee had transferred interest in the trust fund to his wife and as it was voluntary and without consideration it was a gift of an interest in the trust fund, and

that the assessee was entitled to the exemption under s. 5(1) (viii) of the Act to the extent of the value of the gift to his wife as ascertained in accordance with s. 6 of the Act and the rules framed under s. 6(3).

When a larger relief is claimed by the assessee before the Tribunal on the strength of a certain provision of law, he is not prevented from arguing in a reference that he is entitled to a lesser relief under the same provision of law on the ground that the claim for a smaller relief is not one arising out of the order of the Tribunal.

THE facts are stated in the judgment.

G. N. Joshi, with *R. J. Joshi*, instructed by *P. G. Gokhale*, for the applicant.
S. P. Mehta, with *Y. P. Trivedi*, for the respondent.

TAMBE J. This is a reference under sub-s. (1) of s. 26 of the Gift-tax Act (hereinafter called as "the Act") at the instance of the Commissioner of Gift-Tax.

Facts giving rise to this reference are: We are here concerned with the assessment year 1958-59. The assessee, Gordhandas Goculdas Morarji, has been assessed in the status of an individual. The Bombay Municipality acquired

*Decided, February 11, 1965. Gift-tax Reference No. 1 of 1962.

certain immoveable property belonging to the assessee, paying the assessee a compensation of Rs. 2,90,000. Out of this amount, Rs. 2,80,000 were deposited by the assessee in the following manner:

(1) Rs. 1,00,000 (comprising of two deposits, one of Rs. 50,000 deposited in Canara Bank in the joint names of the assessee and his son V. G. Morarji, and the other deposit of Rs. 50,000 in the United Commercial Bank in the joint names of the assessee and his another son D. G. Morarji). Both these deposits were made on October 9, 1958.

(2) Rs. 1,45,000 (comprising of three fixed deposits of Rs. 1,00,000, Rs. 25,000, and Rs. 20,000; the first in the joint names of the assessee and his wife, and the others in the joint names of the assessee and his son).

(3) Rs. 40,000 kept in a fixed deposit in the joint names of the assessee and his son V. G. Morarji, in the Bank of Baroda, on October 9, 1958.

After making these deposits, the assessee made three settlements in respect of these aforesaid three groups of deposits and Rs. 5,000 the balance of Rs. 2,90,000. We are here concerned only with the first item relating to Rs. 1 lakh, comprising the two deposits of Rs. 50,000, each. By a deed of settlement, dated December 22, 1958, the assessee settled the said sum of Rs. 1 lakh in favour of his wife and his three sons. It was not in dispute either before the Gift-tax authorities or before the Tribunal that the aforesaid three settlements were gifts within the meaning of the Act, and were chargeable to tax thereunder. It was, however, contended before the Gift-tax Officer that the assessee was entitled for exemption under s. 5(I)(viii) of the Act in respect of the said sum of Rs. 1 lakh settled by the assessee on his wife by the aforesaid deed dated December 22, 1958. The Gift-tax Officer held that the assessee was not entitled to exemption. The view taken by him was that under the settlement, the sum of Rs. 1 lakh was not gifted outright by the assessee to his wife. On the other hand, the said sum of Rs. 1 lakh was only settled on trust in favour of his wife and three sons, the wife having only a life interest therein, and, therefore, the assessee was not entitled to the exemption under s. 5(I)(viii). An appeal taken by the assessee before the Appellate Assistant Commissioner also failed. The view taken by him was:

"All that had happened is, sum of Rs. 1 lakh has been placed in trust in favour of the appellant's wife and her sons with the stipulation that the appellant's wife was to be entitled only for the income of the trust fund during her life time. Since the beneficiary namely the appellant's wife had only a limited interest in the trust fund, the sum of Rs. 1 lakh cannot be regarded as gifted by the appellant to his wife."

The assessee took a further appeal to the Tribunal. The Tribunal allowed the appeal. The view taken by the Tribunal was:

"This approach of the Department on the argument that there was no gift by the appellant to his wife is based on an argument which is self-contradictory. It is on the basis that this is a gift or a deemed gift within the meaning of Sec. 2(xii) read with sec. 2(xxiv) of the Act that it has been included and taxed as a gift and therefore, to say that this was no gift and to deny the claim for exemption, is an argument which destroys the case for taxing it even. The reason adduced for denying this relief is, therefore, clearly unsustainable. A gift which is a deemed gift if good for being taxed is also good enough for the exemption. The contention of the appellant is accepted."

In this view of the matter, the Tribunal allowed the appeal. At the instance of the Commissioner, the Tribunal has stated the case referring the following question of law to us:

"Whether on the facts and circumstances of this case, the assessee is entitled to the exemption under section 5(1)(viii) of the Gift-tax Act in the sum of Rs. 1 lac?"

Mr. Joshi, learned counsel for the Revenue, contends that the Tribunal was in error in holding that the stand of the Department was self-contradictory. A transaction could be a gift under the Act, but none the less, it may not be a gift falling under the exemption clause. The question which fell for consideration was whether it was a gift falling within the exemption clause, namely, s. 5. According to Mr. Joshi, on a true construction of the relevant provisions of

the settlement deed, there is a gift, but the gift is only to the trustee, and not to the wife. The property that is transferred is the sum of Rs. 1 lakh. That property is transferred to the trustee. Creation of a life interest in the income of the trust fund in favour of the wife is not a transfer of any property to the wife. The gift does not, therefore, fall under the exemption clause of s. 5(1)(viii) of the Gift-tax Act. The assessee, therefore, is not entitled to get exemption in respect of Rs. 1 lakh claimed by him.

Mr. Mehta, learned counsel for the assessee, on the other hand, contends that no doubt the claim made by the assessee in the beginning was that he was entitled to exemption in respect of the entire amount of Rs. 1 lakh. But before the Tribunal, according to Mr. Mehta, it was also contended that even though the assessee may not be entitled to exemption in respect of the entire amount of Rs. 1 lakh, the assessee would be entitled to the exemption to the extent of the amount ascertained to be the value of the gift made by the assessee in favour of his wife under the trust deed. Mr. Mehta further stated that he himself had appeared for the assessee before the Tribunal, and had urged this point before the Tribunal. He further made it clear before us that he was not contending that the assessee should be given an exemption in respect of the entire amount of Rs. 1 lakh. The argument of Mr. Mehta is that under the trust the assessee has provided that the income of the said amount of Rs. 1 lakh was to be given to his wife during her life time. That amounts to creation of an interest in the property, and there is a transfer of property to that extent involved in favour of the assessee's wife. There is, therefore, a gift within the meaning of s. 5(1)(viii) of the Act, and the assessee is entitled to exemption to the extent of the value of the gift determined under s. 6 of the Act.

Before we proceed to deal with the contentions raised by counsel for parties, it is first necessary to deal with the preliminary objection raised by Mr. Joshi. He contends that there is no warrant to assume that a submission as stated by Mr. Mehta just now had been made before the Tribunal. The order of the Tribunal does not disclose it, nor does the Statement of the Case. He further stated before us that in the grounds of appeal in the Memo of Appeal (not before us) filed by the assessee before the Tribunal, such a ground has not been expressly taken. The contention raised by Mr. Mehta, therefore, is not one arising out of the order made by the Tribunal under s. 23 of the Act, and therefore, we have no jurisdiction to answer such a question. We find it difficult to uphold the preliminary objection raised by Mr. Joshi. Under sub-s. (1) of s. 26, the Tribunal is empowered to refer to this Court "any question of law arising out of such order (i.e. order under section 23 or 25)". In the instant case the appellate order of the Tribunal has been one under s. 23. It is indeed true that neither the appellate order of the Tribunal nor the Statement of the Case mentions that the contention in the form now raised by Mr. Mehta before us had been raised before the Tribunal. But then it has to be noticed that the contentions raised on behalf of the assessee before the Tribunal have not been summarised either in the order or in the Statement of the Case. There is, therefore, nothing in the order or in the Statement of the Case to assume that such a contention had not been raised by the assessee before the Tribunal. Mr. Mehta, advocate of this Court, has made a statement at the Bar that he himself had argued the appeal and had raised the contention before the Tribunal and advanced an argument thereon. No statement has been made at the Bar to counter that statement. There is no warrant not to accept the statement of Mr. Mehta. The said contention relates to a question of law. No doubt, the Tribunal has not in its order dealt with it, but it must be deemed to have been dealt with by the Tribunal, and therefore, is one arising out of the order of the Tribunal. Presumably the Tribunal has not dealt with it because it took the view that the assessee was entitled to exemption in respect of the entire amount of Rs. 1 lakh. Having regard to the respective cases of the Revenue and the assessee, and the question referred to us, the contention raised by

Mr. Mehta is covered by the question referred to us. Now, the rival contentions in brief were: According to the Department, the assessee was not entitled to any exemption at all under s. 5(1)(viii) of the Act, while according to the assessee, he was entitled to the exemption under the said provision, and the principal question is whether the transaction falls within the provisions of s. 5(1)(viii) entitling the assessee to claim exemption thereunder. If, on the construction of the relevant provision, we come to the conclusion that the assessee is entitled to exemption under s. 5(1)(viii), the mere fact that he was claiming exemption to the extent of Rs. 1 lakh would not disentitle the assessee from claiming exemption to the extent of the amount he would in law be entitled to. The assessee may pray for a larger relief, but that would not disentitle him from claiming a smaller relief in respect of the right claimed by him. Nor can it be said that when a larger relief is claimed by the assessee before the Tribunal on the strength of a certain provision of law, he cannot be entitled to argue in a reference that he is entitled to a lesser relief under the same provision of law on the ground that the claim for a smaller relief is not one arising out of the order of the Tribunal. In this view of the matter, the preliminary objection raised is over-ruled.

Sub-section (6) of s. 26 in express terms provides that the High Court in deciding the question of law raised before it may, if it thinks fit, alter the form of question of law. Having regard to the statement made by Mr. Mehta, we reframe the question as under:

"Whether on the facts and in the circumstances of the case, the assessee is entitled to the exemption under section 5(1)(viii) of the Gift-tax Act to the extent of the value of the gift to his wife if any?"

Before we proceed to deal with the relevant provisions of the Act, it would be convenient to refer to certain clauses of the settlement deed. As already stated, the settlor is the assessee, G. G. Morarji. He had a wife by name Indumati and three sons by names Narsingh, Vijaysingh and Dilipsingh. The preamble recites:

"Whereas in consideration of the natural love and affection which the Settlor bears towards his wife and his three sons and their respective issues and in order to make a provision inter alia for them and for other diverse other good causes and considerations he is desirous of irrevocably settling and has agreed to settle irrevocably the said sum of Rupees one lac upon the trust..."

And to effectuate the said desire, he under the said deed of settlement, assigned and transferred to the trustees the said amount of Rs. 1 lakh, upon trust, subject to the powers and provisions declared and contained in the deed of settlement. Clauses 1 and 2 relate to the power conferred on the trustees in investing the said fund of Rs. 1 lakh. Clause (2) confers power on the trustees to incur certain expenses incidental to the performance of the trust, and cl. (3) provides:

"Subject to the foregoing clause two the said trustees shall pay the said interest and income of the said trust funds to the said Indumatibai wife of the Settlor for and during her life and down to her death."

It is not necessary to refer to the other clauses which relate to the duties of the trustees after the death of his wife Indumati. Under the deed of settlement thus, the beneficial interest which the wife of the assessee had acquired was to receive interest and income of the trust fund of Rs. 1 lakh during her life time. The question to be considered is whether this constitutes a "gift" to his wife within the meaning of s. 5(1)(viii) of the Act.

And this brings us to the relevant provisions of the Gift-tax Act. This Act has been enacted in the year 1958 by Parliament to provide for levy of gift-tax. The charging section is s. 3, and it provides:

"3. Subject to the other provisions contained in this Act, there shall be charged for every financial year commencing on and from the 1st day of April, 1958, a tax (hereinafter referred to as gift-tax) in respect of the gifts, if any, made by a person

during the previous year (other than gifts made before the 1st day of April, 1957) at the rate or rates specified in the Schedule."

Under the charging section thus, gifts made after April 1, 1957, are chargeable to tax under s. 3 subject to the other provisions contained in the Act. The charge is on the person making the gift in respect of the gifts made by him. Section 5 provides that gift-tax shall not be charged under this Act in respect of certain gifts described in cls. (i) to (xvi) of sub-s. (1) thereof. The material clause, viz. cl. (viii), as it stood at the material time, reads:

"(viii) to his or her spouse, subject to a maximum of rupees one lakh in value in the aggregate in one or more previous years,..."

The question to be considered is whether, by settling the interest and income of the trust fund of Rs. 1 lakh on his wife Indumati during her life time, the assessee had made any gift to his wife. If there is any such gift in the said settlement, the assessee would be entitled to exemption under s. 5(1)(viii) of the Act. If, on the other hand, therein no gift is involved to his wife, the assessee is not entitled to any exemption. Gift has been defined in s. 3, which is the interpretation clause. Clause (xi) defines a "gift" and it provides:

"'gift' means the transfer by one person to another of any existing movable or immovable property made voluntarily and without consideration in money or money's worth, and includes the transfer of any property deemed to be a gift under section 4."

It is not necessary for the purposes of this case to refer to s. 4 which deals with the deemed gifts. Now, the essence of gift thus is a voluntary transfer of an existing moveable or immovable property by one person to another without consideration in money or money's worth. Property has been defined in cl. (xxii) as: "'property' includes any interest in property, moveable or immovable." Clause (xxiv) defining "transfer of property", *inter alia* provides:

"(xxiv) 'transfer of property' means any disposition, conveyance, assignment, settlement, delivery, payment or other alienation of property and, without limiting the generality of the foregoing, includes—

(a) the creation of a trust in property;

(b) the grant or creation of any lease, mortgage, charge, easement, licence, power, partnership or interest in property;"

It is not necessary to read the other sub-clauses of cl. (xxiv). Reading these three clauses—(xi), (xxii) and (xxiv)—together, it is clear that interest in property is itself property, and grant of interest in property by one to another would be a transfer of property within the meaning of the Act. On the reading of these three clauses together, it would necessarily follow that when a person voluntarily grants interest in property to another without consideration in money or money's worth, it would amount to a gift within the meaning of the Act. Mr. Joshi also referred us to the definition of "donee" which provides:

"'donee' means any person who acquires any property under a gift, and, where a gift is made to a trustee for the benefit of another person, includes both the trustee and the beneficiary."

It is his argument, that under the settlement, the property transferred is a sum of Rs. 1 lakh. The said property has been transferred by the assessee to the trustees. The trustees are the donees of the property. The wife of the assessee has acquired no interest in the trust property. There is, therefore, no gift involved by the assessee to his wife. It is not possible to accept the argument of Mr. Joshi. It is indeed true that the legal title to the trust fund has been transferred by the assessee to the trustees. But that has not the effect of creating no interest in trust property in favour of his wife who is the beneficiary under the settlement. A "trust" is defined in s. 3 of the Indian Trusts Act, and reading the section, it becomes clear that though the legal title in the trust property vests in the trustees, what he gets under the trust by accepting the trust is only an obligation annexed to the trust property arising out of the confidence placed in him by the settlor. He has to carry out these obligations

which he has accepted in accordance with the directions given to him by the settlor under the settlement for the benefit of other persons. The persons for whose benefit the trustee discharges these obligations are termed as the beneficiaries, and the interest of the beneficiary under the settlement is termed in s. 3 as the "beneficial interest". The subject-matter of the trust is called "trust property". The nature of the beneficial interest or the interest of the beneficiary has been described in s. 3 as "his (beneficiary's) right against the trustee as owner of the trust property". The argument of Mr. Joshi is that what a beneficiary gets under the settlement is only a right against the trustee and not any interest in the trust fund. Now, reading s. 3 as a whole, it is clear that the right which the beneficiary gets against the trustee is not a right in air. It is a right in respect of the property which is called the trust property. The right of the beneficiary against the trustee in respect of the trust property is called beneficial interest. It is in law termed as equitable title to the property. It is not possible to hold that the right which a beneficiary gets under the trust is not an interest in the trust property. The fundamental attributes of ownership of property is power or right of transfer and right to possess and enjoy property and/or its income. The trustee has no power to transfer trust property for his benefit, nor can he enjoy the trust property for his benefit. He undoubtedly possesses the trust property, but the possession is for the benefit of others, the beneficiaries. The trust thus is merely a means or a vehicle by which a donor passes on his interest in the trust property to the beneficiaries. In effect, a trust is a gift of trust property or an interest therein to the beneficiaries. Mr. Joshi, however, contends that that may be the position under the Trusts Act, but, by reason of the definition of "transfer of property" contained in cl. (xxiv), such is not the position under the Gift-tax Act. Sub-clause (a) of cl. (xxiv) provides that the creation of a trust is transfer of property. A transfer of property is complete when the trust is created. It is not open then to travel to sub-cl. (b) of cl. (xxiv) to see whether by making a trust an interest in the property has also been created by the author of the trust. We see nothing in the language used in cl. (xxiv) so to restrict the operation and legal effect of creation of a trust in favour of the beneficiaries. To accept the contention of Mr. Joshi would lead to unforeseen results. It would virtually amount to denial of the benefit which the Legislature by enacting s. 5 have conferred on a donor. It would mean that the gifts which fall within s. 5 would fall out of s. 5 if made through the instrumentality of a trust. Various types of gifts are, to the extent stated therein, exempted from tax. To illustrate, cl. (vii) provides: "to any relative dependent upon him for support and maintenance...". The section contemplates that a person, who by making a gift of his property makes a provision for support and maintenance of a relative dependent on him, should get certain exemptions from liability to pay tax. A person, who has to provide for maintenance of his minor children, if the construction is accepted, would have to make it otherwise than by trust or settlement. In certain cases, assuming that there are minor children, it would not be possible even to make provision for support and maintenance of these minor children without making a trust. On the construction, a person if he does make provision for support and maintenance of his minor children by creating a trust, invites a liability to tax. Such illustrations could be multiplied by referring to certain other clauses of s. 5, e.g. (iv), (v), (xi), etc. There is no warrant to assume such an intention on the part of the Legislature, specially when making a trust has been taken to be a mode of "transfer of property". In our opinion, therefore, by creating a settlement of date December 22, 1958, the assessee has transferred interest in the trust fund to his wife. There is no dispute that the settlement has been voluntarily made, and there is no consideration in money or money's worth. It would, therefore, be a gift of an interest in the trust property, namely, the trust fund, which was in existence at the time of making of the transfer. Mr. Joshi, however, contends that even if on the view we have taken, it is a

gift, it is not a gift falling under cl. (viii) of s. 5(1). According to him, in order to bring a gift under the said cl. (viii), it must be established that the spouse has a disposing power over the property gifted to him or her. Reliance in support of this argument is placed on sub-s. (3) of s. 5. Sub-section (3) provides that

"Notwithstanding anything contained in sub-section (1) or sub-section (2), where either spouse makes any gifts out of any such gifts received by the spouse as fall within clause (viii) of sub-section (1), the gifts so made shall be deemed to be taxable gifts made by that spouse and nothing contained in sub-section (1) or sub-section (2) shall apply in relation to any such gifts."

It is difficult to read the said sub-section as limiting the operation of cl. (viii) of s. 5(1), or as a proviso to cl. (viii) taking out of it certain gifts which fairly fall under cl. (viii). Sub-section (3) is a provision relating to subsequent gifts of the gifted property. All that has been stated in this sub-section is that a spouse after getting a property by way of a gift, if makes another gift of the same property, he or she would not be entitled to get any exemption provided for either in sub-s. (1) or sub-s. (2) of s. 5. That does not mean that for a gift to fall under cl. (viii), it must be one in respect of which the donor's spouse should necessarily have capacity to dispose it off. Mr. Joshi, in the alternative, argued that unless the spouse is the only donee of the gift, the gift does not fall under cl. (viii). Here the donees are more than one. The settlement deed provides that the wife Indumati is entitled to the interest and income of the trust fund during her life time. Thereafter the property is to go to his children and others as provided for in the trust deed. The wife is not the only donee. There are other donees also. A gift to the spouse under the settlement deed, therefore, does not fall under cl. (viii). Again, we are unable to read any such proviso to the said cl. (viii). All that is provided in the clause is that if there is a gift in favour of the spouse, then to the extent of the gift not exceeding Rs. 1 lakh, the assessee is entitled to an exemption. Further, in our opinion, having regard to the terms of the settlement-deed, there is no joint donee along with the spouse Indumati in the year of assessment. The interest whatever the children and others have in the trust property is a contingent beneficial interest which would come into existence on the happening of the event, namely, the death of Indumati. There had been no transfer of interest as such *in presenti* in favour of these persons in the year of assessment. In our judgment, therefore, the assessee is entitled to an exemption under s. 5(1)(viii) to the extent of the value of the gift involved in the settlement to his spouse. The manner or the mode of ascertaining the value of a gift is provided in s. 6 and the rules framed under sub-s. (3) of s. 6 of the Act.

In the result, our answer to the question re-framed is that on the facts and in the circumstances of the case, the assessee is entitled to the exemption under s. 5(1)(viii) of the Gift-tax Act to the extent of the value of the gift to the spouse as may be ascertained in accordance with the provisions of law. No order as to costs.

Answer accordingly.

Before Mr. Justice Tambe and Mr. Justice V. S. Desai

THE COMMISSIONER OF GIFT-TAX, BOMBAY CITY I

v.

YOGENDRA N. MAFATLAL.*

Gift-tax Act (XVIII of 1958), Sec. 5(1)(v)—Initial gifts made for constituting fund for charitable purposes—Whether such gifts entitled to exemption—Indian Income-tax Act (XI of 1922), Sec. 12B.

Under s. 5(1)(v) of the Gift Tax Act, 1958, the initial gifts which are made for the purpose of starting or constituting a fund for the charitable purposes of the kinds specified in the section will be entitled to exemption under it in the same manner in which the subsequent gifts to the fund will be.

THE facts are stated in the judgment.

G. N. Joshi, with *R. J. Joshi*, for the applicant.

N. A. Palkhivala, with *F. N. Kaka*, for the respondents.

V. S. DESAI J. The assessee concerned in this reference had executed trust deeds constituting charitable funds in respect of certain shares possessed by them. The question, which arises for consideration, is:

"Whether the assessee is entitled to exemption under Sec. 5(1)(v) of the Gift Tax Act for the value of the shares transferred as aforesaid."

The Tribunal has held that the assessee was entitled to exemption as claimed by them and the reference has been made at the instance of the Department under s. 26(1) of the Gift-tax Act.

One of the two assessee had executed a trust-deed on March 26, 1959 settling on trust 5 ordinary shares of the Mafatlal Gagalbhai & Co. Pvt. Ltd., possessed by him, for the creation of a trust called "Shri Yogendra Navinchandra Mafatlal and Smt. Madhuri Yogendra Mafatlal Trust", and the shares settled under this trust were to constitute the trust fund. In the preamble of the trust-deed it was stated:

"And whereas the Settlers are desirous of settling the said shares on trust for public charitable purposes as hereinafter expressed or contained in these presents and have in pursuance of such desire prior to the execution of these presents delivered the share certificates and duly executed transfer-forms in respect of the said shares to the Trustees." Clause 1 of the trust deed thereafter stated:

"In pursuance of the said desire and for carrying out such desire into effect the Settlers respectively do hereby grant transfer and assign unto the Trustees all those respective shares particularly described in the Schedule hereunder written AND ALL the respective estate right title and interest claim and demand of the Settlers respectively into upon or out of the said shares TO HAVE AND TO HOLD the said shares unto and to the use of the Trustees but upon and subject to the Trusts powers and provisions hereinafter declared and expressed of and concerning the same."

The other assessee had similarly executed a trust-deed on June 21, 1958, settling 500 ordinary shares on trust for the constitution and creation of a charitable trust fund to be known as "Shardaben Bhagubhai Mafatlal Public Charitable Trust". The said trust-deed also contained identical recitals in the preamble and clause (1) thereof as in the other trust-deed. After the first trust fund was constituted on March 26, 1959, the assessee made another gift of 177 ordinary shares to the Fund on March 28, 1959. In the gift-tax assessment of the first assessee for the assessment year 1959-60, the assessee claimed exemption for the value of all the 182 shares, which had been donated by him, viz. the initial five shares donated at the time of the creation of the trust fund and the subsequent 177 shares donated to the trust two days later. In the assessment of the other assessee, she claimed exemption for the value of the 500

*Decided, February 12, 1965. Gift Tax Reference No 2 of 1962.

shares, which she had gifted under the trust-deed for the creation of the fund. In the case of the first assessee, the Gift-tax Officer was willing to allow him exemption in respect of the value of 177 shares, which were donated to the trust after the creation of the trust fund, because, according to him, this gift of 177 shares qualified for exemption under s. 5(I)(v) of the Gift-tax Act as being a gift to a fund established for a charitable purpose, to which the provisions of s. 15B of the Income-tax Act applied. In respect of the initial gift of 5 shares, he was of the opinion that the assessee was not entitled to exemption: his view being that the gift in respect of the said shares had been completed and tax attracted to it even before the execution of the trust or the creation of the fund for a charitable purpose. Secondly, according to him, the gift contemplated under s. 5(I)(v) was a gift to a charitable fund after the fund had been created and brought into existence. In the present case the gift was made first and the fund was created subsequently as a result of the gift, and the assessee, therefore, was not entitled to any exemption in respect of the value of the 5 shares initially gifted by him. Thirdly, according to him, it is only where a gift is made to an existing charity, fund or institution, which possesses the qualifications specified in s. 15B of the Income-tax Act that it is exempted from gift-tax. In the present case, the gift is not to any such fund, which was already there in existence to receive it and it would not, therefore, qualify for exemption from tax. He, accordingly, disallowed exemption in respect of the value of the initial 5 shares settled in trust by the first assessee. For the same reasons he disallowed exemption in respect of the value of the 500 shares donated by the second assessee under the trust-deed executed by her. In the appeals to the Appellate Assistant Commissioner against the decision of the Gift Tax Officer in their respective assessment orders, the Appellate Assistant Commissioner held that there was a gift to a fund established for a charitable purpose, which would be covered by the provisions of s. 5(I)(v) and would, therefore, be entitled to exemption from gift tax. He, accordingly, allowed the appeals of the assessee and modified the orders passed by the Gift Tax Officer. In the appeals preferred by the Department against the decision and orders of the Appellate Assistant Commissioner, the Appellate Tribunal upheld the orders passed by the Appellate Assistant Commissioner and dismissed the appeals, holding that although the formation of the trust fund and the transfers of the shares to the trust fund were actually coterminous, the transfers of the shares must be taken to have been received by the trust fund after it came into existence and consequently the gifts under the trust deeds were gifts to a charitable fund so as to qualify for exemption under s. 5(I)(v) of the Gift-tax Act. Thereafter at the instance of the Department, it has drawn up a Statement of the Case and referred the question arising out of its order, which we have already stated earlier.

Mr. Joshi, the learned counsel, who appears for the Department, has argued that a gift, which is entitled to exemption under s. 5(I)(v), must be a gift to a fund for a charitable purpose, which is already established and in existence at the point of time when the gift is made. It must be a gift to a fund and, therefore, the fund must be already there to receive it. A gift, which is made not to a fund already existing, but which by the gift itself is brought into existence, cannot be said to be a gift to a fund and would not, therefore, qualify for the exemption under s. 5(I)(v) of the Gift-tax Act. He points out that the scheme of the Gift-tax Act allowing exemption from tax in respect of gifts and donations made out of the property of the assessee for charitable purposes is the same as under the Income-tax Act for exemption of income-tax for donations and gifts of income made for such purposes. Even under the Indian Income-tax Act, donations and gifts of incomes made for charitable purposes or for the purpose of founding charities or charitable purposes are not exempted. It is only gifts or donations, which are made to institutions or funds, which satisfy the requirements of s. 15B of the Indian Income-tax Act that are exempted. The same is the position under the Gift-tax Act and it is only

gifts or donations, which are made to institutions or funds to which the provisions of s. 15B of the Income-tax Act apply that are permitted exemption from gift-tax. An examination of the provisions of the trust-deeds in the present case will show, says Mr. Joshi, that the shares settled under the said trust-deeds constitute or create the charitable trust fund and are not gifts made to a charitable fund. According to Mr. Joshi, therefore, the Appellate Assistant Commissioner and the Tribunal have erred in allowing exemption to the assessee in respect of the value of the shares transferred by them under their respective trust deeds.

The main question that is involved in the present case is what, on a proper construction, is the nature and scope of the exemption allowed under s. 5(I)(v) of the Gift-tax Act, and that would depend upon what is meant by a gift to any institution or fund established for a charitable purpose, to which the provisions of s. 15B of the Indian Income-tax Act apply. "Gift" as defined in s. 2(xii) of the Gift-tax Act means the transfer by one person to another of any existing movable or immovable property made voluntarily and without consideration in money or money's worth. "Property" under s. 2(xxii) includes any interest in property, movable or immovable and under s. 2(xxiv) "transfer of property" means any disposition, conveyance, assignment, settlement, delivery, payment or other alienation of property, and includes amongst other things, the creation of a trust in property. The settling in trust of a fund as a charitable fund would be the creation of a trust in property and would, therefore, amount to transfer of property. There would, therefore, be a gift within the meaning of the Gift-tax Act if there is a creation of trust in property for a charitable purpose. There can, therefore, be no doubt whatsoever that there has been a gift under the respective trust-deeds within the meaning of the Gift-tax Act. The further question to be considered is whether this is a gift to a fund established for a charitable purpose.

Now, it seems to us that if the creation of a trust in property for a charitable purpose is a gift for a charitable purpose and if the gift is so made under the trust-deed as to belong to a charitable fund, which was created under the trust-deed for a charitable purpose, the gift could be said to be made to a fund for charitable purpose within the meaning of s. 5(I)(v) of the Act.

Mr. Joshi argues that in order to satisfy the provision of s. 5(I)(v) the fund must be already in existence at the point of time when the gift is made. The gift, which starts the fund itself, cannot be said to be made to a fund, which is already established and in existence. In other words, what the section has intended, according to Mr. Joshi, is that the initial gift, which starts the fund, is not exempted but a gift, which is made the very next moment, after the initial gift has been made and all subsequent gifts, will be entitled to exemption. In other words, the person, who conceives of the idea of a charitable fund and starts it by his initial payment, is not entitled to exemption for his donation while all others, who come in subsequently and augment the fund are given exemption by the statute.

We find it difficult to understand why the Legislature should have looked upon with disfavour the founder of the fund and disentitle him to exemption, which is allowed to others, who donate to the fund. Mr. Joshi says that it is not necessary to look into why the Legislature has made a certain provision. What has got to be considered is what the provision made by the Legislature is and to give effect to it. If there can be no doubt about what the Legislature has intended and the language, which the Legislature has used is so clear as to leave no manner of doubt about its meaning, what Mr. Joshi says is undoubtedly right. When, however, the language used by the Legislature is capable of more than one interpretation, it would be relevant to consider if one of the constructions suggested leads to a curious or strange result, as to whether any good reason can be found why the Legislature should have intended that result. In the absence of any such good reason which can be suggested, the con-

struction which avoids curious or strange results will have to be accepted in preference to the other which yields such results.

Now, it seems to us that the intention of the Legislature is to allow exemption in respect of gifts made to institutions or funds, which satisfy certain qualifications, which are laid down in s. 15B of the Indian Income-tax Act. In view of that intention it would be reasonable to hold that all gifts made to such institutions or funds, are intended to be exempted irrespective of whether any of the said gifts are the initial gifts for starting the fund or the institution or whether they are made subsequent to the starting or establishment of the institution or fund. It may be worthy to note that the language used in s. 5(I) (v) is "to any institution or fund established for a charitable purpose" and not "to any institution or fund, which has been established..." The interpretation, which Mr. Joshi wants to put upon it, is that "any institution or fund established" must mean "any institution or fund, which has been established". It is possible to construe the expression "any institution or fund established for a charitable purpose" as meaning any institution or fund, which has for its objects charitable purposes and a gift made to such an institution or to a fund at its very starting can reasonably be regarded as a gift made to an institution or fund established for a charitable purpose within the meaning of the Act.

In our opinion, the language of s. 5(I)(v) of the Gift-tax Act need not be restricted so as to cover gifts made to an institution or fund subsequent to its being established and not include those that are given at the very inception or commencement of the institution or fund. It may be pointed out that a gift when it is made to a charitable fund adds to it and becomes part of it. The very initial gift by which the fund starts constitutes the part, to which the further gifts are added. All gifts together form the fund, which is augmented by them. If the subsequent gifts, which are parts of the fund itself, are gifts to the fund, the initial gift, which starts the fund itself, could as well be a gift to the fund. Even if we were to take the view that a gift to be exempted under s. 5(I)(v) of the Gift-tax Act must be made to a fund after it has come into existence, the trust-deeds in the present case could be regarded as constituting the fund in the sense of a receptacle in which the donations go and donating the gifts to them. In our opinion, therefore, the initial gifts made under the respective trust-deeds by the assessee in the present case were rightly held by the Appellate Assistant Commissioner and the Appellate Tribunal as entitled to exemption.

Mr. Joshi has argued that the scheme for exemption of gift tax under the Gift-tax Act is the same as for exemption from income-tax under the Indian Income-tax Act so far as gifts or donations to charities are concerned. He has, therefore, invited our attention to s. 15B of the Indian Income-tax Act and has urged that having regard to the provisions of that section there can be no doubt whatsoever that the initial gifts made out of income for the purpose of constituting or creating charitable funds would not be entitled to exemption from gift-tax.

We do not want to consider what would be the position under the Indian Income-tax Act, though we are by no means satisfied that the provisions of that section are even *prima facie* so clear that under the Indian Income-tax Act no exemption of gifts of income for the creation or constitution of a charitable fund will ever be allowed. We do not, however, wish to go into the position under the Indian Income-tax Act in the present case. We are here concerned with the provisions of the Gift-tax Act, and having regard to the definitions of the words "gift", "property" and "transfer of property" under the Gift-tax Act and the provision of s. 5(I)(v), which allows exemption in respect of gifts to charitable institutions or funds, we are of the opinion that under s. 5(I)(v) of the Gift-tax Act, the initial gifts, which are made for the pur-

pose of starting or constituting a fund for the charitable purposes of the kinds specified in s. 5(1)(v) of the Gift-tax Act would be entitled to exemption under the said provision in the same manner in which the subsequent gifts to the fund would be.

In the result, therefore, our answer to the question referred to us is in the affirmative. The Department will pay the costs of the assesseees.

Answer accordingly.

Before Mr. Justice Tambe and Mr. Justice V. S. Desai

THE COMMISSIONER OF GIFT TAX, POONA

v.

HIS HIGHNESS SIR SAHAJI THE CHHATRAPATI
MAHARAJSAHEB OF KOLHAPUR.*

Gift-tax Act (XVIII of 1958), Sec. 5(1)(vi)—Indian Income-tax Act (XI of 1922), Sec. 4(3), 15B—Wealth-tax Act (XXVII of 1957), Sec. 5(1)—Expenditure-tax Act (XXIX of 1957), Sec. 5(m)—“Charitable purpose” in s. 5(1) (vi) of Gift-tax Act whether includes “religious purpose”—Construction of statute—Omission of words in later Act which were superfluous in earlier Act—Whether such omission indicative of change of intention.

The expression “charitable purpose” in s. 5(1) (vi) of the Gift Tax Act, 1958, includes “religious purpose”.

Presumption as to the change of intention on the part of the Legislature on account of the variation in language between an earlier Act and a later Act is of the slightest weight especially when the omission of certain words in the later Act is of words, which were more or less superfluous in the earlier Act. In such cases the omission of words cannot necessarily be said to be indicative of a change of intention on the part of the Legislature. It is equally possible that a draftsman of a later Act may omit the unnecessary words.

The facts are stated in the judgment.

G. N. Joshi, with R. J. Joshi, for the applicant.

N. A. Palkhivala, with B. A. Palkhivala and S. B. Mujumdar, for the respondent.

TAMBE J. At the instance of the Commissioner of Gift Tax, this reference has been made under sub-s. (1) of s. 26 of the Gift-tax Act (hereinafter referred to as the Act). The assessee before us is His Highness Sir Shahaji the Chhatrapati Maharajasaheb of Kolhapur. The assessment year with which we are concerned is 1958-59: the relevant previous year being one commencing from April 1, 1957 and ending with March 31, 1958, and the question to be considered is:

“Whether on the facts and in the circumstances of this case the gifts amounting to Rs. 3,30,000 are exempt from Gift-tax within the meaning of section 5(1) (vi) (a) of the Gift-tax Act?”

The assessee executed a settlement on January 1, 1956, setting apart certain agricultural lands valued at Rs. 5 lakhs in trust. The income of this property was to be utilised in the manner indicated in the said deed. The deed mentions that there are several public temples in the States of Bombay and Hyderabad for the upkeep and maintenance of which the assessee had been for several years contributing. The assessee was desirous of making and declaring a religious and charitable trust in respect of the said lands and giving the trustees

*Decided, February 12/15, 1965. Gift Tax Reference No. 3 of 1962.

certain directions. Clause (3) of the Trust Deed shows that the income was, *inter alia*, to be utilised:

(1) for the upkeep and maintenance of the public temples mentioned in the Schedule including the expenses of the repair and the maintenance of the temple buildings;

(2) for the expenses of the repair and replacement of any ornaments and utensils and other articles required for the said temples;

(3) for the expenses in respect of the maintenance of the Nagarkhana attached to the temples;

(4) for the payment of rates and taxes and other outgoings in respect of the temples and the temple buildings;

(5) for the expenses in respect of the performance of pujas and other ceremonies, and

(6) for the expenses of the performance of temple festivals (utsavs) and the salaries of the priests and the payment of dakshinas to Purohits attending religious rites and ceremonies and for other expenses relating to the said temples.

It is not in dispute that the gift made under this settlement is not taxable under the Act, it being one made prior to April 1, 1957.

Now, the assessee later on felt that the income of the properties, which he had already settled and set apart on trust under the aforesaid settlement deed, would not be sufficient to satisfy and fulfil the purposes of the trust. The assessee, therefore, executed further supplementary Trust Deeds on October 1, 1957, settling certain other properties worth Rs. 2 lakhs in trust for carrying out the purposes already mentioned in the said earlier settlement deed of January 18, 1956. A month thereafter, i.e. on November 1, 1957 the assessee further executed a third deed of settlement setting apart certain further properties worth Rs. 1,38,000 in trust as he was desirous of making permanent provision for the up-keep and maintenance of certain newly added properties, which, according to the settlor, were all of religious and historical importance to the settlor as well as to the public as those properties were attached to the Amba Bhavani Chauk in the old Palace and he was desirous of making and declaring a religious charitable trust in respect of those properties newly added. The terms and conditions enumerated in the other two Trust Deeds also were incorporated in this Trust Deed with slight modifications. One of the properties set apart on trust under this Trust Deed of November 1, 1957, was a portion of the old palace attached to the Amba Bhavani Chauk in a portion of which Her Highness the Junior Dowager Maharanisahab of Kolhapur was residing.

In respect of this palace certain directions were given in clauses 5 and 6 of the Trust Deed, which need be reproduced for the purposes of this case. This property has been mentioned as Property A in the Schedule attached to the Trust Deed. Clauses 5 and 6 of the Trust Deed of November 1, 1957 read as follows:

(5) "In respect of the property mentioned below as item (A) in the Schedule given below, there is the portion of the Old Palace now in possession of Her Highness the Junior Dowager Maharanisahab of Kolhapur to be enjoyed by her as residence for her lifetime. The right title and interest in this portion is transferred to the trustees by this deed of settlement subject to a condition that the Trustees are to allow to Her Highness the Junior Dowager Maharanisahab of Kolhapur to occupy the same for her life time as residential quarters for Her Highness the Junior Dowager Maharanisahab of Kolhapur; and after her death this portion in her possession will be taken in possession by the Trustees."

(6) "Though the possession of the portion of the property in possession of Her Highness the Junior Dowager Maharanisahab of Kolhapur is postponed for a future period contingent on the death of Her Highness the Junior Dowager Maharanisahab of Kolhapur, still the Trustees are responsible to maintain and keep the same in good order and condition by making suitable repairs and spending for the upkeep and maintenance of the said portion of the property settled on the Trust."

The assessee had also executed a fourth Trust Deed setting apart certain properties in trust for a trust named "Chhatrapati Charitable Aid to the deserving Trust". Under this Trust Deed the assessee had further settled properties valued at Rs. 45,500. The gift made under this fourth Trust Deed was also sought to be brought to tax by the Revenue. The Tribunal, however, held that the assessee was entitled to exemption in respect of the amount gifted under this Trust. The reference which has been made to us does not include this amount, the Department having given up its claim in respect of this Trust at the time of making the Reference. It is, therefore, not necessary to narrate the terms and conditions of this Trust Deed. Now, we are here concerned only with the gifts made under the aforesaid second and third Settlement Deeds of October 1, 1957 and November 1, 1957. It would be noticed that these gifts under the aforesaid Trust Deeds have been made between the period April 1, 1957 and March 31, 1958. At this stage it may be mentioned that the Act came on the statute book on May 15, 1958 and s. 3, which is the charging section, provided:

"Subject to the other provisions contained in this Act, there shall be charged for every financial year commencing on and from the 1st day of April, 1958, a tax (hereinafter referred to as gift-tax) in respect of the gifts, if any, made by a person during the previous year (other than gifts made before the 1st day of April, 1957) at the rate or rates specified in the Schedule".

Under this charging section tax is levied on an assessee in respect of the gifts made by him from and after April 1, 1957. The levy of the tax under the said section is "subject to the other provisions contained in this Act" and s. 5 is the section, which grants exemption in respect of certain gifts. It is not in dispute that the properties settled under these two Deeds constitute a gift within the meaning of the Act but not falling under s. 5(1)(v). The question to be considered is whether the assessee is entitled to exemption under s. 5(1)(vi)(a). That section *inter alia* provides that a gift made for any charitable purpose not falling within cl. (v) at any time before April 1, 1958, will be exempted from the charge to tax. The assessee claimed that the gifts made under the said two Deeds were for a charitable purpose and, therefore, he was entitled to exemption in respect of these two gifts. The Gift Tax Officer took the view that the gifts in respect of which exemptions have been claimed are made for religious purposes and gifts, which are exempted from tax under s. 5(1)(vi)(a) are only those gifts, which are made for charitable purposes. The gifts not being for charitable purposes, the assessee was not entitled to exemption. In this view of the matter, he brought to tax both the gifts of Rs. 2 lakhs and Rs. 1,38,000 made under the aforesaid two settlement deeds. The Appellate Assistant Commissioner also took the view that the objects of the trust were religious and the gifts were for religious purposes. Examining the provisions in certain other enactments he came to the conclusion that the omission of the word "religious" in s. 5(1)(vi) was not accidental but was with a definite purpose of excluding gifts made for religious purposes from the exemption provided in s. 5(1)(vi)(a) and, therefore, the assessee was not entitled to claim any exemption in respect of these two gifts. The Appellate Assistant Commissioner, however, granted a very small relief to the assessee in respect of the gift pertaining to the maintenance of the Nagarkhana provided in the Trust Deed of date October 1, 1957. The Appellate Assistant Commissioner held that the maintenance of Nagarkhana was a charitable purpose and that part of the gift, which related to the maintenance of the Nagarkhana, was, therefore, liable to be exempted. After valuing that part, the Appellate Assistant Commissioner held that the assessee was entitled to exemption to the extent of Rs. 8,000. Thus the Appellate Assistant Commissioner brought to tax gifts amounting to Rs. 3,30,000. The assessee took a further appeal to the Tribunal and the same contentions were reiterated by the parties before it. The Tribunal has written a very elaborate order reviewing both English as well

as Indian cases commencing from *Commissioner for special purposes of Income Tax v. Pemsel*¹ in which the question has been considered as to whether the expression "charitable purposes" includes religious purposes or not. On a review of these authorities the Tribunal came to the conclusion that the expression "charitable purpose" in s. 5(I)(vi) includes "religious purpose". The Tribunal further held that the mention of the word "religious" in some enactments and non-mention of the words "religious purposes" in the said clause made no material difference. In this view of the matter, the Tribunal allowed the appeal and held that the assessee's claim for exemption from gift tax was proper. It may be mentioned here that before the Tribunal it had also been contended on behalf of the Department that in the Trust Deed of November 1, 1957, a direction had been given to the trustees to expend money for the repairs, upkeep and maintenance of the building in possession of Her Highness the Junior Dowager Maharani Sahab of Kolhapur. The said object was not charitable and, therefore, a gift attributable for that object should not be granted exemption in any event. The Tribunal over-ruled this contention taking the view that the building in a portion of which the Dowager Maharani Sahab of Kolhapur was residing, was a trust property and the direction given was only for the purpose of maintenance of the trust property. The object was, therefore, a charitable one. On an application made on behalf of the Department the Tribunal has referred to us the aforesaid question.

Having regard to the arguments advanced before us, it is not necessary to elaborately consider the judicial decisions as to the import of the expression "charitable purpose". It is not in dispute before us that under the Indian law the expression "charitable purpose" is a generic term of a very wide import and scope covering both public charitable as well as religious trusts. It is also not in dispute, save and except to the extent of the gift relating to the repairs of the portion of the palace occupied by the Junior Dowager Maharani Sahab, that the trusts are for religious purposes. On this undisputed position, it is apparent that the said two gifts would be for a charitable purpose and would ordinarily fall within "charitable purpose" as understood in Indian law.

Mr. Joshi, however, contends that the expression "charitable purpose" occurring in s. 5(I)(vi) must be given a restricted meaning. That expression does not include gifts made for religious purposes. The contention is founded on certain provisions in the Income-tax Act, Wealth-tax Act and the Expenditure-tax Act. Mr. Joshi, referring to s. 4(3) of the Income-tax Act, s. 5(I) of the Wealth-tax Act and s. 5(m) of the Expenditure-tax Act, argued that these Acts and the Gift-tax Act are allied Acts enacted with a certain objective. They are all Acts of Central Legislature. Whenever the Legislature has desired to grant exemptions to a tax-payer in respect of his contributions to or expenditure on public religious and charitable institutions, funds or purposes, the Legislature has in express terms said so. In the aforesaid three provisions, the Legislature has used both the terms "religious" and "charitable" purpose. In s. 5(I)(vi) of the Gift-tax Act, however, the words "religious purpose" have been omitted and the only expression used is "charitable purpose". The said omission, according to Mr. Joshi, is deliberate and, therefore, restricted meaning is required to be given to the expression "charitable purpose" and when this expression is so read in a restricted sense, the gifts in question, which are admittedly for public religious purpose, get excluded or fall out of the exemption provided in s. 5(I)(vi)(a) of the Act.

We find it difficult to accept the contention raised by Mr. Joshi. There is no ambiguity in the provisions of the said cl. (vi). The expression "charitable purpose" is a generic term in law and has assumed a definite meaning in Indian law. As already stated that expression is wide enough to include both "charit-

able purpose" as well as "religious purpose". If the Legislature desired to give this well understood term a limited meaning, it would be reasonable to assume that the Legislature would have in express terms said so.

Presumption as to the change of intention on the part of the Legislature on account of the variation in language between the earlier Acts and later Acts is of slightest weight especially when the omission of certain words in the later Act is of words, which were more or less superfluous in the earlier Acts. In such cases the omission of words cannot necessarily be said to be indicative of a change of intention on the part of the Legislature. It is equally possible that a draftsman of a later Act may omit the unnecessary words. It has been observed in Maxwell, 11th edn., p. 317:

"A change of language effected by the omission in the later statute of words which occurred in an earlier one would make no difference in the sense when the omitted words of the earlier enactment were unnecessary."

Here, in certain sections of the earlier enactment, the words used were either "religious charitable purposes" or "public purposes of a charitable or religious nature". In the instant Act the words "religious purpose" have been omitted but the omission has been of unnecessary words only. As stated earlier, the expression "charitable purpose" is wide enough to include public religious purposes also.

Further there is positive indication in the Gift-tax Act itself that the expression "charitable purpose" has been used in a wider sense covering religious purposes and not in a restricted sense as is contended for by Mr. Joshi. Clauses (v) and (vi) (clauses with which we are concerned), are connected clauses. Clause (v) speaks of certain gifts to institutions or funds established for a charitable purpose to which the provisions of s. 15B of the Indian Income-tax Act apply. Sub-clause (a) of cl. (vi) speaks of exemption granted to gifts made for charitable purpose not falling within cl. (v). It would be noticed that exemption in respect of gifts made for charitable purpose falling under cl. (v) is not restricted to any period. The exemption is available all the time. Exemption under sub-cl. (a) of cl. (vi), i.e. relating to gifts made to charitable purpose not falling under cl. (v) is available only when the gift had been made before April 1, 1958. Both clauses speak of gifts to charitable purpose. When cl. (v) is read along with the relevant clause of s. 15B of the Indian Income-tax Act, it leaves no doubt that the expression "charitable purpose" includes religious purpose as well. Sub-section (1) of s. 15B of the Indian Income-tax Act provides:

"The tax shall not be payable by an assessee in respect of any sums paid by him on or after the 1st day of April 1953, as donations to any institution or fund to which this section applies."

Sub-section (2) of s. 15B enumerates the institution or fund to which this section applies. Clause (2) of sub-s. (2) of s. 15B is material for the purposes of this reference. It reads:

15-B. (2) "This section applies to any institution or fund established in the taxable territories for a charitable purpose—

(i) ...

(ii) which is not expressed to be for the benefit of any particular religious community."

It is clear that the donation for religious purpose is not excluded from the expression "charitable purpose".

Turning to the provisions of the earlier Act to which Mr. Joshi had referred us, the first provision that has to be considered is cl. (i) of sub-s. (3) of s. 4 of the Indian Income-tax Act. The sub-section relates to the exclusion of certain income, profits and gains from being included in the total income of the assessee. The material part reads:

(3) "Any income, profits or gains falling within the following classes shall not be included in the total income of the person receiving them:

(i) ...any income derived from property held under trust or other legal obligation wholly for religious or charitable purposes, in so far as such income is applied or accumulated for application to such religious or charitable purposes..."

It is indeed true that in this clause the expression used is "religious or charitable purposes", but the definition clause for the purposes of this section occurring at the end of the section refers only to "charitable purposes". It is in following terms:

"In this sub-section 'charitable purposes' includes relief of the poor, education, medical relief and the advancement of any other object of general public utility, but nothing contained in clause (i) or clause (ii) shall operate to exempt from the provisions of this Act that part of the income from property held under a trust or other legal obligation for private religious purposes which does not enure for the benefit of the public."

The definition is an inclusive definition and is not an exhaustive definition, and the concluding part of the definition itself shows that religious purposes enuring for the benefit of the public is included in the expression "charitable purposes". It would be seen on reading the definition clause and cl. (i) of sub-s. (3) of s. 4 that the expression "charitable purposes" and the expression "religious and charitable purposes" are inter-changeable and used for conveying the same meaning. This is the earliest Taxation Act enacted in the year 1922. The Wealth-tax Act and the Expenditure-tax Act have been enacted in the year 1957. The Gift-tax Act with which we are concerned here, however, was enacted later in the year 1958. It would be reasonable to assume that the Legislature in omitting the words "religious purposes" must have only intended to omit the unnecessary words which occurred in the earlier Acts and as already pointed out there is an indication in the Gift-tax Act itself and when cl. (v) is read there is no doubt that the expression "charitable purpose" has been used in the Act in a wider sense and not in a restricted sense.

Further, if it really be the true position as argued by Mr. Joshi that all these Acts, viz., Income-tax Act, Wealth-tax Act, Expenditure-tax Act and Gift-tax Act are allied Acts enacted with a certain objective, we fail to see why the Legislature would intend to give a restricted meaning to the expression "charitable purpose". Now, when the property is held under a trust or under a legal obligation for religious and charitable purposes its income does not enter "total income". When a donation is given to an institution or fund established for public religious and charitable purpose, the income is exempt from tax. When a property is held under trust or legal obligation relating to any public purpose of a charitable or religious nature it is not liable to be included in the wealth of a person for the purpose of levy of wealth tax. Similarly, if an expenditure is incurred for any public purpose of religious or charitable nature, it is excluded from the expenditure, which attracts tax. We see no reason why a person should not be entitled to exemption from tax in respect of gifts made for public religious and charitable purposes. In our judgment, therefore, the contention advanced on behalf of the Revenue should fail. In our judgment, therefore, the Tribunal was not in error in taking the view it has taken as to the interpretation of the expression "charitable purpose".

The other contention raised on behalf of the Revenue is that at any rate that part of the gift, which relates to the repairs of that part of the property, in which the Junior Dowager Maharanisahab of Kolhapur is given a right of residence for her lifetime, is not a gift for a religious purpose. The contention, in our opinion, has a little force. We have already referred to this clause in the Gift Deed of November 1, 1957. The material clauses already reproduced are clauses 5 and 6 therein and they relate to a portion of the property mentioned in clause A of the Schedule. It would be seen that the entire property mentioned in Clause A has been settled on trust and the portion in which the Maharanisahab of Kolhapur is staying is also a trust property. Maharanisahab has been given only a right of residence in that portion of the trust property for her lifetime. The trustees have been given a direction to take possession of that portion of the property on the death of the Maharanisahab

for the purposes of the trust. It being a trust property, it was incumbent on the trustees to maintain this property in good repair in the interest of the trust. Lest the trustees may think that there was no obligation on them to keep in good order that part of the property in which the Junior Dowager Maharani-saheb of Kolhapur was staying, the direction appears to have been given in clause (6) of the Trust Deed. In the circumstances it is not possible to accept this contention raised on behalf of the Revenue. In our opinion, therefore, the Tribunal also was right in not accepting this contention of the Revenue.

In the result, our answer to the question referred to us is in the affirmative. The Commissioner shall pay the costs of the assessee.

Answer accordingly.

SUPREME COURT.

*Present: Mr. Justice Raghubar Dayal, Mr. Justice J. R. Mudholkar and
Mr. Justice V. Ramaswami.*

BHAURAO SHANKAR LOKHANDE

v.

THE STATE OF MAHARASHTRA.*

Hindu Marriage Act (XXV of 1955), Secs. 17, 3(a)—Indian Penal Code (XLV of 1860), Secs. 494, 495—"Solemnized", meaning of word in s. 17.

It is essential for the purpose of s. 17 of the Hindu Marriage Act, 1955, that the marriage to which s. 494 of the Indian Penal Code, 1860, applies on account of the provisions of the Act, should have been celebrated with proper ceremonies and in due form. Merely going through certain ceremonies with the intention that the parties be taken to be married, will not make the ceremonies prescribed by law or approved by any established custom.

THE facts appear in the judgment.

S. G. Patwardhan, with M. S. Gupta, for the appellants.

Dr. W. S. Barlingay, with B. R. G. K. Achar, for R. H. Dhebar, for respondent No. 1.

RAGHUBAR DAYAL J. Bhaurao Shankar Lokhande, appellant No. 1, was married to the complainant Indubai in about 1956. He married Kamlabai in February 1962, during the lifetime of Indubai. Deorao Shankar Lokhande, appellant No. 2, is the brother of appellant No. 1. These two appellants, together with Kamlabai and her father and accused No. 5, a barber, were tried for an offence under s. 494, Indian Penal Code. The latter three were acquitted by the Magistrate. Appellant No. 1 was convicted under s. 494, Indian Penal Code and appellant No. 2 for an offence under s. 494 read with s. 114, Indian Penal Code. Their appeal to the Sessions Judge was dismissed. Their revision to the High Court also failed. They have preferred this appeal by special leave.

The only contention raised for the appellants is that in law it was necessary for the prosecution to establish that the alleged second marriage of appellant No. 1 with Kamlabai in 1962 had been duly performed in accordance with the religious rites applicable to the form of marriage gone through. It is urged for the appellants that the essential ceremonies for a valid marriage were not performed during the proceedings which took place when appellant No. 1 and Kamlabai married each other. On behalf of the State it is urged that the proceedings of that marriage were in accordance with the custom prevalent in the community of the appellant for Gandharva form of marriage and

*Decided, February 1, 1965. Criminal Appeal No. 178 of 1963.

that, therefore, the second marriage of appellant No. 1 with Kamlabai was a valid marriage. It is also urged for the State that it is not necessary for the commission of the offence under s. 494, Indian Penal Code that the second marriage be a valid one and that a person going through any form of marriage during the life time of the first wife would commit the offence under s. 494, Indian Penal Code, even if the later marriage be void according to the law applicable to that person.

Section 494 Indian Penal Code reads:

"Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

Prima facie, the expression 'whoever... marries' must mean 'whoever... marries validly' or 'whoever... marries and whose marriage is a valid one.' If the marriage is not a valid one, according to the law applicable to the parties, no question of its being void by reason of its taking place during the life of the husband or wife of the person marrying arises. If the marriage is not a valid marriage, it is no marriage in the eye of law. The bare fact of a man and a woman living as husband and wife does not, at any rate, normally give them the status of husband and wife even though they may hold themselves out before society as husband and wife and the society treats them as husband and wife.

Apart from these considerations, there is nothing in the Hindu law, as applicable to marriages till the enactment of the Hindu Marriage Act of 1955, which made a second marriage of a male Hindu, during the life time of his previous wife, void. Section 5 of the Hindu Marriage Act provides that a marriage may be solemnized between any two Hindus if the conditions mentioned in that section are fulfilled and one of those conditions is that neither party has a spouse living at the time of the marriage. Section 17 provides that any marriage between two Hindus solemnized after the commencement of the Act is void if at the date of such marriage either party had a husband or wife living, and that the provisions of ss. 494 and 495, Indian Penal Code, shall apply accordingly. The marriage between two Hindus is void in view of s. 17 if two conditions are satisfied: (i) the marriage is solemnized after the commencement of the Act; (ii) at the date of such marriage, either party had a spouse living. If the marriage which took place between the appellant and Kamlabai in February 1962 cannot be said to be 'solemnized', that marriage will not be void by virtue of s. 17 of the Act and s. 494, Indian Penal Code, will not apply to such parties to the marriage as had a spouse living.

The word 'solemnize' means, in connection with a marriage, 'to celebrate the marriage with proper ceremonies and in due form', according to the Shorter Oxford Dictionary. It follows, therefore, that unless the marriage is 'celebrated or performed with proper ceremonies and due form' it cannot be said to be 'solemnized'. It is, therefore, essential, for the purpose of s. 17 of the Act, that the marriage to which s. 494, Indian Penal Code, applies on account of the provisions of the Act, should have been celebrated with proper ceremonies and in due form. Merely going through certain ceremonies with the intention that the parties be taken to be married, will not make the ceremonies prescribed by law or approved by any established custom.

We are of opinion that unless the marriage which took place between appellant No. 1 and Kamlabai in February 1962 was performed in accordance with the requirements of the law applicable to a marriage between the parties, the marriage cannot be said to have been 'solemnized' and therefore appellant No. 1 cannot be held to have committed the offence under s. 494, Indian Penal Code.

We may now determine what the essential ceremonies for a valid marriage between the parties are. It is alleged for the respondent that the marriage

between appellant No. 1 and Kamlabai was in 'gandharva' form, as modified by the custom prevailing among the Maharashtrians. It is noted in Mulla's Hindu Law, 12th ed. at p. 605:

"...The Gandharva marriage is the voluntary union of a youth and a damsel which springs from desire and sensual inclination. It has at times been erroneously described as an euphemism for concubinage. This view is based on a total misconception of the leading texts of the Smritis. It may be noted that the essential marriage ceremonies are as much a requisite part of this form of marriage as of any other unless it is shown that some modification of those ceremonies has been introduced by custom in any particular community or caste."

At p. 615 is stated:

"(1) There are two ceremonies essential to the validity of a marriage, whether the marriage be in the Brahma form or the Asura form, namely—

(1) invocation before the sacred fire, and

(2) saptapadi, that is, the taking of seven steps by the bridegroom and the bride jointly before the sacred fire.

(2) A marriage may be completed by the performance of ceremonies other than those referred to in sub-section (1), where it is allowed by the custom of the caste to which the parties belong."

It is not disputed that these two essential ceremonies were not performed when appellant No. 1 married Kamlabai in February 1962. There is no evidence on record to establish that the performance of these two essential ceremonies has been abrogated by the custom prevalent in their community. In fact, the prosecution led no evidence as to what the custom was. It led evidence of what was performed at the time of the alleged marriage. It was the counsel for the accused in the case who questioned certain witnesses about the performance of certain ceremonies and to such questions the witnesses replied that they were not necessary for the 'gandharva' form of marriage in their community. Such a statement does not mean that the custom of the community deemed what took place at the 'marriage' of appellant No. 1 and Kamlabai, sufficient for a valid marriage and that the performance of the two essential ceremonies had been abrogated. There ought to have been definite evidence to establish that the custom prevalent in the community had abrogated these ceremonies for such form of marriage.

What took place that night when appellant No. 1 married Kamlabai, has been stated thus, by P.W. 1:

"The marriage took place at 10 P.M. Pat—wooden sheets—were brought. A carpet was spread. Accused No. 1 then sat on the wooden sheet. On the other sheet accused No. 3 sat. She was sitting nearby accused No. 1. Accused No. 4 then performed some Puja by bringing a Tambya—pitcher. Betel leaves and cocoanut was kept on the Tambya. Two garlands were brought. Accused No. 2 was having one and accused No. 4 having one in his hand. Accused No. 4 gave the garland to accused No. 3 and accused No. 2 gave the garland to accused No. 1. Accused Nos. 1 and 3 then garlanded each other. Then they each struck each other's forehead."

In cross-examination this witness stated:

"It is not that Gandharva according to our custom is performed necessarily in a temple. It is also not that a Brahmin Priest is required to perform the Gandharva marriage. No 'Mangala Ashtakas' are required to be chanted at the time of Gandharva marriage. At the time of marriage in question, no Brahmin was called and 'Mangala Ashtakas' were chanted. There is no custom to blow a pipe called 'Bher' in vernacular." Sitaram, witness No. 2 for the complainant, made a similar statement about what happened at the marriage ceremony and further stated, in the examination-in-chief:

"Surpan is the village of accused No. 3's maternal uncle and as the custom is not to perform the ceremony at the house of maternal uncle, so it was performed at another place. There is no custom requiring a Brahmin Priest at the time of Gandharva."

He stated in cross-examination:

"A barber is not required and accused No. 5 was not present at the time of marriage.

There is a custom that the father of girl should make to touch the foreheads of the girl and boy to each other and the Gandharva is completed by the act."

It is urged for the respondent that as the touching of the forehead by the bridegroom and the bride is stated to complete the act of Gandharva marriage, it must be concluded that the ceremonies which, according to this witness, had been performed, were all the ceremonies which, by custom, were necessary for the validity of the marriage. In the absence of a statement by the witness himself that according to custom these ceremonies were the only necessary ceremonies for a valid marriage, we cannot construe the statement that the touching of the foreheads completed the Gandharva form of marriage and that the ceremonies gone through were all the ceremonies required for the validity of the marriage.

Bhagwan, witness No. 3 for the complainant, made no statement about the custom, but stated in cross-examination that it was not necessary for the valid performance of Gandharva marriage in their community that a Brahmin priest was required and *mangal ashtakas* were to be chanted. The statement of Jeebhau, witness No. 4 for the complainant, does not show how the custom has modified the essential forms of marriage. He stated in cross-examination:

"I had witnessed two Gandharvas before this. For the last 5 or 7 years a Brahmin Priest, a Barber and a Thakur is not required to perform the Gandharva but formerly it was essential. Formerly the Brahmin used to chant Mantras and Mangalashtakas. It was necessary to have a maternal uncle or any other person to make touch the foreheads of the sponsors together. A Brahmin from Kasara and Dhadana comes to our village for doing rituals but I do not know their names."

This statement too, does not establish that the two essential ceremonies are no more necessary to be performed, for a Gandharva marriage. The mere fact that they were probably not performed in the two Gandharva marriages Jeebhau had attended, does not establish that their performance is no more necessary according to the custom in that community. Further, Jeebhau has stated that about five or seven years earlier the performance of certain ceremonies which, till then, were essential for the marriage, were given up. If so, the departure from the essentials cannot be said to have become a custom, as contemplated by the Hindu Marriage Act.

Clause (a) of s. 3 of the Act provides that the expressions 'custom' and 'usage' signify any rule which, having been continuously and uniformly observed for a long time, has obtained the force of law among Hindus in any local area, tribe, community, group or family.

We are, therefore, of opinion that the prosecution has failed to establish that the marriage between appellant No. 1 and Kamlabai in February 1962 was performed in accordance with the customary rites as required by s. 7 of the Act. It was certainly not performed in accordance with the essential requirements for a valid marriage under Hindu law.

It follows, therefore, that the marriage between appellant No. 1 and Kamlabai does not come within the expression 'solemnized marriage' occurring in s. 17 of the Act and consequently does not come within the mischief of s. 494, Indian Penal Code, even though the first wife of appellant No. 1 was living when he married Kamlabai in February 1962.

We have not referred to and discussed the cases referred to in support of the contention that the 'subsequent marriage' referred to in s. 494, Indian Penal Code, need not be a valid marriage, as it is unnecessary to consider whether they have been correctly decided, in view of the fact that the marriage of appellant No. 1 with Kamlabai could be a void marriage only if it came within the purview of s. 17 of the Act.

The result is that the conviction of appellant No. 1 under s. 494, Indian Penal Code, and of appellant No. 2 under s. 494 read with s. 114, Indian Penal Code, cannot be sustained. We, therefore, allow their appeal, set aside their convictions and acquit them. The bail bonds of appellant No. 1 will stand discharged. Fines, if paid, will be refunded.

Appeal allowed.

Present: The Hon'ble Mr. P. B. Gajendragadkar, Chief Justice, Mr. Justice M. Hidayatullah, Mr. Justice J. C. Shah and Mr. Justice S. M. Sikri.

THE BOMBAY MUNICIPAL CORPORATION

v.

DHONDU NARAYAN CHOWDHARY.*

Bombay Municipal Corporation Act (Bom. III of 1888), Sec. 68—Control envisaged in s. 68—Nature of.

The control envisaged in s. 68 of the Bombay Municipal Corporation Act, 1888, is not control over the decision as such of the delegate but over the administrative aspects of cases and their disposal. The administrative side of the delegate's duties are the subject of control and revision by the Commissioner (e.g. the kinds of cases in which the delegate could take action or the period or time during which the power might be exercised) but not the essential power of the delegate to decide whether to take action or not in a particular case.

THE facts appear in the judgment.

M. C. Setalvad, with *J. B. Dadachanji*, *O. C. Mathur* and *Ravinder Narain*, for the appellant.

Dr. B. K. Bhattacharjee, with *S. N. Mukherjee*, for the respondent.

HIDAYATULLAH J. In this appeal by special leave against the judgment and order of the Principal Judge, City Civil Court, Bombay dated February 14, 1964, the only question is whether the delegation by the Commissioner, Municipal Corporation, of his functions under ss. 105B to 105E to certain officers of the Corporation was valid and proper. This question arises in the following circumstances: One Govind Hari was a monthly tenant of room No. 23 of a *chawl* at Chandanwadi. After his death in 1961 the tenancy devolved on his widow Anusuyabai, who took in a boarder. The *chawl* belonged to the Municipal Corporation and proceedings were taken to eject Anusuyabai and the boarder under Chap. VI-A of the Municipal Corporation Act. These proceedings were initiated by one of the officers to whom the powers of the Commissioner were delegated by him under s. 68 of the Act. After due enquiry the officer passed an order evicting these persons. An appeal was filed under s. 105F of the Act before the Bombay City Civil Court. In that appeal it was held that the delegation was not proper inasmuch as the judicial functions of the Commissioner under ss. 105B to 105E had been delegated to be exercised under the Commissioner's control and subject to his revision. The learned Judge pointed out that judicial or quasi-judicial power could not ordinarily be delegated and, in any event, it could not be delegated so that the control over the decision was kept by the Commissioner. He, therefore, held that the officer who had passed the order was not properly invested with jurisdiction and the order was thus a nullity.

The Bombay Municipal Corporation Act is an Act of 1888 and it has been amended frequently. Section 68 is one of the original sections and it provides as follows:

"68. *Municipal officers may be empowered to exercise certain of the powers, etc. of the Commissioner.*—

(1) Any of the powers, duties or functions conferred or imposed upon or vested in the Commissioner by any of the sections, sub-sections or clauses mentioned in sub-section (2) may be exercised, performed or discharged, under the Commissioner's control and subject to his revision and to such conditions and limitations, if any, as he shall think fit to prescribe, by any municipal officer whom the Commissioner generally or specially either by name or by virtue of office, empowers in writing in this behalf; and in each of the said sections, sub-sections and clauses the word 'Commissioner' shall, to

*Decided, February 8, 1965. Civil Appeal No. 865 of 1964.

the extent to which any municipal officer is so empowered, be deemed to include such officer.

(2) The sections, sub-sections and clauses of this Act referred to in sub-section (1) are the following namely:—...

Section 105B.

Section 105C.

Section 105D.

Section 105E."

A reference to ss. 105B, 105C, 105D and 105E was inserted by the Maharashtra Act XIV of 1961. These sections are in Chapter 6A which was also newly added by the same Act. It is not necessary to refer to these sections, except a portion from s. 105B which brings into prominence the action taken by the Corporation against the respondents:

"105B. Power to evict person from corporation premises.—

(1) Where the Commissioner is satisfied—

(a) that the person authorised to occupy any corporation premises has, whether before or after the commencement of the Bombay Municipal Corporation (Amendment) Act, 1960,—

(i) ...

(ii) sub-let, contrary to the terms or conditions of his occupation, the whole or any part of such premises; or...

the Commissioner may, notwithstanding anything contained in any law for the time being in force, by notice... order that that person, as well as any other person who may be in occupation of the whole or any part of the premises, shall vacate them within one month of the date of the service of the notice."

It will be noticed that s. 68 was originally intended to cover very different matters because Chapter 6A could not have been in contemplation. When Chapter 6A was added and a reference to ss. 105B to 105E was included in s. 68, the wording of that section became applicable to the powers exercisable under ss. 105B to 105E, even though that wording, taken literally, is somewhat inapt to cover delegation of judicial power.

No question has been raised that any of the amendments is *ultra vires* so the words of s. 68 must be reasonably construed. It goes without saying that judicial power cannot ordinarily be delegated unless the law expressly or by clear implication permits it. In the present case the amendment of s. 68 by inclusion of delegation of the functions of the Commissioner under ss. 105B to 105E does indicate the intention that the judicial or quasi-judicial powers contained in Chap. VIA were expressly intended to be delegated. To the delegation as such there can be no objection. What is objected to is the provision, both in the section as well as in the order of delegation, that the exercise of the function is to be under "the Commissioner's control" and "subject to his revision". These words are really appropriate to a delegation of administrative functions where the control may be deeper than in judicial matters. In respect of judicial or quasi-judicial functions these words cannot of course bear the meaning which they bear in the delegation of administrative functions. When the Commissioner stated that his functions were delegated subject to his control and revision it did not mean that he reserved to himself the right to intervene to impose his own decision upon his delegate. What those words meant was that the Commissioner could control the exercise administratively as to the kinds of cases in which the delegate could take action or the period or time during which the power might be exercised and so on and so forth. In other words, the administrative side of the delegate's duties were to be the subject of control and revision but not the essential power to decide whether to take action or not in a particular case. This is also the intention of s. 68 as interpreted in the context of the several delegated powers. This is apparent from the fact that the order of the delegate amounts to an order by the Commissioner and is appealable as such. If it were not so the appeal to the Bombay City

Civil Court would be incompetent and the order could not be assailed. The order of the delegate was the order of the Commissioner and the control envisaged both in s. 68 and the order of delegation was not control over the decision as such but over the administrative aspects of cases and their disposal. No allegation has been made that the Commissioner intervened in the decision of the case or improperly influenced it. In these circumstances, the order impugned in the appeal cannot be sustained.

We allow the appeal and set aside the order of the Bombay City Civil Court and restore the order of the officer who exercised powers under s. 105B of the Act, but make no order about costs.

Appeal allowed.

Present: The Hon'ble Mr. P. B. Gajendragadkar, Chief Justice, Mr. Justice K. N. Wanchoo and Mr. Justice S. M. Sikri.

LOTUS LINE PRIVATE LTD. v. THE STATE OF MAHARASHTRA.*

Damages—Measure of,—Damage to person's property—Whether person entitled to compensation or restitution.

A person to whom a wrong is done is entitled to full compensation for restoring the thing damaged to its original condition. This applies equally to a private person as to a corporation or trustee. If this is called restitution, the corporation as well as a private person would be entitled to it, but if by restitution is meant complete reconstruction irrespective of the damage done, then neither a private person nor a corporation or a trustee is entitled to complete reconstruction irrespective of the damage done.

Wednesbury Corporation v. The Lodge Holes Colliery Company Limited,¹ explained and applied.

The Lodge Holes Colliery Company Limited v. Mayor of Wednesbury,² referred to.

THE facts appear in the judgment.

Purushottam Tricanddas, with *J. B. Dadachanji*, *O. C. Mathur* and *Ravinder Narain*, for the appellant.

T. V. R. Tatachari and *R. N. Sachthey*, for the respondent.

WANCHOO J. This appeal on a certificate granted by the Bombay High Court arises out of a suit brought by the State of Bombay (respondent) against the appellant for recovery of Rs. 24,979-2-4. The facts which led to the filing of the suit are not now in dispute as they have been concurrently found by the two Courts below and may be briefly narrated. On April 27, 1948, at about mid-day, the vessel Padam belonging to the appellant arrived in the Dharamtar creek carrying a cargo of 3500 bags of manure weighing about 250 tons and laid anchor alongside Dharamtar jetty lying on the Pen side of the creek on the Pen-Khopoli road. The Dharamtar jetty is meant for small vessels bringing passengers and luggage crossing the creek and so the peon on duty there requested the master of the ship to remove the vessel into the creek and to unload the cargo with the help of small boats. The master of the ship agreed to do so. But when he tried to move the vessel away from the jetty, she actually came on top of it due to the force of the ebb tide and got stuck there. The incident was reported by the peon to his superior officer who directed the peon to inform the master to refloat the vessel at night when there was high tide. The master did so at about 3 A.M. The consequence of the vessel getting on the jetty and the attempt to take it off was serious damage to the jetty, which was broken. This damage was found on the next day i.e. April 28, 1948. An

*Decided, January 7, 1965. Civil Appeal 1 [1907] 1 K.B. 78.
No 810 of 1962. 2 [1908] A.C. 323.

estimate for special repairs of the damage done was prepared soon after and was submitted on May 12, 1948, to the Executive Engineer. The appellant was asked by telegram on May 5, 1948, to send a representative in order that an estimate of the cost of special repairs for the damage done might be prepared. The appellant replied by telegram that a representative would be sent but no one appeared on behalf of the appellant when the estimate was prepared. This estimate was for Rs. 16,400. It appears that sometime thereafter emergent repairs costing Rs. 2,783 were undertaken to make the jetty workable. Later, some minor repairs costing about Rs. 1,223 were further carried out. In the meantime the appellant was asked again and again to pay for the damage done. The appellant refused to do so and, therefore, the State of Bombay filed the suit claiming the three sums mentioned above for special repairs, emergent repairs and minor repairs and also 6 per centum per annum interest thereon.

The trial Court found that the above facts had been established by the evidence led before it and that the appellant was liable to make good the loss as it arose on account of the negligence of the master of the ship. It then came to consider the quantum of damages. It came to the conclusion that the claim for Rs. 16,400 was really for reconstruction of the whole damaged area and this showed that the respondent-State wanted restitution and not compensation for the damage done. It however refused to give restitution on the ground that it had not been proved that special repairs to the extent of Rs. 16,400 were absolutely necessary for the damaged portion of the jetty. The trial Court also inspected the jetty and was of the opinion that the emergent and minor repairs that had been made had put the jetty in order and traffic was going on as usual. Further it took into account the statement of a witness that a bridge was being constructed over the Dharamtar creek and was likely to be completed within two years. It, therefore, finally gave a decree for Rs. 3,671-12-6 which had been actually spent by the State in making the repairs. The rest of the claim was dismissed.

This led to an appeal by the State before the High Court, and the only question which the High Court had to decide was the quantum of damages. In that connection the High Court relied on *Wednesbury Corporation v. The Lodge Holes Colliery Company, Limited*¹ and held that that case laid down that the general rule was to require the party in the wrong to make compensation and not restitution, but there was an exception to this rule and that exception was where the party complaining of a wrong to property was a corporation or a trustee charged with the maintenance of a highway or other public work. In such a case the wrongdoer was bound to make restitution because a corporation or a trustee who was charged with the maintenance of public works was bound to restore the property in its or his possession to its original condition. On this view, the High Court allowed the appeal and modified the decree of the trial Court by awarding Rs.19,038-8-0 and interest at 6 per centum from the date of suit till realisation. The present appeal on a certificate granted by the High Court challenges the principle laid down by the High Court, and it is urged that no such principle has been laid down in *Wednesbury Corporation's* case and that that case was overruled in *The Lodge Holes Colliery Company, Limited v. Mayor of Wednesbury*.²

The only question that arises for decision before us, therefore, is the quantum of damages in a case like this. Apart from the fact that the case relied upon by the High Court has been partly over-ruled in the *Lodge Holes Colliery Co. Limited's* case, we have been unable to find therein the principle which the High Court has deduced from the case of *Wednesbury Corporation*. Learned counsel for the respondent-State is also unable to point out any passage in the judgment of Cozens-Hardy L.J. which lays down the proposition in the form in which the High Court has stated it. As we read that case it lays down that

1 [1907] 1 K.B. 78

2 [1908] A.C. 323.

the rights of a corporation in such a case are at least as high as that of a private owner, with this addition that a trustee or corporation cannot renounce those rights in the same way as a private owner could. The true measure of compensation was held in that case to be the cost of restoration and compensation must give full restoration. In that case the dispute really was whether the road which had subsided should be raised to the same level as it was before or whether the purpose would be served even though it was not raised to the same level and a dip was allowed therein. The Appeal Court held that the Corporation was entitled to full compensation for restoring the road to its original condition. It may be mentioned that this view was not accepted in full by the House of Lords. It seems to us, however, that the view taken in *Wednesbury Corporation's* case that a person to whom a wrong is done is entitled to full compensation for restoring the thing damaged to its original condition may be accepted as the true measure of damages in a case of this kind. This applies equally to a private person as to a corporation or trustee. Therefore, the respondent-State was entitled to compensation to the extent necessary to restore the jetty to its original condition. If this is to be called restitution, the corporation as well as a private person would be entitled to it. But if by restitution, the High Court meant complete reconstruction irrespective of the damage done, then neither a private person nor a corporation or a trustee is entitled to complete reconstruction irrespective of the damage done.

This being the principle, the respondent-State would be entitled to such cost as would restore the jetty to its original condition. It is in that connection that an estimate was submitted for special repairs to the jetty as early as May 12, 1948. The appellant was invited to send a representative to assess the cost of repairing the damage done but it neglected to do so. There is nothing on the record to show that the special repairs to the tune of Rs. 16,400 were for complete reconstruction of the jetty irrespective of the damage done to it. Nothing has been brought out in the evidence of Patel who prepared the estimate and of the Sub-Divisional Officer who supervised it to show that the estimate of Rs. 16,400 was for complete reconstruction of the jetty irrespective of the damage done. The covering letter to the estimate shows that it was an estimate for special repairs to the jetty. If the appellant neglected to send a representative to be present to assess the damage and the cost of repairing it, it cannot now come forward and say that the amount of Rs. 16,400 would not be the proper sum required for restoring the jetty to its original condition. All that has been brought out in the evidence of the two witnesses referred to above is that it could not be said whether any part of the dismantled material was fit for re-use; nor were the witnesses able to say what the dismantled material would have fetched if sold. Barring these two matters all that the evidence shows is that the amount of Rs. 16,400 was needed to carry out the special repairs, which would have presumably restored the jetty to its original condition. Therefore the respondent-State would be entitled to this sum of Rs. 16,400. But in view of the fact that some of the material might have been fit for re-use and some of the material might have been resold and thus fetched some price, we would deduct the item of Rs. 1,600 (from the total of Rs. 16,400) which refers to "dismantling the damaged portion and removing the debris outside including sorting materials and stacking the useful one to a suitable site etc.". The rest of the estimate amounting to Rs. 14,800 is clearly for restoration of the jetty to its original condition and the respondent-State would be entitled to that amount.

We may add however that there is no reason to allow anything to the respondent-State in the shape of emergent repairs. It has been shown that Rs. 14,800 would have restored the jetty to its original condition and that is all that the State is entitled to have. How it decided to spend that sum, whether at one time or at different times in the shape of emergent repairs or minor repairs, has no bearing on the quantum of compensation necessary for restoring the jetty to its original condition. For the same reason the fact that the State

might not have spent the whole amount by the time the trial Court came to give its judgment or the fact that a bridge was going up and the jetty might not thereafter be required has no relevance on the question of damage done on April 27, 1948, though the former may affect the date from which interest may be awarded. We are, therefore, of opinion that the respondent-State is entitled to Rs. 14,800 as compensation for the damage done to the jetty to put it back in its original condition. We, therefore, partly allow the appeal and reduce the amount decreed to Rs. 14,800. This sum will carry interest at the rate of Rs. 6 per centum from the date of decree of the trial Court till realisation as ordered by the High Court. The appellant will pay proportionate costs throughout to the respondent-State.

Appeal partly allowed.

Present: The Hon'ble Mr. K. Subba Rao, Acting Chief Justice, Mr. Justice Raghubar Dayal, Mr. Justice R. S. Bachawat and Mr. Justice Ramaswami.

SHAH CHHOTALAL LALLUBHAI

v.

THE CHARITY COMMISSIONER, BOMBAY.*

Bombay Public Trusts Act (Bom. XXIX of 1950), Secs. 56, 55—Court giving directions under s. 56(1) to give effect to original intention of founder—Method indicated by founder cannot be carried out—Applicability of doctrine of cy pres.

In giving directions under the first part of s. 56(1) of the Bombay Public Trusts Act, 1950, the Court should give effect to the original intention of the founder as far as that intention can be carried out. If the method indicated by the founder cannot be carried out, the Court will substitute another method *cy pres*, that is to say, as nearly as possible to the method specified by the founder.

THE facts are stated at 59 *Bombay Law Reporter* p. 349.

*Gumanmal Lodha, J. S. Rastogi, and J. B. Dadachanji, for the appellant.
P. K. Chatterjee, B.R.G.K. Achar, for R. H. Dhebar, for respondent No. 1.*

BACHAWAT J. One Jhaverchand Dahyabhai Shah died in 1916, leaving a will dated August 6, 1915. He was a resident of Vejalpore in the suburbs of Broach and a Ladva Shrimali Bania by caste. He professed the Jain religion, and believed in the tenets of the Svetambar Murti Pujak sect of Jains. By cl. (7) of the will, he directed his executors to spend out of the earnings of his shop every year during the life-time of his niece, Bai Jakore, the amounts mentioned below on the following religious objects:

(1) Rs. 100 for feeding cattle with grass, fodder, oil cakes etc., in the Broach Pinjrapole.

(2) Rs. 100 for *Jiva-daya Khata* (fund for kindness to animals).

(3) Rs. 25 for offering flowers for the worship of Lord Rikabdev in the Jain temple at Vejalpore, Broach.

(4) Rs. 200 for providing food to *Shravak* pilgrims at the Shatroonjaya Hill at Palitana.

(5) Rs. 50 for providing food to pilgrims at Mount Girnar.

(6) Rs. 50 for providing food to pilgrims at Mount Abu.

(7) Rs. 250 for providing cereals, clothes etc., to *Shravaks* and *Shravikas*.

(8) Rs. 100 for providing cloth to Jain *Sadhus* and *Sadhavies*.

(9) Rs. 200 for education and food of Hindu orphans.

(10) Rs. 200 for Jain *Gyan Khata* (fund for imparting knowledge).

(11) Rs. 100 for feeding *Shravaks* and *Shravikas* who have observed fast.

(12) Rs. 300 for giving food, cloth etc., to the blind, lame and crippled members of the Hindu Community.

*Decided, January 22, 1965. Civil Appeal No. 634 of 1964.

In addition, he also directed his executors to give a *Swamivatsal* feast or meal consisting of *methi-dal* and *ladus* made of sugar to the members of his caste at 15 specified villages and towns in the Broach and Surat Districts every year on the occasion of the sacred festival of *Pajusan*. By cl. (15) of the will, he directed that after the death of his niece, Bai Jakore, a sum of Rs. 75,000 should be set apart by the executors, and out of the moneys so set apart, suitable amounts should be sent to the respective *Khatas* (funds) in his name, so that the religious acts mentioned in cl. (7) be continued for ever.

On the death of Bai Jakore on May 20, 1928, the estate vested in the residuary legatee, Bai Chanchal, daughter of Bai Jakore. Mulchandbhai, husband of Bai Chanchal, set apart Rs. 75,000 on trust for the purposes mentioned in cl. (7) of the will, and began to manage the trust estate. Out of the trust moneys, he invested Rs. 8,000 in 5 per cent. tax-free Government Loan, 1944-45, yielding an annual income of Rs. 400, and pursuant to the directions given in cl. (15) of the will, handed over loans of the face value of Rs. 4,000, Rs. 1,000, Rs. 1,000 and Rs. 2,000 respectively to four religious and charitable institutions in full discharge of the obligation of the trust for expending annually the sums of Rs. 200, Rs. 50, Rs. 50, and Rs. 100 on items 2, 4, 5 and 6 of the religious purposes mentioned in cl. (7) of the will. On December 8, 1947, Bai Chanchal executed a trust deed in respect of the investments representing the balance amount of Rs. 67,000 and an accumulation of surplus or unexpended income amounting to Rs. 25,796-6-8. The trust is registered as a public trust under the Bombay Public Trusts Act, 1950, hereinafter referred to as the Act. The trust deed provided that the unexpended accumulation of Rs. 25,796-6-8 should be applied for establishing, maintaining and supporting a *Nivas* for housing the poor and middle-class Ladva Shrimali Jains at low and cheap rents. The trust deed also provided that after setting apart the aforesaid sum of Rs. 25,796-6-8 the balance funds would be held in trust for applying its income to the charities mentioned in cl. (7) of the aforesaid will other than items 2, 4, 5 and 6. Now, the trustees had no authority to divert any part of the trust fund for the purposes of the *Nivas* scheme. The establishment of a *Nivas* for housing the poor and middle-class Ladva Shrimali Jains is not one of the original objects of the trust. As a matter of fact, the *Nivas* scheme was not carried into effect. The Charity Commissioner, Bombay challenged the validity of the *Nivas* scheme. The Courts below rightly proceeded on the footing that the *Nivas* scheme is invalid. Subsequent to the execution of the trust deed, there were further accumulations of unexpended income. The *Swamivatsal* feasts were given, and the fixed annual payments to all the charities were duly met up to Samvat year 1999 corresponding to 1942-1943 A.D. During the subsequent years, the fixed annual payments to the charities were duly made, but on account of rationing restrictions the feasts could not be given up to Samvat year 2010 corresponding to 1953-1954 A.D. During the samvat year 2011 corresponding to 1954-1955 A.D., the feast was not given in spite of the removal of rationing restrictions. The trustees allege that the current income of the trust fund after disbursing the fixed annual payments is not sufficient to meet the usual expenses of annual feasts. On June 3, 1955, the Charity Commissioner filed an application before the District Judge, Broach, under s. 55(1)(b) and s. 56 of the Act for suitable directions for the utilisation of the accumulations of the unexpended income of the trust for some educational purpose. The trustees were impleaded as respondents to this application. Pursuant to a general notice issued by the Court, the appellants and four other members of the Ladva Shrimali Shrivak Bania Community in Broach and Surat Districts appeared, and intervened in the application. On their behalf, it was contended that the trust was for religious purposes and its funds could not be diverted for other purposes under ss. 55(1)(b) and 56 of the Act, and that the accumulations should be utilised year after year for meeting the deficit amount required for the annual *Swamivatsal* feasts.

The district Judge held that the provisions of s. 56 of the Act did not apply to the funds of a public religious trust, and if the accumulations were held for a religious purpose, the Court could not give any directions for its utilisation under that section, that the *Swamivatsal* feast confers religious benefits and objects Nos. 2, 3, 4, 5, 6, 8 and 11 are also religious in character, while the remaining objects are charitable, and therefore the entire feast was not of a religious character, but assuming that the trust was wholly religious, the accumulation was not held for religious purposes, and was subject to the directions of the Court as to its utilisation under s. 56 read with s. 55(1)(b) of the Act. He also held that the trustees could not save any moneys in future by simply refusing to give the *Swamivatsal* feasts but it was not in the public interest to provide for the expenses of the feast out of the accumulation, and the accumulation should be spent for educational and medical purposes. The District Judge passed final orders on October 25, 1956. On that date, the accumulation of unexpended income amounted to Rs. 45,019-14-0, besides another sum of Rs. 107-2-0. The District Judge directed the trustees to hand over a sum of Rs. 22,509-15-0 to an institution known as the Sad Vidya Mandal for giving four freeships every year to deserving students, who should preferably be Jains of Broach District and failing such deserving cases, to other Hindu students. Subject to the condition of giving freeships, the Sad Vidya Mandal would be at liberty to spend the amount for purposes of the building of the college or its hostel or in providing other educational facilities to the students. He also directed the trustees to pay another sum of Rs. 22,509-15-0 to the trustees of the Sevashram Hospital at Broach on condition that the amount be invested in any approved trust security and its income be utilised in providing maintenance, food and medicine to poor and deserving patients. He directed the payment of the remaining sum of Rs. 107-2-0 towards costs.

The appellants and two other members of the Ladva Shrimali Shravak Bania Community preferred an appeal to the Bombay High Court. The High Court held that the Court could on an application under s. 55 of the Act deviate from the directions of the settlor, even if the purpose of the trust has not failed, where the Court finds that it is inexpedient, impracticable, undesirable, unnecessary or improper in the public interest to abide by his directions, but the Court could exercise this power only in respect of funds of a public trust which was not a trust for religious purposes. The High Court held that none of the purposes mentioned in cl. (7) of the will except the one mentioned in item 3 of the clause could be regarded as religious, that the object of providing funds for annual *Swamivatsal* feasts was charitable and not religious, and that the Court was, therefore, competent to entertain the application under s. 55. The High Court further held that providing a feast to the members of the caste even on the occasion of a religious festival or on days which may be regarded as holy is not expedient, desirable, necessary or proper in the public interest, and the directions of the District Judge with regard to the distribution of the fund should not be interfered with. The High Court accordingly dismissed the appeal. The appellants now appeal to this Court by special leave. They challenge the propriety and the legality of the directions given by the District Judge below, and repeat the submission made on their behalf in the Courts below. The respondents contend that the aforesaid directions were rightly given under ss. 55(1)(b) and 56 of the Act.

The Bombay Public Trusts Act, 1950, was passed on August 14, 1950, with a view to regulate and make better provision for the administration of public religious and charitable trusts in the State of Bombay. Soon after the Act came into force, its constitutional validity was assailed. In *Ratilal Panachand Gandhi v. The State of Bombay*,¹ this Court held that a religious sect or denomination has the right guaranteed by the Constitution to manage its own affairs in matters of religion, and this includes the right to spend the trust property or

1 [1954] S.C.R. 1055, 1070-1072, s.c. 56 Bom. L.R. 1184.

its income for religion and for religious purposes and objects indicated by the founder of the trust or established by usage obtaining in a particular institution. To divert the trust property or funds for purposes which the Charity Commissioner or the Court considers expedient or proper, although the original objects of the founder can still be carried out, is an unwarranted encroachment on the freedom of religious institutions in regard to the management of their religious affairs and therefore s. 55(1)(c), which contains the offending provision and the corresponding provision relating to the powers of the Court occurring in the latter part of s. 56(1) must be held to be void. Subsequently, Bombay Act LIX of 1954 amended s. 55(1)(c) by excluding from its purview a trust for a religious purpose. Sections 55 and 56 of the Bombay Trusts Act, 1950, as they stand now, are as follows:

"55. (1) If upon an application made to him or otherwise the Charity Commissioner is of opinion that—

(a) the original object for which the public trust was created has failed,

(b) the income or any surplus balance of any public trust has not been utilized or is not likely to be utilized,

(c) in the case of a public trust other than a trust for a religious purpose, it is not in public interest expedient, practicable, desirable, necessary or proper to carry out wholly or partially the original intention of the author of the public trust or the object for which the public trust was created and that the property or the income of the public trust or any portion thereof should be applied to any other charitable or religious object,

(d) in any of the cases mentioned in sections 10 to 13 or in regard to the appropriation of the dharmada sums held in trust under section 54 the directions of the court are necessary, the Charity Commissioner shall require the trustee to apply within the prescribed time for directions to the Court within the local limits of whose jurisdiction the whole or part of the subject-matter of the trust is situate.

(2) If the trustees fail to make the application as required under sub-section (1) or if the Charity Commissioner himself is a trustee or if there is no trustee of the public trust, the Charity Commissioner shall make an application to the Court.

56. (1) On such application being made, the court after hearing the parties and making an inquiry shall decide the matter and shall give directions. In giving the directions, the court shall, so far as may be expedient, practicable, desirable, necessary or proper in public interest, give effect to the original intention of the author of the public trust or the object for which the public trust was created. If the court is of opinion that the carrying out of such intention or object is not wholly or partially expedient, practicable, desirable, necessary or proper in public interest the court may direct the property or income of the public trust or any portion thereof to be applied *cy pres* to any other charitable or religious object. In doing so, it shall be lawful for the court to alter any scheme already settled or to vary the terms of any decree or order already passed in respect of the public trust or the conditions contained in the instrument of the public trust.

(2) Any decision or order passed by the court under sub-section (1) shall be deemed to be a decree of such court and an appeal shall lie therefrom to the High Court."

Section 2(13) of the Act provides that unless there is anything repugnant in the subject or context, public trust means an express or constructive trust for either a public religious or charitable purpose or both. Section 55(1)(c) expressly excludes from its operation a trust for a religious purpose. But ss. 55(1)(a) and 55(1)(b) do not exclude religious trusts from their operation, and they apply to all public trusts for religious and charitable purposes. On an application either under s. 55(1)(a) or s. 55(1)(b) read with s. 56(2), the Court is bound to give directions in respect of all public trusts. Section 56(1) provides that in giving the directions, the Court shall, so far as may be expedient, practicable, desirable, necessary or proper in the public interest, give effect to the original intention of the author of the trust or the object for which the trust was created. The conjunction "or" in this sentence introduces several alternatives. The Court must give effect to the original intention or

object if and so far as it may be either expedient or practicable or desirable or proper or necessary to do so. If for example, the Court finds that it is proper in the public interest to give effect to the original object, the Court must give effect to it, though it is not necessary to do so in the public interest. Under the latter part of s. 56(1), if the Court finds that the carrying out of the original intention or object wholly or partially is neither expedient nor practicable nor desirable nor necessary nor proper in public interest, the Court may direct the property or income of the trust or any portion thereof to be applied *cy pres* to any other charitable or religious object. The latter part of s. 56(1) thus permits the diversion of trust funds for other objects, though the original objects of the founder can still be carried out. But we think that the respondents have made out no case for such a diversion of trust funds. One of the objects for which the trust was created was that a *Swamivatsal* feast to the members of the Ladva Shrimali Bania caste should be given every year on the occasion of the holy-festival of *Pajusan*. The Jains of Ladva Shrimali Shrivak Bania Community are the chief beneficiaries of this trust. Looking at their interest, it is certainly expedient, practicable, desirable and proper to give the feast. The giving and taking of the *Swamivatsal* feast on the occasion of the holy festival of *Pajusan*, if not a religious act, is a meritorious act prescribed by the scriptures of Swetambar Murti Pujak Jains. The wider public interest does not require that this special charity for a section of the Jain public should be subverted and overthrown. In the wider public interest also, it is expedient, practicable, desirable and proper to respect the sentiments and interests of this section of the Jain public and to give effect to this charity, and we find no reason for giving directions under the latter part of s. 56(1). We, therefore, propose to give directions under the first part of s. 56(1).

In this view of the matter, it is not necessary to decide whether the trust is a trust for religious purposes, and if so, whether, having regard to *Ratilal Panachand's* case its income or surplus balance spendable for the purposes of the trust can be diverted for other purposes, though the original object of the trust can still be carried out. The question whether or not objects mentioned in cl. (7) of the will are religious objects is not raised in the pleadings. No issues were framed and no evidence was led on this point by either party. What are religious purposes must be decided according to the tenets and religious beliefs of the Murti Pujak Swetambar sect of Jains, to which the testator belonged. It is difficult to decide the point in the absence of relevant pleadings, issues and evidence. The District Judge held that the *Swamivatsal* feast and many other objects are religious objects. The High Court too lightly brushed aside this finding. Chapter IX of the Report of the Hindu Religious Endowments Commission (1960-62) contains an interesting discussion of Jain endowments. Paragraphs 7 to 11 of Chap. IX of the Report refer to seven types of religious funds specifically recognised by the Jain scriptures concerning (1) *Jeena Bimba*, (2) *Jeena Chaitya*, (3) *Gyan Fund*, (4) *Sadhu*, (5) *Sadhvi*, (6) *Shrivak* and (7) *Shravika*. The Jains recognise numerous other endowments or funds for general or specific purposes, the corpus or interest of which is to be utilised as per the donor's intentions. The question whether the several objects of the trust including the giving of a *Swamivatsal* feast are religious in their character must be left open for future decision.

We must now consider what directions should be given under s. 56(1) on the present application. No case for applying the latter part of s. 56(1) and for refusing to give effect to the original objects of the trust has been made out. We should, therefore, give effect to the original intention of the founder as far as that intention can be carried out. If the method indicated by the founder cannot be carried out, the Court will substitute another method *cy pres*, that is to say, as nearly as possible to the method specified by the founder. The application of the *cy pres* principle is explained in Story's Equity Jurisprudence, 3rd edn., Art. 1176, at p. 494 thus:

"The doctrine of *cy pres* as applied to charities was formerly pushed to a most

extravagant length. But this sensible distinction now prevails that the Court will not decree the execution of the trust of a charity in a manner different from that intended, except so far as it is seen that the intention cannot be literally executed. In that case another mode will be adopted, consistent with the general intention, so as to execute it, although not in mode, yet in substance. If the mode should become by subsequent circumstances impossible, the general object is not to be defeated, if it can in any other way be attained."

In the instant case, the overriding intention of the founder of the trust is that the sum of Rs. 75,000 set apart by him should be devoted to the objects mentioned in cl. (7) of the will, so that those objects may be continued and carried out for ever. His intention was that fixed sums should be expended annually for the 12 items of charity mentioned and reasonable sums should be expended annually in giving *Swamivatsal* feasts to members of his caste. The sum spendable annually for the feast was necessarily of a fluctuating character. In accordance with the directions given in cl. (15) of the will, the obligations of the trust for the charities mentioned in items 2, 4, 5 and 6 of cl. (7) of the will have been fully discharged by donating Rs. 8,000 out of the corpus of the trust. The expenses of the annual *Swamivatsal* feasts were met, and the payments to other charities were duly made out of the income of the balance funds every year up to Samvat 1999 corresponding to 1942-43 A.D., and the accumulations of the unexpended income up to that year represent a true surplus. In accordance with the intention of the founder of the trust, the surplus should be applied as nearly as possible to the original uses and purposes of the trust. In all the circumstances of the case, the surplus should be applied to increase the amounts spendable for the surviving objects of the trust. During the subsequent years up to Samvat year 2010 corresponding to 1953-54 A.D., the annual feasts could not be given due to rationing restrictions, but the expenses of the other charities were duly met. The savings of the income spendable during these years for the feasts should be applied suitably for carrying out the same object in future. The balance savings, if any, should be devoted towards increasing the amounts spendable for the other objects of the trust. The savings during Samvat year 2011 corresponding to 1954-55 A.D., were due to the fact that the annual feast was not given in spite of the absence of rationing restrictions. The savings for this year should be devoted towards the giving of the *Swamivatsal* feasts. The trustees cannot be allowed to defeat the objects of the trust by refusing to carry them out. It is said that the giving of a *Swamivatsal* feast on the scale given in the past would now cost about Rs. 3,000. But if the income at the disposal of the trustees will not permit the spending of such a large amount, there is no reason why the trustees would not spend a smaller amount and give the feast to a smaller number of guests. In view of the enormous rise in prices since the creation of the trust, an increase of the amounts spendable for the charities would be in accordance with general intention of the founder. This is an additional reason for applying the unexpended income for the original objects of the trust instead of diverting them for other purposes. It is desirable that instead of spending the accumulations, the same should be invested and its income should be applied towards the original objects. In the light of all these considerations, we propose to give the directions set out in our order.

The scheme framed by the Courts below is objectionable in several ways. In framing the scheme, the Courts below erroneously disregarded one of the main objects of the trust, viz., the giving of the annual *Swamivatsal* feast on the ground that it is not expedient, desirable, necessary or proper in the public interest to carry out this object. The scheme disregards the basic principle that the trust funds should be applied for effectuating the intention of the founder of the trust as far as possible. The direction for payment of one half of the accumulations to the Sad Vidya Mandal on the ground that its object is analogous to the object of the Jain *Gyan* Fund mentioned in item 8 of cl. 10 of the will is objectionable on the ground that the freeships are not restricted to the

Jains and also on the ground that subject to giving the freeships the donee is entitled to spend the corpus for other purposes. Moreover, the purposes of the Sad Vidya Mandal and its freeships are not analogous to the purposes of the Jain *Gyan* Fund, which is a religious fund for imparting knowledge of Jain religion and Jain *Shastras*. The direction for payment of one half of the accumulated amount to the Sevashram Hospital is objectionable on the ground that medical treatment of the poor and deserving is not one of the objects specifically mentioned in cl. 7 of the will. Both these directions are also objectionable on the ground that they do not take into account the original objects of the trust. For all these reasons, the directions given by the Courts below must be set aside.

In the result the appeal is allowed, and the judgments and decrees passed by the Courts below are set aside. In lieu of the directions given by the Courts below, we give the following directions.

Out of the accumulations of the unexpended income up to October 25, 1956, amounting to Rs. 45,091-14-0 the trustees will set apart a reasonable sum not exceeding Rs. 5,000 as a working fund to meet current expenses. The trustees will invest the balance amount in such manner as they think fit in accordance with s. 35 of the Bombay Public Trusts Act, 1950. The trustees will spend and utilise every year one-half of the annual income from these investments for the charities mentioned in items 1, 3, 7, 8, 9, 10, 11 and 12 of cl. 7 of the will of Jhaverchand Dahyabhai Shah dated August 6, 1915 in such proportion and in such manner as the trustees think fit and proper. The trustees will spend and utilise every year the balance one-half of the annual income of those investments for the annual *Swamivatsal* feast (caste-dinner) mentioned in cl. 7 of the aforesaid will. The disbursements to be made under these directions will be in addition to the payments to be made by the trustees out of the income of the investments of the original corpus of the trust funds. Out of the net income of the investments of the original corpus, the trustees will continue to make the annual payments to the charities mentioned in items 1, 3, 7, 8, 9, 10, 11 and 12 of cl. 7 of the aforesaid will and will spend the balance income for giving the annual *Swamivatsal* feasts. The trustees shall give the *Swamivatsal* feast every year as far as possible. If for some reason the feast cannot be given in any year, the amount spendable for this object in that year should be spent for giving the feast in the following years.

In the circumstances of the case, we direct that the parties will pay and bear their own costs throughout in this Court as also in the Courts below, except that the trustees will pay the sum of Rs. 64-8-0 to the Charity Commissioner and the sum of Rs. 42-10-0 to opponents Nos. 6 to 13 to the application, as originally directed by the District Judge.

Appeal allowed

Present: The Hon'ble Mr. P. B. Gajendragadkar, Chief Justice, Mr. Justice J. C. Shah and Mr. Justice N. Rajagopala Ayyangar.

THE STATE OF BOMBAY

v.

SHIVABALAK GAURISHANKAR DUBE.*

Bombay Tenancy and Agricultural Lands Act (Bom. LXVII of 1948), Secs. 65(1), 83—Enquiry to be made under s. 65(1) whether should be made only by delegate of State Government himself.

Section 65(1) of the Bombay Tenancy and Agricultural Lands Act, 1948, requires that the State Government and, therefore, its delegate may after making such enquiry as it thinks fit, declare that the management of the land shall be resumed. In what form the enquiry should be held is a matter left entirely in the discretion of the State Government or its delegate. Therefore, where the Dy. Collector is the

*Decided, August 31, 1964. Civil Appeal No. 269 of 1962.

delegate of the State Government, s. 65(1) of the Act does not require that the Dy. Collector must himself go to the agricultural fields and enquire on the spot whether they are lying fallow. He may, if he so desires, record evidence himself, or the recording of the evidence and the actual inspection on the spot can be left to some subordinate officer.

Nathubhai Gandabhai v. State,¹ approved.

Allingham v. Min. of Agriculture,² referred to.

THE facts are stated in the judgment.

S. G. Patwardhan, with *B. R. G. K. Achar*, for the appellant.

G. S. Pathak, with *Naunil Lal*, for the respondents.

GAJENDRAGADKAR C. J. What is the scope and effect of the provisions contained in s. 65 read with s. 83 of the Bombay Tenancy and Agricultural Lands Act, 1948 (No. LXVII of 1948) (hereinafter called the Act), that is the short question which arises for our decision in this appeal. The four respondents are the owners of certain agricultural lands in Deokhope in Taluka Palghar in Maharashtra. On June 23, 1951, a notice was served by the appellant, State of Bombay (now Maharashtra), inviting the attention of the respondents to the fact that the agricultural lands of which they were the owners had remained fallow since 1948-49, and intimating to them that the appellant State would resume management of the said lands under s. 65 of the Act unless the respondents took steps to bring them under cultivation in the following agricultural season. The respondents were told that in case they wanted to bring the said lands into cultivation, they should send intimation of their intention to do so within 15 days from the date of the receipt of the notice. It appears that later, an enquiry was made under the orders of the Dy. Collector as a result of which on December 30, 1951, he passed an order under s. 65 directing that the lands should be resumed by the Government for cultivation. Thereafter, representations were made by the respondents to the Dy. Collector as a result of which about 8 acres and 30 ghunthas of land were released on the ground that the owners had taken steps to cultivate that portion of the lands in pursuance of the direction given to them by the earlier notice. The order passed by the Dy. Collector in respect of other lands remained unaffected. Thereafter, respondent No. 1 approached the Collector by his application dated March 24, 1952. This application was, however, rejected. The respondents then moved the Revenue Department, but that effort also failed. That is why the present suit was filed by them on December 23, 1953 for a declaration that the order passed by the Dy. Collector on December 30, 1951 was illegal and void, and that it could not dispossess them of the lands which belonged to them. As a consequence of the declaration thus claimed by them, the respondents asked for a decree for possession and mesne profits against the appellant.

The appellant disputed the respondents' claim. It urged that the suit as framed was barred under s. 65(1) and s. 85 of the Act. On the merits, the appellant challenged the correctness of the allegations made by the respondents. It was averred by the appellant that the requisite enquiry had been duly and properly made and the impugned order was passed in accordance with the relevant provisions of the Act. According to the appellant, civil Court has no jurisdiction to consider the propriety or reasonableness of the conclusion reached by the Dy. Collector before he passed the impugned order.

The learned trial Judge who framed appropriate issues on these pleadings, in the main upheld the contentions raised by the appellant. In his opinion, the present suit was barred by ss. 65(1) and 85 of the Act. He also held that the declaration made by the Dy. Collector was not null and void. The plea raised by the respondents against the validity of the statutory provisions contained in ss. 65 and 66 of the Act was rejected by him, because he thought that

1 [1955] Bom. 407, s.c. 57 Bom L.R. 199. 2 [1948] 1 All E.R. 780

the said sections did not contravene the provisions of arts. 19 and 31 of the Constitution. The learned Judge also found that the grievance made by the respondents against the propriety or reasonableness of the enquiry made prior to the passing of the impugned order was not justified. In the result, the respondents' suit was dismissed.

The respondents then carried the matter before the High Court by an appeal, and on their behalf three contentions were raised before the High Court. It was first argued that the lands in respect of which the impugned declaration was made were not lands as defined by the Act, and so, the relevant provisions of the Act were inapplicable. It was then urged that before the Government could exercise its powers under s. 65 of the Act, a duty was cast on it to be satisfied that the lands had remained uncultivated for a period of two years before their management was assumed; and this condition had not been satisfied, because delegation by the State Government to subordinate officers of its duty to satisfy itself, or its power to make the declaration, was not justified in law. It was also contended that since the satisfaction had to be by the authority who was competent to make the declaration, he could not delegate any part of his function and duty in that behalf and the said authority had to hold the enquiry himself.

The High Court has upheld the second of these contentions. It has found that on a fair and reasonable construction of s. 65(I) read with s. 83, the appellant could delegate its powers prescribed by s. 65(I), but could not delegate its duty incidental to the exercise of the said power. That is why the decree passed by the trial Court has been reversed on this ground and the respondents' suit has been decreed. Consistently with this decision, an appropriate order has been passed in regard to the delivery of possession and the payment of mesne profits as claimed by the respondents. It is against this decree that the appellant has come to this Court by special leave; and the only point which is raised on its behalf by Mr. Patwardhan is that the view taken by the High Court in regard to the scope and effect of the provisions contained in s. 65(I) read with s. 83 is not well-founded.

Section 65(I) reads thus:—

"If it appears to the State Government that for any two consecutive years, any land has remained uncultivated or the full and efficient use of the land has not been made for the purpose of agriculture, through the default of the holder or any other cause whatsoever not beyond his control the State Government may, after making such enquiry as it thinks fit, declare that the management of such land shall be assumed. The declaration so made shall be conclusive."

Along with this section, it is necessary to refer to s. 83 which reads thus:—

"The State Government may, subject to such restrictions and conditions as it may impose, by notification in the *Official Gazette*, delegate to any of its officers not below the rank of an Assistant or Deputy Collector, all or any of the powers conferred on it by this Act."

The High Court appears to have taken the view that though it was competent to the State Government to delegate its powers under s. 65(I), it could not delegate its duty or obligation to make an enquiry as a result of which the declaration in question can be made. The State Government, says the High Court, can exercise its authority to make a declaration and this authority or power can be delegated under s. 83; but before such authority or power can be exercised, there is an obligation imposed on the State Government to make an enquiry as to whether the agricultural land in question has remained uncultivated or fallow for the period prescribed by the statute, and the obligation or duty to hold such an enquiry which is distinct and separate from the power or authority to make a declaration consequent upon the enquiry, cannot be delegated under s. 83. It is common ground that the enquiry was not made by the State Government, and if the view taken by the High Court is right that the obligation or duty to hold the enquiry cannot be delegated, then the

impugned declaration would be open to attack, because it had not been preceded by a proper enquiry. Mr. Patwardhan contends that the view taken by the High Court is plainly erroneous and we are satisfied that this contention is well-founded.

Section 83 in terms authorises delegation by the State Government to any of its officers of the specified status and the delegation can be in respect of all or any of the powers conferred on the State Government by the provisions of the Act. Now, it seems to us that the authority to delegate all or any of the powers which is expressly conferred on the State Government by s. 83 would be rendered almost meaningless if the duty to hold an enquiry as a condition precedent for the exercise of the said authority cannot be delegated. In the context, the power which can be delegated is inseparable from the enquiry which must precede the exercise of the power, and so, in order to make s. 83 effective it is necessary to hold that the delegation of the power authorised by the said section must necessarily involve the delegation of the discharge of obligations or functions which are necessary for the exercise of the said power.

If the view taken by the High Court is right it would mean that whereas the State Government can authorise any of the officers belonging to the specified class to exercise its powers under s. 65(1), it must hold the preliminary enquiry itself without delegating the authority to hold such an enquiry to any officer. It is hardly necessary to emphasise that this position is so plainly illogical that it would be unreasonable to recognise the validity of the authority to confer powers while insisting that the conditions precedent for the exercise of the powers are of such a separate and distinct character that in order to satisfy the said conditions, the required enquiry must be held not by any delegate of the State Government but by the State Government itself. In coming to the conclusion that the duty, as distinct from the power, cannot be delegated, the High Court was apparently influenced by the fact that there would be no appeal against the enquiry and the conclusion reached at such an enquiry. We do not propose to express any opinion on this part of the reasoning adopted by the High Court; that will depend upon the construction of s. 86 of the Act. But whatever may be the position in respect of the competence of an appeal, we are satisfied that on a fair and reasonable construction of s. 83 it must be held to authorise the delegation not only of the powers mentioned by it, but also of duties or functions which are incidental to the exercise of the powers and are integrally connected with them.

In this connection, we may usefully refer to the decision of the Privy Council in *Mungoni v. Attorney-General of Northern Rhodesia*.¹ In that case, in dealing with a similar question under regulation 16(1) of the Emergency powers Regulations, 1956, of Northern Rhodesia, made by the Acting Governor of Northern Rhodesia under his statutory powers, the Privy Council has held that the power and the duty under reg. 16(1) were so interwoven that it was not possible to split the one from the other so as to put the duty on one person and the power in another; the regulation contained not so much a duty, but rather a power coupled with a duty, and he who exercised the power had to carry out the duty. In the result, the Privy Council took the view that in delegating his functions under reg. 16(1) the Governor could delegate both the power and duty together to one and the same person—he could not delegate the power to another and keep the duty to himself. It is not difficult to realise what anomalous consequences would follow if it is held that the power can be delegated, but not the duty to hold the incidental enquiry which alone can lead to the exercise of the power. In substance, the view taken by the High Court would make the authority to delegate the power wholly meaningless. In fairness, we ought to add that Mr. Pathak who appeared for the respondents did not seek to support this part of the High Court's decision.

1 [1960] 2 W.L.R. 389.

It appears that as a result of the decision of the High Court in the present case, the Maharashtra Legislature thought it prudent to make the necessary amendment in s. 83 of the Act. Section 29(a) of the Amending Act provides that for the words "powers conferred" the words "powers conferred or duties imposed" shall be and shall be deemed to have been, substituted on October 31, 1949; and accordingly, the delegation or the purported delegation by the State Government under s. 83 of any duty imposed shall (notwithstanding the judgment, decree or order of any Court) be deemed always to have been valid, and the discharge of any such duty by any officer shall for all purposes be valid and effective and shall not be called in question in any Court on the ground only that the State Government had no power to delegate the duty; and clause (b) provides that to the marginal note the words "and duties" shall be added. It is not surprising that in view of the serious consequences which would have inevitably followed if the judgment under appeal had remained unchanged, the Legislature thought it necessary to make a suitable amendment in order to avoid any interruption in the peaceful and smooth working of the relevant provisions of the Act.

Realising the infirmity in the view taken by the High Court, Mr. Pathak attempted to support the decision of the High Court on another ground. He argued that since the enquiry was made by the Talathi and the Mamlatdar under s. 65 and not by the Dy. Collector, the declaration made by the Dy. Collector was invalid. In other words, the argument is that the State Government may have validly delegated its powers under s. 65(1) to the Dy. Collector, but the Dy. Collector who is a delegate of the State Government cannot, in turn, delegate a part of his power or authority to a subordinate of his own, and that is what he has done in the present case. This argument proceeds on the basis that in exercising his powers under s. 65(1), the Dy. Collector must himself hold the enquiry and cannot delegate the function of holding such an enquiry to any other subordinate revenue officer. There is no doubt that a delegate who has received the authority from the principal cannot, in turn, delegate his own authority to a delegate of his own, but there is hardly any question of delegation by a delegate in the present case. All that s. 65(1) requires is that the State Government and therefore its delegate may after making such enquiry as it thinks fit, declare that the management of the land shall be resumed. In other words, in what form the enquiry should be held is a matter left entirely in the discretion of the State Government or its delegate. All that the Dy. Collector has done in the present case is to direct his subordinate officers to collect material relevant to the purpose of the enquiry. The Talathi went on the spot and ascertained as to whether the respondents' lands were lying fallow for the requisite period. He submitted his report to the Mamlatdar. The Mamlatdar in turn made his report to the Dy. Collector. In other words, all that the Dy. Collector has done is to collect the relevant material, so that he can enquire into the question as to whether the lands are lying fallow or not. This procedure does not, in our opinion, involve the question of any delegation at all. The form of the enquiry and its mode are entirely in the discretion of the Dy. Collector. Section 65(1) does not require that the Dy. Collector must himself go to the agricultural fields and enquire on the spot whether they are lying fallow. He may, if he so desires, record evidence himself, or the recording of the evidence and the actual inspection on the spot can be left to some subordinate officer. The report of such local inspection and the record of the evidence collected in that behalf would be forwarded to the Dy. Collector, and that would be the material on which he would hold the enquiry himself. The enquiry is thus held by the Dy. Collector, though the mechanical work of collecting material has been entrusted to a subordinate revenue officer. In such a case, we do not see how the principle that a delegate cannot delegate comes into operation.

In support of his argument, Mr. Pathak has relied on a decision of the

King's Bench Division in *Allingham v. Min. of Agriculture*.² In that case, the Court held that on the principle of *delegatus non potest delegare*, the Committee exercising its powers under reg. 62(1) could not delegate its powers to determine the land to be cultivated to its officers and, therefore, the notice issued in that behalf was ineffective and non-compliance with it was not an offence. It, however, appears that the War Agricultural Committee for the County did appoint the Biggleswade District Committee as a sub-committee to act under the instructions of the executive committee and to make recommendations to the executive committee. Apparently, they made some recommendations to the executive officer and the executive officer accordingly made the order. On these facts, Lord Goddard, C. J., observed that he could find nothing in the regulations or the statute which enabled the executive officer to make the order. The appellants had contended before the Court that they were entitled to have the decision of the executive committee and no one else on the matter, and this contention was upheld on the facts of that case. We do not see how this case can assist Mr. Pathak's argument in the appeal before us, because there has been no delegation to hold an enquiry as such. What the Dy. Collector has done in the present proceedings is not to delegate his authority to hold an enquiry, but to get the material necessary for the enquiry collected by his subordinate officers. After the material was thus collected, he examined the material himself, held the enquiry and came to the conclusion that the lands had remained fallow and uncultivated for the requisite period. We are, therefore, satisfied that the English decision on which Mr. Pathak relies does not assist him in the present case.

This contention appears to have been raised before the High Court and has been rejected by it and, we think, rightly. In fact, in *Nathubhai Gandabhai v. State*³ a similar contention was raised before the High Court and had been rejected by it. In that case, the High Court has held that inasmuch as the Legislature has left it entirely to the discretion of the State Government or the delegated authority to hold such enquiry as it thinks proper, if an enquiry is held the Court cannot consider as to whether the enquiry was a proper one or whether a better enquiry would not have yielded better results. This view has been consistently followed in the Bombay High Court and we see no reason to doubt its correctness.

In the result, the appeal succeeds, the decree passed by the High Court is set aside and that of the trial Court restored. There would be no order as to costs throughout.

Appeal allowed.

Present: Mr. Justice Raghubar Dayal and Mr. Justice J. R. Mudholkar.

VELJI RAGHAVJI PATEL v. THE STATE OF MAHARASHTRA.*

Indian Penal Code (Act XLV of 1860) Secs. 405, 403—“Entrustment of dominion” over property, what constitutes under s. 405—Whether mere existence of dominion over property enough—Partner whether can be convicted under s. 406 for failure to account for monies belonging to his firm—Whether partner criminally liable under s. 403 for using partnership money for his own purposes.

Under s. 405 of the Indian Penal Code, 1860, in order to establish “entrustment of dominion” over property to an accused person the mere existence of that person's dominion over property is not enough. It must be further shown that his dominion was the result of *entrustment*.

Therefore, in a prosecution against a partner for an offence under s. 406 of the Code on the ground that his failure to account for monies belonging to the firm in which he is a partner amounts to criminal breach of trust, the prosecution must establish that dominion over the assets or a particular asset of the partnership was, by a special agreement between the parties, entrusted to the accused partner. If in the absence of such a special agreement a partner receives money belonging to the

2 [1948] 1 All E.R. 780.

3 [1955] Bom. 407, s.c. 57 Bom L.R. 199.

*Decided, December 11, 1964. Criminal

Appeal No. 43 of 1963.

partnership he cannot be said to have received it in a fiduciary capacity or cannot be held to have been "entrusted" with dominion over partnership properties.

Bhuban Mohan Rana v. Surendra Mohan Das,¹ approved.

The Queen v. Okhoy Coommar Shaw,² overruled.

Jagannath v. Emperor,³ referred to.

A partner has undefined ownership along with the other partners over all the assets of the partnership and if he chooses to use any of them for his own purposes he may be accountable civilly to the other partners but he does not thereby commit any misappropriation within s. 403 of the Indian Penal Code.

THE facts appear in the judgment.

O. P. Rana, for the appellant.

P. K. Chatterjee and *B. R. G. K. Achar*, for the respondent.

MUDHOLKAR J. In this appeal from the judgment of the Bombay High Court the question which falls to be considered is whether a partner can be convicted under s. 406, Indian Penal Code, on the ground that his failure to account for monies belonging to the firm in which he was a partner amounts to criminal breach of trust.

The admitted facts are briefly these:

The firm, Messrs. Bharat Silp Pramandal, which was formed for carrying on the business of building construction, originally consisted of eight partners and the appellant was its working partner. This firm was constituted in the year 1954. But on February 6, 1957, three of the partners retired and the business was continued by the remaining five partners. Disputes arose amongst them, which were referred to arbitration of Mr. J. T. Desai, a Solicitor. Apparently, in pursuance of his award a fresh agreement (exh. N) was entered into by the partners on June 4, 1958. By virtue of this agreement the appellant's share in the firm's business was to be of 50 nP. in a rupee while the other partners had different shares in the remaining 50 nP. Nagindas Jivraj Mehta, who is the complainant in this case had a share to the extent of 6 nP. Under this agreement the parties decided not to undertake new work. The agreement required the appellant to complete all the accounts and prohibited from borrowing money in the name of the firm. It required him to "to use his best efforts to realise all pending bills, security deposits, claims etc." as well as to dispose of the plant, machinery etc. The agreement also provided that partners, other than the appellant, would procure, if the need arose, further finance to the maximum limit of Rs. 25,000 but that if a sum in excess of this amount was required, that excess was to be brought in by all the partners including the appellant "individually *pro rata* in proportion to their shares of profits and losses in the firm". Clause 8 of this agreement permitted the appellant to withdraw on his own account a sum of Rs. 10,000 "no sooner he is able to realise any of the pending claims of bills of the firm or security deposits". We have dealt with this agreement at some length because it will be relevant to consider these matters in the context of the argument of Mr. Rana to the effect that the appellant as working partner was entitled to utilise the realizations made by him for carrying on the work of the firm.

According to the complainant the appellant committed misappropriation to the tune of Rs. 8,905 consisting of the following six items:

Rs.
2,871
3,000
1,100
1,100
750
84
8,905

¹ [1952] II Cal. 23, F.B.

² (1874) 13 Beng. L.R. 307, F.B.

³ [1932] A.I.R. Bom. 47, s.c. (1931) 33 Bom. L.R. 1518.

The trial Court acquitted the appellant with respect to the last two items but convicted him in respect of the first four items.

The appellant admits that he realised these four items but he says that he did so in his capacity as partner and he utilised them for the business of the partnership. Therefore, according to him, he is only liable to render accounts to his partners and cannot in any circumstances be said to be guilty of an offence under s. 406, Indian Penal Code. He also points out that the complainant has instituted a suit for the dissolution of the partnership and for rendition of accounts and that he instituted the present complaint solely with the idea of making it difficult, if not impossible, for the appellant to defend the civil suit properly.

On behalf of the appellant it is contended that even if the prosecution had succeeded in showing that the four items referred to above were realised by the appellant and that he has not accounted for them properly he will not be liable for criminal breach of trust under s. 406, Indian Penal Code but that his liability would be only of a civil nature. In support of this contention reliance is placed upon *Bhuban Mohan Rana v. Surendra Mohan Das*.¹ There the following question was referred for decision by the Full Bench:

"Can a charge under s. 406 of the Indian Penal Code be framed against a person, who, according to the complainant, is a partner with him and is accused of the offence in respect of property belonging to both of them as partners?"

All the five Judges constituting the Full Bench answered the question in the negative. In the leading judgment which was delivered by Harris C. J., he pointed out that before criminal breach of trust is established it must be shown that the person charged has been entrusted with property or with dominion over property and that a partner does not, in the ordinary course, hold property in a fiduciary capacity. The learned Chief Justice further pointed out that there is really no distinct or defined share of a partner in any item belonging to the partnership. Upon the dissolution of the partnership and after an account is taken it may turn out that a partner who retains an asset is entitled to the whole of the asset and may be, much more. He referred to the English view that a partner does not hold money belonging to the partnership in a fiduciary capacity and said that this view appeared to him to be correct. Referring to the decision in *The Queen v. Okhoy Coomar Shaw*² in which a Full Bench had held that a partner who dishonestly misappropriates or converts to his own use any of the partnership property with which he is entrusted or over which he has dominion, is guilty of an offence under s. 405, Indian Penal Code, Harris, C. J. observed (p. 32):

"The Full Bench never seems to have considered that there is really no partner's share in the property until an account (sic) and it may well be that a partner, who retains an asset, is entitled not only to his share according to the partnership agreement in that asset, but, on taking an account, it may be found that he is entitled to the whole of the asset and considerably more. In such a case, how can it be said that he has been guilty of a breach of trust and has acted dishonestly towards his co-partners, if an account would show that he was entitled to everything which he had retained?"

He has referred to a number of decisions of the Indian High Courts in some of which the view taken in *Okhoy Coomar Shaw's* case was followed. One of those cases was *Jagannath v. Emperor*³ where it was held that a partner may be prosecuted under s. 406, Indian Penal Code for failure to account for partnership monies and assets. In that case the partner who was the accused was given authority by the other partners to collect monies or property and according to the Bombay High Court in these circumstances he was "entrusted" with dominion over collections made by him. The learned Judges who decided that case had, however, pointed out that the Court should approach cases of this kind very carefully because it was impossible to say in many cases what

1 [1952] II Cal. 23, F.B.

2 [1874] 13 Beng. L.R. 307, F.B.

3 [1932] A.I.R. Bom. 47, S.C. (1931) 33 Bom. L.R. 1518.

the share of the accused might be, whether the accused was indebted to the firm or whether the firm was indebted to him. The High Court also pointed out that if the firm was indebted to him there might be no dishonest intention in his dealing with the partnership property. In the arguments before us, apart from these three decisions, our attention was called to a few more decisions of the High Courts in India. But whether they take one view or the other they do not seem to add to what has been said in these three decisions. We, therefore, do not feel called upon to make any reference to these decisions.

It seems to us that the view taken in *Bhuban Mohan Rana's* case by the later Full Bench of the Calcutta High Court is the right one. Upon the plain reading of s. 405, Indian Penal Code, it is obvious that before a person can be said to have committed criminal breach of trust it must be established that he was either entrusted with or entrusted with dominion over property which he is said to have converted to his own use or disposed of in violation of any direction of law etc. Every partner has dominion over property by reason of the fact that he is a partner. This is a kind of dominion which every owner of property has over his property. But it is not dominion of this kind which satisfies the requirements of s. 405. In order to establish "entrustment of dominion" over property to an accused person the mere existence of that person's dominion over property is not enough. It must be further shown that his dominion was the result of *entrustment*. Therefore, as rightly pointed out by Harris C. J., the prosecution must establish that dominion over the assets or a particular asset of the partnership was, by a special agreement between the parties, entrusted to the accused person. If in the absence of such a special agreement a partner receives money belonging to the partnership he cannot be said to have received it in a fiduciary capacity or, in other words, cannot be held to have been "entrusted" with dominion over partnership properties.

Mr. Chatterjee who appears for the respondent sought to show that there was special agreement in this case. According to him, by virtue of certain decisions taken at a meeting of the partners held on January 7, 1959, the appellant had been entrusted with the duty of making recoveries of monies from the debtors of the firm and, therefore, this was a case of specific entrustment. All that he could point out was item No. 15 in the minutes of that meeting which runs thus:

"Shri Veljibhai agrees to recover the monies due by Shri Kablasingh immediately and shall deposit the same with the Bankers of the firm."

He has, however, not been able to explain the next item in the minutes, the relevant portion of which runs thus:

"(16) If in future any further moneys are required to be spent the same shall be spent out of the recoveries of the firm and no partner shall be bound or responsible to bring in any further moneys...."

Reading the two together the meaning seems to be only this that as working partner the appellant should carry on the work of recovery of the dues of the partnership and that in respect of the dues from one Kablasingh it was decided that they should be deposited in the bank. It does not follow from this that any of the other partners was precluded from making the recoveries. Further, even if this is said to be a mandate to the appellant item 16 authorises him to spend the money for the business of the partnership. That is to say, if the money was required for the business of the partnership it was not obligatory upon the appellant to deposit it in the bank. In our opinion, therefore, the appellant cannot be said to have been guilty of criminal breach of trust even with respect to the dues realised by him from Kablasingh and in not depositing them in the bank as alleged by the prosecution.

Mr. Chatterjee finally contends that the act of the appellant will at least amount to dishonest misappropriation of property even though it may not amount to criminal breach of trust and, therefore, his conviction could be alter-

ed from one under s. 406 to that under s. 403. Section 403 runs thus:

"Whoever dishonestly misappropriates or converts to his own use any movable property, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."

It is obvious that an owner of property, in whichever way he uses his property and with whatever intention will not be liable for misappropriation and that would be so even if he is not the exclusive owner thereof. As already stated, a partner has, undefined ownership along with the other partners over all the assets of the partnership. If he chooses to use any of them for his own purposes he may be accountable civilly to the other partners. But he does not thereby commit any misappropriation. Mr. Chatterjee's alternative contention must be rejected.

In the result we allow the appeal and set aside the conviction and sentence passed against him.

Appeal allowed.

Present: Mr. Justice K. N. Wanchoo and Mr. Justice J. R. Mudholkar.

KURBAN HUSSEIN MOHAMEDALLI RANGAWALLA

v.

THE STATE OF MAHARASHTRA.*

Indian Penal Code (XLV of 1860), Secs. 304-A, 285—Rash or negligent act under s. 304-A, nature of.

In order that a person may be guilty under s. 304-A of the Indian Penal Code, 1860, the rash or negligent act must be the direct or proximate cause of the death.

Emperor v. Omkar Rampratap,¹ approved.

THE facts appear in the judgment.

S. T. Desai, with *J. B. Dadachanji*, *O. C. Mathur* and *Ravinder Narain*, for the appellant.

S. G. Patwardhan, with *B. R. G. K. Achar*, for *R. H. Dhebar* for the respondent.

WANCHOO J. This appeal by special leave against the judgment of the Bombay High Court raises questions regarding the interpretation of s. 304-A and s. 285 of the Indian Penal Code. The facts are not now in dispute and may be briefly set out as found by the Courts below. The appellant along with three partners is the owner of a factory styled as Carbon Dry Colour Works which manufactures paints and varnish. The factory was licensed by the Bombay Municipality in the year 1953 to manufacture paints involving a cold process and was located at 79/81 Jail Road, Dongri. The factory was also licensed to store 455 litres of turpentine, 455 litres of varnish and 14000 gallons of paint. The licence was issued subject to certain conditions to which we shall refer later. The appellant is the manager and working partner. He converted the factory from the cold process of manufacturing dry paints to a process of manufacturing wet paints by heating. For that purpose four burners were used for the purpose of melting rosin or bitumen by heating them in barrels over the burners and adding turpentine thereto after the temperature cooled down to a certain degree. On April 20, 1962, this process was going on in the factory which had no licence for manufacturing wet paints through heating. Hatim Tasduq was the person looking after the operation. According to him the rosin was melted on one burner and lime was added and the whole thing was boiled for half an hour. Thereafter the burner was extinguished and the barrel in which the

*Decided, December 15, 1964. Criminal Appeal No. 67 of 1963. 1 (1902) 4 Bom. L.R. 679.

rosin was melted was allowed to cool. This began at about 4 p.m. The barrel in which the rosin is melted is about 4½ feet high and after the temperature comes down to a certain level turpentine is added in the barrel to prepare Black Japan. Hatim Tasduq takes a drum of 5 gallons of turpentine which is poured into the barrel. As turpentine is poured, the mixture begins frothing and in order to keep down the froth the whole thing is stirred all the time. One man helps Hatim Tasduq in this operation. On April 20, 1962, rosin was melted and the barrel was allowed to cool from 4 p.m. At about 5 p.m. Hatim started pouring turpentine into the barrel. It may be mentioned that 5 p.m. is the closing time and the process of pouring turpentine started just about that. As soon as Hatim started pouring turpentine the mixture began to froth. Hatim was unable to stir as according to him his assistant had gone some distance and he could not give the drum of turpentine to him so that he might stir the mixture. The result was that froth overflowed out of the barrel and because of heat, varnish and turpentine, which were stored at a short distance, caught fire. Seven men were working in a loft which is reached by a ladder and where manufactured paint is stored. The material in the premises being of combustible nature, the fire spread rapidly. Those who were working on the ground-floor managed to get out with burns only but those who were working in the loft could not get out in time with the result that all seven of them were burnt to death. The fire-brigade was sent for, but in view of the combustible nature of the material stored, it took 2½ hours to bring the fire under control. After the fire was controlled, bodies of four workmen were recovered the same night. Next morning two more bodies were recovered and in the afternoon one more body was found. Thus seven of the workmen lost their lives while seven other workmen suffered burns and were sent to hospital where they were treated as indoor patients. It may be mentioned that the appellant was not present on the premises when the fire took place, though he came there as soon as the information about it reached him.

These facts have been found by Courts below to be proved. Originally the other three partners were also prosecuted but the Magistrate acquitted them as the appellant was the managing partner and was directly in charge of work in the factory. On these facts the appellant was convicted under s. 304-A and s. 285 of the Indian Penal Code and it is the correctness of that conviction which is being assailed in the present appeal. The appellant appealed to the High Court but his appeal was summarily dismissed. His application for leave to appeal to this Court having been refused, he came to this Court and was granted special leave.

We shall first take up s. 304-A which runs thus:—

“Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.”

The main contention of the appellant is that he was not present when the fire broke out resulting in the death of seven workmen by burning and it cannot, therefore, be said that he caused the death of these seven persons by doing any rash or negligent act. The view taken by the Magistrate on the other hand which appears to have been accepted by the High Court was that as the appellant allowed the manufacture of wet paints in the same room where varnish and turpentine were stored and the fire resulted because of the proximity of the burners to the stored varnish and turpentine, he must be held responsible for the death of the seven workmen who were burnt in the fire. We are however of opinion that this view of the Magistrate is not correct. The mere fact that the appellant allowed the burners to be used in the same room in which varnish and turpentine were stored, even though it might be a negligent act, would not be enough to make the appellant responsible for the fire which broke out. The cause of the fire was not merely the presence of burners in the room in which varnish and turpentine were stored, though this circumstance was

indirectly responsible for the fire which broke out. But what s. 304-A requires is causing of death by doing any rash or negligent act, and this means that death must be the direct or proximate result of the rash or negligent act. It appears that the direct or proximate cause of the fire which resulted in seven deaths was the act of Hatim. It seems to us clear that Hatim was apparently in a hurry and, therefore, he did not perhaps allow the rosin to cool down sufficiently and poured turpentine too quickly. The evidence of the expert is that the process of adding turpentine to melted rosin is a hazardous process and the proportion of froth would depend upon the quantity of turpentine added. The expert also stated that if turpentine is not slowly added to bitumen and rosin before it is cooled down to a certain temperature, such fire is likely to break out. It seems, therefore, that as turpentine was being added at about closing time, Hatim was not as careful as he should have been and probably did not wait sufficiently for bitumen or rosin to cool down and added turpentine too quickly. The expert has stated that bitumen or rosin melts at 300 degree F and if turpentine is added at that temperature, it will catch fire. The flash point of turpentine varies from 76 to 110 degree F. Therefore, the cooling must be brought down, according to the expert, to below 76 degree F to avoid fire. In any case even if that is not done, turpentine has to be added slowly so that there may not be too much frothing. Clearly, therefore, the fire broke out because bitumen or rosin was not allowed to cool down sufficiently and turpentine was added too quickly in view of the fact that the process was performed at closing time. It is clearly the negligence of Hatim which was the direct or proximate cause of the fire breaking out, though the fact that burners were kept in the same room in which turpentine and varnish were stored, was indirectly responsible for the fire breaking out and spreading so quickly. Even so in order that a person may be guilty under s. 304-A, the rash or negligent act should be the direct or proximate cause of the death. In the present case it was Hatim's act which was the direct and proximate cause of the fire breaking out with the consequence that seven persons were burnt to death; the act of the appellant in allowing turpentine and varnish being stored at a short distance was only an indirect factor in the breaking out of fire.

We may in this connection refer to *Emperor v. Omkar*¹ where Sir Lawrence Jenkins had to interpret s. 304-A and observed as follows:—

“To impose criminal liability under s. 304-A, Indian Penal Code, it is necessary that the death should have been the direct result of a rash and negligent act of the accused, and that act must be the proximate and efficient cause without the intervention of another's negligence. It must be the *causa causans*; it is not enough that it may have been the *causa sine qua non*.”

This view has been generally followed by High Courts in India and is in our opinion the right view to take of the meaning of s. 304-A. It is not necessary to refer to other decisions, for as we have already said this view has been generally accepted. Therefore the mere fact that the fire would not have taken place if the appellant had not allowed burners to be put in the same room in which turpentine and varnish were stored, would not be enough to make him liable under s. 304-A, for the fire would not have taken place, with the result that seven persons were burnt to death, without the negligence of Hatim. The death in this case was, therefore, in our opinion not directly the result of a rash or negligent act on the part of the appellant and was not the proximate and efficient cause without the intervention of another's negligence. The appellant must, therefore, be acquitted of the offence under s. 304-A.

This brings us to s. 285 which runs as follows:—

“Whoever does, with fire or any combustible matter, any act so rashly or negligently as to endanger human life, or to be likely to cause hurt or injury to any other person, or knowingly or negligently omits to take such order with any fire or any com-

1 (1902) 4 Bom. L.R. 679.

bustible matter in his possession as is sufficient to guard against any probable danger to human life from such fire or combustible matter,

shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both." We are in the present case concerned with the second part of s. 285 which runs thus:

"Whoever knowingly or negligently omits to take such order with any fire or any combustible matter in his possession as is sufficient to guard against any probable danger to human life from such fire or combustible matter, shall be punished...."

The question is whether the appellant on the facts which have been proved knowingly or negligently omitted to take such order with fire or combustible matter in his possession as was sufficient to guard against probable danger to human life from such fire or combustible matter. In this connection we may refer to the fact that the appellant did not have a licence for manufacturing wet paints and, therefore, when he allowed wet paints to be manufactured in the circumstances which have been proved, he must be held to have knowingly acted in a manner in which he should not have done. There is a map on the record which shows that four burners were in one corner while turpentine and varnish were in another corner of the same room, and the distance between the burners and the stores was about 8 or 10 feet. The licence for storage given to the appellant contained general and special conditions. One of the general conditions was that "the licensee shall not use or permit to be used any portion of the licensed premises for dwelling or cooking purposes and no fire shall be lighted therein other than what is authorised." The articles stored being combustible, this general condition was imposed on the appellant and he had no business to light any fire in the room where stores were kept unless he was authorised to do so. There is no proof that he was authorised to light any fire in that room; and therefore he acted in breach of the general condition of the licence which forbade him from lighting any fire in the room where varnish and turpentine were stored. We take it that when the general condition says that no fire would be lighted except what is authorised, the intention must have been that the municipal committee will take necessary steps to see that the fire would be sufficiently guarded, if lighted in the same room, so that there may not be any outbreak of fire. The appellant clearly acted against this general condition of the licence and must be held to have knowingly, or at any rate negligently, omitted to take such order with any fire or any combustible matter in his possession as was required. Further the special conditions for keeping turpentine and varnish and paints require that "no smoking, light or fire in any form shall be permitted at any time" in the room in which paints, turpentine and varnish are kept or even in any premises licensed for storage unless in the case of a light, such light be duly protected and on no account be naked. The appellant clearly committed breach of this special condition also in allowing the lighting of four burners in the same room without taking any precaution for duly protecting the fire and even allowed it to be naked. It must, therefore, be held that the appellant negligently or knowingly omitted to take proper order with the fire or combustible matter in his possession. The contention on behalf of the appellant however is that even if he may have negligently or knowingly omitted to take proper order with the fire or combustible matter in his possession it cannot be said that his omission to take proper order was such as was insufficient to guard against any probable danger to human life. What is urged is that his not taking precautions may result in possible danger to human life but it cannot be said that this omission was such as would result in probable danger to human life. In particular it is urged that this method of work had been going on for some years and no fire had broken out and this shows that though there may have been possible danger to human life from such fire or combustible matter there was no probable danger. We are unable to accept this contention. The fact that there was no fire earlier in this room even though the process had been going on for some years is not a cri-

terion for determining whether the omission was such as would result in probable danger to human life. We have already pointed out that four burners were in one corner of the room and the combustible matter was in another corner of the same room and there was only a distance of 8 or 10 feet between the two. The burners were lighted against the general as well as the special conditions of the licence for storage granted to the appellant. The proximity of naked fire to the stores of turpentine and varnish is in our opinion always a matter of probable danger to human life, namely, the life of the persons working in the room. This was particularly so with respect to turpentine which has a low flash point i.e. 76 degree F to 110 degree F. The use of naked fire could in conceivable circumstances even raise the temperature of the room itself above the flash point of turpentine and if the turpentine ever happened to be exposed it might easily catch fire. There was in our opinion, therefore, always a probable danger to human life by the appellant negligently or knowingly omitting to take proper care in the matter of the four burners and turpentine and varnish. His action in allowing burners to be lighted in the room without any safeguard did in our opinion amount to omission to take such order with fire and combustible matter as would be sufficient to guard against probable danger to human life. We can only say that it was lucky that fire had not broken out earlier. But there can be no doubt that the omission of the appellant to take proper care with burners in particular when such combustible matter as turpentine in large quantity was stored at a distance of 8 to 10 feet from the burners was such omission as amounted to insufficient guard against probable danger to human life. Finally when we remember that all this was done in breach of the general and special conditions of the licence given to the appellant for storage of turpentine, varnish and paints, we have no doubt that the appellant knowingly, or at least negligently, failed to take such order with fire and the combustible matter as would be sufficient to guard against any probable danger to human life. In the circumstances we are of opinion that the appellant has been rightly convicted under s. 285 of the Indian Penal Code. Considering that seven lives have been lost on account of the negligence of the appellant in this connection, the sentence of six months' rigorous imprisonment which is the maximum provided under s. 285, cannot be said to be harsh.

We, therefore, partially allow the appeal and set aside the conviction and sentence of the appellant under s. 304-A of the Indian Penal Code. The appeal is dismissed so far as his conviction under s. 285 of the Indian Penal Code is concerned. The appellant will surrender to his bail to serve the remaining sentence under s. 285 of the Indian Penal Code.

Appeal partly allowed.

APPELLATE CIVIL.

Before Mr. Justice Patel and Mr. Justice Tulzapurkar.

MISS ANINHA D'COSTA v. MRS. PARVATIBAI M. THAKUR.*

Transfer of Property Act (IV of 1882), Sec. 105—Indian Easements Act (V of 1882), Secs. 52, 56, 60—Bombay Court-fees Act (Bom. XXXVI of 1959), Secs. 8, 10—Bombay Rents, Hotel and Lodging House Rates Control Act (Bom. LVII of 1947)—Landlord engaging broker and inserting newspaper advertisement offering premises on leave and licence basis—Agreement between landlord and person given exclusive possession of premises—Agreement stating that licensee to use and occupy premises for eleven months renewable at licensee's option and to pay monthly compensation—Agreement also stating that licence would stand revoked on failure by licensee to observe its terms and licensee not to allow any other person use and occupation of premises—Whether such agreement created relationship of landlord and tenant between parties—Construction of document—Whether Court can refuse to give effect to term of document on ground that it is placed at one place and not at other—Sections 8 and 10 of Bombay Court-fees Act whether lay down any special procedure for inquiry.

The plaintiff who owned a flat in Bombay employed the services of a broker for the purpose of giving the premises on the basis of leave and licence. The broker inserted an advertisement in a newspaper that a licence was intended to be granted in respect of the premises. The defendant approached the broker in pursuance of the advertisement and paid a certain amount to the latter by way of deposit and also a substantial sum by way of brokerage. Subsequently an agreement was entered into between the plaintiff and the defendant whereby the plaintiff "agreed to grant leave and licence to use and occupy the flat, furniture and fittings for eleven months renewable at the option of the Licensee every eleven months... on the following terms... 1. that the Licensee shall pay monthly compensation for use and occupation; 2. that the premises shall be used for residence and business... 5. that if the Licensee fails to observe the terms of the agreement or if she commits nuisance, the licence shall stand revoked and the Licensor shall have the right to eject the Licensee forcibly; 6. that the Licensee shall not allow any other person to use and occupy the premises... 7. that the Licensee shall not claim any right as a tenant...". The premises were given in the exclusive possession of the defendant. On the question whether the agreement between the parties created a relationship of landlord and tenant:

Held, that on the terms of the agreement and the circumstances of the case, the relationship between the parties was that of landlord and tenant.

Booker v. Palmer,¹ *Errington v. Errington and Woods*,² *Addiscombe Garden Estates Ltd. v. Crabbe*,³ *Associated Hotels of India Ltd. v. R. N. Kapoor*⁴ and *Ramjibhai Virpal v. Gordhandas*,⁵ referred to.

While construing a document, the Court has to consider the whole document and cannot refuse to give effect to a term of the document on the ground that it is placed at one place and not at the other. Therefore, as long as the agreement between the parties is clear, the place where a term of the document is found cannot matter much.

Section 8 or s. 10 of the Bombay Court-fees Act, 1959, does not lay down any special procedure for the inquiry. Section 8 of the Act only gives discretion to the Court to hold "such inquiry as it deems proper" and s. 10 only confers powers of a Court upon the Court or the Commissioner holding the inquiry.

S. Sohan Singh Chhadda v. Jitkaur,⁶ explained.

*Decided, November 25, 1964. Letters Patent Appeal No. 31 of 1963, against the order of dismissal passed by Naik J., in First Appeal No. 673 of 1961, confirming the decree passed by B. N. Chandiramani, Judge, City Civil Court, Bombay, in Short Cause Suit No. 4148 of 1960.

¹ [1942] 2 All E.R. 874.

² [1952] 1 K.B. 200.

³ [1958] 1 Q.B. 513.

⁴ [1960] 1 S.C.R. 368.

⁵ (1954) 56 Bom. L.R. 365.

⁶ (1963) Letters Patent Appeal No. 13 of 1963, decided by Patel and S. M. Shah JJ., on April 3, 1963 (Unrep.).

ONE Mrs. Parvatibai M. Thakur (plaintiff) filed a suit against Miss Aninha D'Costa (defendant) for *inter alia* a mandatory injunction to remove herself and her belongings from the suit premises situate at Churchgate, Bombay, alleging that the premises which she had taken on ownership basis were given to the defendant on November 15, 1959, on leave and licence basis and that she had revoked the licence. The defendant *inter alia* contended that the agreement on which the premises were given to her was of tenancy and not of leave and licence and that as the relationship between the parties was one of landlord and tenant the City Civil Court in which the suit was filed had no jurisdiction to entertain and try the suit.

The trial Court held *inter alia* that the agreement between the parties created the relationship of leave and licence and not of tenancy and decreed the plaintiff's suit.

The defendant appealed to the High Court.

The appeal was heard by Naik J. who, after dealing with the question of the Court-fee to be paid in a suit for possession by a licensor against his licensee (reported at 66 *Bombay Law Reporter* 744) observed in his judgment, delivered on July 29, 1963, as follows:

NAIK J. That takes me to the only and the important question in this case viz. whether the agreement arrived at between the parties amounted to a tenancy or a mere leave and licence. Before setting out the important terms and conditions of the agreement of the leave and licence (exh. A), it would be necessary to outline a few facts on which there is no dispute today. The plaintiff had employed one Gulab as the broker for the purpose of giving the premises on the basis of leave and licence. She had handed over the possession of the premises to Gulab by giving him the key thereof. Gulab forwarded the advertisement to the Press on November 14, 1959, for being published in the issue of "The Times of India" dated November 15, 1959. Accordingly, the advertisement appeared in the "Times of India" dated November 15, 1959, which reads thus:

"Churchgate—Immediate possession, two rooms, kitchen, furniture, flat. Compensation Rs. 225. Contact Flat No. 2, Churchgate Mansion, 'A' Road, near Churchgate Station".

The address given in this advertisement is the address of the suit premises. There is no dispute that on November 15, 1959, the defendant approached broker Gulab. There is considerable divergence as to whether the defendant approached the plaintiff before approaching Gulab. I will deal with the rival versions on that point a little later. For the time being I am discussing the facts which are either admitted or proved beyond the pale of doubt. On November 15, 1959, the defendant paid a sum of Rs. 675 by way of deposit to the broker and also a sum of Rs. 350 by way of brokerage to Gulab and secured possession from him on the same day. The agreement was reduced to writing on November 15, but, it is an admitted fact that the signatures of the parties were taken on the 16th. The document also was attested on the 16th. -

I will now set out the principal terms of the agreement (exh. A). The agreement contains a lengthy preamble and it will be necessary to set out the important terms of this preamble as follows:

(1) The expression "licensee" shall include her heirs, executors, administrators and assigns.

(2) The licensor has agreed to grant the leave and licence to use and occupy the flat, furniture and also fittings for the period of eleven months renewable every eleven months at the option of the licensee.

(3) The agreement has been arrived at in view of the cordial relation between the said parties.

(4) The agreement does not confer upon the licensee any right or title whether as tenant or sub-tenant.

The only terms and conditions to which reference may be made are Nos. 2 and 6 of the agreement. Term No. 2 provides "that the licensee shall use and occupy the said furnished flat for residential purposes and business for her and her family". Term No. 6 provides "that the licensee shall not allow any other person to use and occupy the said furnished flat except for her business and the *bona fide* members of her family and shall not transfer or part with the possession of the said flat to any other person or persons". The rest of the terms are not material for the purpose of construing the document with a view to see whether the intention of the parties was to create an agreement of tenancy or an agreement of leave and licence.

The plaintiff, at para. (2) of the plaint, stated that the defendant on or about November 15, 1959, was permitted to use the suit premises as a licensee on terms and conditions incorporated in the agreement of leave and licence dated November 15, 1959. That means that the plaintiff has based her claim on the terms and conditions of the agreement at exh. A. The defendant contended that the suit premises were let out to her prior to the alleged agreement of leave and licence and that the agreement was entered into between the plaintiff and the defendant provisionally, but that the same was not to be acted upon.

At the trial, it was suggested on behalf of the plaintiff that the terms and conditions of the agreement (exh. A) were drawn up by the broker, who copied these provisions from some other document and that these terms would not afford the basis for arriving at the real intention of the parties. It is also suggested that the plaintiff herself knows very little English and, in fact, she did not apply her mind to the terms and conditions of the document. All that she told to the broker was that she wanted to give the premises on leave and licence basis for a stated compensation. This line has been adopted with a view to explain some of the clauses contained in the leave and licence agreement and particularly the clauses contained in the preamble. Mr. Patel contended that since the plaintiff has based her claim on the agreement (exh. A) it is not open to her to offer any explanation about the terms and conditions of the agreement. It is not open for the plaintiff to go behind the agreement. I am unable to accept this line of reasoning. The main question for me to decide is, what was the intention of the parties, and every piece of evidence, which affords a clue to the intention of the parties, would certainly be relevant.

Before discussing the evidence on the above question it will be necessary to refer to the legal position on the principles governing the interpretation of a document of the nature of leave and licence. These principles are fairly well established. But the difficulty is about the application of those principles to the facts of each case. The most authoritative pronouncement on this question is the judgment of the Supreme Court reported in *Associated Hotels of India Ltd. v. R. N. Kapoor*.¹ The preamble to the document in that case ran as follows:

"Whereas the Licensee approached the Licensor through their constituted Attorney to permit the Licensee to allow the use and occupation of space allotted in the Ladies and Gents Cloak Rooms, at the Hotel Imperial, New Delhi, for the consideration and on the terms and conditions as follows:"

The following were the terms and conditions:

"1. In pursuance of the said agreement, the Licensor hereby grants to the Licensee, Leave and License to use and occupy the said premises to carry on their business of Hair Dressers from 1st May, 1949 to 30th April, 1950.

2. ...

3. That in the first instance the Licensor shall allow to the Licensee leave and licence to use and occupy the said premises for a period of one year only.

4. That the licensee shall have the opportunity of further extension of the period

of license after the expiry of one year at the option of the Licensor on the same terms and conditions...

5 to 7 ...

8. That in case the licensee for reasons beyond their control are forced to close their business in Delhi, the licensor agrees that during the remaining period the license shall be transferred to any person with the consent and approval of the licensor subject to charges so obtained not exceeding the monthly charge of Rs. 800".

On a construction of the terms set out above, the Supreme Court came to the conclusion that although the document was apparently in a language appropriate to a licence, the agreement between the parties, judged by its substance and real intentions, as it must be, left no manner of doubt that the document was a lease. In particular, their Lordships pointed out that the distinguishing features of this agreement were:

"(1) that it created an interest in the property in favour of the respondent, and,

(2) it gave him exclusive possession thereof, which, in the absence of any circumstances that negated it, must indicate a clear intention to grant a lease".

Subba Rao J. pointed out that the distinction between the two concepts viz., lease and leave and licence is clear though the dividing line becomes very thin and sometimes even blurred. Reference was made to the famous case of *Errington v. Errington*² wherein Lord Denning stated (*vide* p. 384):

"The result of all these cases is that, although a person who is let into exclusive possession is, *prima facie*, to be considered to be tenant, nevertheless he will not be held to be so if the circumstances negative any intention to create a tenancy".

Thereafter, Subba Rao J. laid down the following propositions which, he says, are fairly well established (p. 384):

"...(1) To ascertain whether a document creates a licence or lease, the substance of the document must be preferred to the form;

(2) the real test is the intention of the parties—whether they intended to create a lease or a licence;

(3) if the document creates an interest in the property, it is a lease; but, if it only permits another to make use of the property, of which the legal possession continues with the owner, it is a licence; and

(4) if under the document a party gets exclusive possession of the property, *prima facie*, he is considered to be a tenant; but circumstances may be established which negative the intention to create lease".

After laying down the above principles, Subba Rao J. proceeded to point out that the agreement puts the licensee in exclusive possession of the premises, untrammelled by the control and free from the directions of the appellants. His Lordship laid considerable emphasis upon the right of the respondent to transfer his interest, which, according to the learned Judge, was destructive of the theory of licence.

Applying the above test to the present case, let us try to find out which circumstances are favourable for the hypothesis that the agreement is an agreement of lease and what circumstances are favourable for the hypothesis that it is a leave and licence. Firstly, there was an advertisement in the newspaper, which mentioned that the premises were to be given along with furniture for a compensation of Rs. 225 p.m. It is the case for the plaintiff that it was in pursuance of this advertisement that the defendant went to the flat, the address of which was mentioned in the advertisement, and contacted the broker. It is further the plaintiff's case that the terms of the agreement were settled by the defendant with the broker and it was agreed that the defendant should take the premises on leave and licence basis on a monthly compensation of Rs. 225. It is further her case that the defendant was put in possession of the premises by the broker himself on November 15. An attempt was made by the defendant to show that it was not in pursuance of the advertisement that she contacted the broker of the plaintiff but that she had contacted

the plaintiff before the date of the agreement through the intervention of one Watts. Sukhdev Watts has been examined in this case to support this theory. The evidence given by Watts is unacceptable, mainly because according to him, he made a casual discovery about this particular vacancy and took the defendant to the plaintiff. He admitted that he did not know the plaintiff before, nor had he contacted her any time before. For the same reason, the evidence of the defendant must be rejected, when she says that she had approached the plaintiff with Watts requesting for granting the premises to her. In the course of her cross-examination the defendant made a startling statement viz., that she went to the broker, Gulab, on November 15, 1959, in his office and that it was from him that she got the address of the suit premises. Gulab has been examined and he stated that the defendant went to him on November 15, 1959, at the flat. The evidence of Gulab is consistent with the circumstances of the case and in particular the advertisement put up by him. On reading the evidence of the plaintiff, defendant and broker Gulab, no room is left for doubting the position advanced on behalf of the plaintiff viz., that the defendant approached Gulab in pursuance of the advertisement and that the terms and conditions were settled between her and Gulab.

Let me now consider the evidence of Gulab as to how the terms and conditions were agreed upon between him and the defendant. In the first place, Gulab says that the plaintiff had told him to give the flat on leave and licence basis and it is on that account that he put up the advertisement. He then says that the defendant saw the premises, that he took her to the plaintiff in the evening and that he told the defendant that she would have to pay three months' deposit and also told her that the agreement would be of leave and licence. He also told her that the amount of compensation would be Rs. 225 p.m. According to him, she agreed to these terms, handed over a cheque for Rs. 675 and she was then put in possession of the premises. Gulab explained that he had agreements of leave and licence with him in respect of other properties and that he made changes as to the names, description and the amount of compensation therein and got the agreement typed by his clerk. He added that he knows a little English and that his partner, D'Souza had made changes in the agreement before it was typed. No reason has been shown as to why this part of the broker's evidence should not be accepted as true. It is clear that the defendant has introduced the story that she had seen the suit premises in the company of Watts prior to the date of the agreement with a view to avoid the consequence that the defendant had approached the broker in pursuance of the advertisement and that the terms and conditions were settled with him. The most important circumstances to be considered in this case are that the terms and conditions were settled between the defendant and the broker on November 15, 1959; that payment of deposit amount and brokerage was made on that date; that possession was delivered to the defendant in pursuance of the above agreement and that it was only thereafter that the terms and conditions were reduced to writing.

It is in this light that we have to consider the terms and conditions of the agreement. In the first place, it is significant to note that all the important conditions, on which reliance is placed on behalf of the defendant for spelling out a contract of lease, are set out in the form of a preamble. This is somewhat extraordinary. The principal term viz., that the licence was to be heritable, should have been put in the form of one of the conditions of the lease. Instead of that, it has been put in an oblique way as an explanation of the term "licencee", which "includes her heirs, executors, administrators and assigns". This supports Gulab's contention viz., that he was keeping some old and hackneyed forms of agreement which were with him. In the same way, the other important condition relating to renewal was also put in the form of a preamble. No mention, whatsoever, has been made with regard to the licensee's right to get the term extended on her option in the terms and conditions of the licence. Mr. Patel contended that the fact that an heritable in-

terest was created under the agreement is indicative of an intention to transfer the interest in the property, that is to say, the right to enjoy the property hereditarily. In this connection, he pointed out that the decision of the Supreme Court has turned on the right of transfer, which was given to the licensee by the agreement. As pointed out above, in the agreement, in the present case, there is no specific clause that the right has been made heritable. It has been put only as an explanation of the term "licensee". That, in my view, makes considerable difference in the position arising in the present case. Again, no reason was shown as to why the broker's evidence should not be accepted, when he says that he copied some of the terms from the drafts, which were already with him. It is also necessary to remember that the plaintiff did not know much of English and all that she knows about English is that, she knows how to sign in English. She can neither read nor write except certain figures and names. Although the agreement stated that the premises were let out to the defendant for residential purpose and also for the purpose of her business as also the business of the family, still, it is in evidence that the defendant was making use of the premises only for the purpose of residence. She started doing tailoring business sometime after the institution of the suit. The dominant idea was, therefore, to give the premises to the defendant for residential purpose and not for the purpose of business.

Reliance was placed on the circumstance that in the rent receipts, which are at exh. 1, the word "rent" has been consistently mentioned. Rival versions have been placed before the Court as to how these receipts came into being. It is the case for the plaintiff that the defendant used to bring the receipts either typed or written and place them for her signature, whereas it is the case for the defendant that the plaintiff used to get those receipts either typed or written herself. The defendant was driven to admit that one of the receipts dated August 15, 1960, is in her own handwriting. This is sufficient to give a lie direct to her contention that it was the plaintiff who got the receipts prepared and she of her own put her signature and handed them over to the plaintiff. Two of the receipts are type-written and four written in hand. It was suggested in the course of the cross-examination of the defendant that, barring the receipt dated August 15, 1960, the other receipts are in the handwriting of one Sheshappa, who was helping her in this litigation; she dodged the issue by saying that she did not know the hand-writing of Sheshappa. The defendant knows English very well. In view of the plaintiff's deficiency in English, no importance can be attached to the use of the word "rent" in the receipts. Furthermore, at the back of one of these receipts dated March 1, 1960, the defendant had written the following in her own hand.

"I hereby agree that you (Defendant) may take paying guests and can give table space to anyone".

Below that the plaintiff has put her signature. It is significant that term No. 6 of the agreement prohibited the transfer or parting with possession of the flat to any other person. In the first place, such a term is destructive of the idea of tenancy. In the second place, the defendant appears to be clearly conscious of the prohibition contained in term No. 6. That seems to be the reason why she sought express permission of the plaintiff for keeping paying guests. As a matter of fact, the defendant has admitted that she had kept only one paying guest during the entire period. Of course, she tried to improve upon this admission by saying that she kept three paying guests in the course of her occupation of the premises.

The conduct of the defendant in not exercising the so-called option for the renewal of the so-called tenancy is also significant. At the end of the period of eleven months, the defendant never approached the plaintiff either orally or with a notice calling upon her to extend the term of the licence for a further period. The mere fact that exclusive possession was awarded to the defendant cannot be considered to be a decisive circumstance in the light of the direct evidence that has been led on the question as to how the agreement came to be

hammered out. Having regard to the background in which the agreement was arrived at and the positive evidence led on the terms and conditions that were settled between the parties and construing the document, as a whole, and taking the conduct of the parties into account, I feel no hesitation in holding that the real intention of the parties was to give the premises on leave and licence basis.

The result is that the appeal fails and is dismissed. The decree of the lower Court is confirmed with the modification that the plaintiff do recover possession of the premises from the defendant. The remaining part of the decree is confirmed. The decree be drawn up as set out above on the condition that the plaintiff pays the court-fee on a sum of Rs. 15,000. In the peculiar circumstances of the case, I direct that the parties should bear their respective costs of this appeal.

THE defendant appealed under the Letters Patent.

C. P. Patel, for the appellant.

K. S. Lulla, for the respondent.

PATEL J. This is an appeal by the defendant who has failed in both the Courts in a suit which arose out of the occupation of the suit premises by the defendant apparently as a licensee. The plaintiff is the owner of the flat in suit situated in the Churchgate Co-operative Housing Society Ltd. On November 15, 1959, the defendant was let into possession on her agreeing to execute a document of leave and licence and the document was actually executed between the parties on November 16, 1959. The document is at ex. A. It purported to be for a period of 11 months. In terms of the document an attempt was made to obtain forcible possession without resort to Court, but the plaintiff did not succeed, with the result that the present suit was filed in the City Civil Court at Bombay as a short cause suit for recovery of possession from the defendant on the basis that the licence was ended or terminated. The reliefs claimed were those of mandatory injunctions and Court-fee was paid on the footing that the suit was one for mandatory injunctions. The defendant resisted the suit contending that she was a tenant, that the premises were let out to her as a tenant and that the Court had no jurisdiction as the dispute was one between a landlord and a tenant. She contended that the amount charged for the occupation was excessive and that she had already filed an application under the Rent Act for determination of standard rent before the Court of Small Causes at Bombay. She objected to the frame of the suit contending that a suit for mandatory injunctions was not maintainable. The learned trial Judge construed the agreement between the parties as an agreement of leave and licence. He negatived the contentions of the defendant and decreed the suit. Against this judgment, the defendant came in appeal which was heard by Mr. Justice Naik sitting singly. He agreed with the conclusion of the learned Judge of the City Civil Court and dismissed the appeal. Before him, three points were argued by the advocate for the defendant, viz. (i) that the frame of the suit was improper and it was not, therefore, maintainable; (ii) that on a proper valuation being made the Court would have no jurisdiction to deal with the suit; and (iii) that the agreement between the parties was one of tenancy and, therefore, the plaintiff was not entitled to any relief. All these three contentions were negatived by the learned Judge.

The learned advocate for the defendant in this appeal has urged the same three contentions before us. His first contention is that the suit for injunctions as prayed for by the plaintiff is not maintainable, inasmuch as the defendant was in exclusive possession of the premises and the plaintiff's remedy was, therefore, to ask for possession of the property. In this contention he is supported by a judgment of the Division Bench of this Court (in which I was a member) in the case of *Lakshiram v. Vidyut Etc. Industries*.¹ But in that

case we also pointed out that the Court would be entitled to construe the plaint, and if on a fair construction the Court could arrive at the conclusion that what was really intended by the plaint was a claim to possession, then the suit ought not to be dismissed only on the ground that Court-fee had been paid as on an injunction. In view of this judgment, Naik J. construed the plaint and directed the plaintiff to pay the Court-fee which she would have been bound to pay as in a suit for possession on the basis of the value of the property as fixed by him. In our view, the learned Judge was right in the course that he adopted in the matter. This contention, therefore, ought to fail.

The next question is about the market value of the property. Mr. Patel for the appellant invited our attention to the decision of the Division Bench in *S. Sohonsingh Chhadda v. Jitkaur*,² where we held that ordinarily the market value of the property could be arrived at by taking the licence fee as the return on the property and multiplying it by $12\frac{1}{2}$, i.e. at $12\frac{1}{2}$ years' purchase. While adopting that rule, we made some basic assumptions which we thought would be appreciated by most. But it seems necessary to amplify the reasons for our doing so.

Now, the Court-fees Act is a finance Act. It requires that proper Court-fee should be paid on a plaint in accordance with the nature of the subject matter of the suit. The section which imposes the Court-fee is s. 6 and it deals with a large number of subjects in respect of each of which it prescribes different amounts of Court-fee. In respect of some of the matters, the Court-fee that is required to be paid is proportionate to the market value of the property depending upon the nature of the reliefs claimed by the plaintiff. We do not think it is necessary to refer to these sub-sections specifically. Section 8 enables the Court, whenever a question of valuation of the subject-matter of the suit is raised to decide the same and to do so "it may hold such inquiry as it deems proper". The language shows that the manner of inquiry is left to the Court and would depend upon the nature of the subject-matter of the suit. The reason for the giving of this discretion is quite understandable. The valuation of the property for the purpose of Court-fee is not the real dispute between the parties which falls to be decided by the Court, but is only a collateral matter and that is why the strict procedure which applies for decision of suits need not be applied to such an inquiry. In order to reduce its work and not to waste its time in this inquiry, s. 9 enables the Court to appoint even a Commissioner for certain investigation. Section 10 gives some of the powers of a Court under the Civil Procedure Code to either the Court or the Commissioner making the inquiry. This may suggest that the inquiry may not even be regarded strictly as judicial. Thus the section does not prescribe that the Court which makes the inquiry shall follow a particular procedure such as is done by the Bombay Rent Act and the Tenancy Act. An analysis of the provisions of s. 6 of the Court-fees Act shows that in respect of certain kind of property the method of computing the value is laid down and in such cases no difficulty arises. It only arises in other cases where market value is to be determined.

Now, the words "market value" mean the price which a willing purchaser would pay to a willing seller for the property on the day when the suit is filed. The method of valuation is familiar to most who deal with land acquisition cases. Two methods are very frequently adopted for determining the market value. One is by production of sale deeds of comparable properties in the vicinity of the property in question during the period nearabout the date with respect to which the price has to be determined. The other is by reference to the net income of the property which it earns. One method is used to also check the result arrived at by the other. However, with all the care, the Court cannot determine the exact value. Sometimes, expert evidence is call-

² (1963) Letters Patent Appeal No. 13 of 1963, decided by Patel and S. M. Shah JJ., on April 3, 1963 (Unrep.).

ed to state the value of the property, but experience has shown in many cases that the expert for one party will say that the value is Rs. 100 and the expert for the other side will say that it is Rs. 1,000. Though discretion is given to the Court for adopting such procedure as it deems necessary for making the valuation, it has to determine the value of the property fairly though, of course, the same exactness as one may expect under the Land Acquisition Act may not be required. We, therefore, adopted a ready method for determining the value of the property where it is earning income in the above case.

At this stage, it is also desirable to explain why we took only 12½ years' purchase and not longer. If the market value of the property is to be assessed on the basis of the net income, then the number of years' purchase depends on the rate of interest on gold-edged securities. Usually, in respect of non-agricultural income, it has become customary to adopt a rule of 16 2/3 years' purchase upto even 20 years' purchase. But then this method is on the hypothesis that the income is the normal income and is likely to be recovered for a reasonably long period. Now, the licence fees which are earned in the present days are very exorbitant and the good or bad days cannot be expected to last for a considerably long time. We, therefore, took only 12½ years' purchase of the licence fee.

The learned Judge says:

"Section 10 of the Bombay Court-fees Act provides the mode and the manner in which the inquiry is to be conducted for arriving at the market value of the property in question. All that section 8 of the Court-fees Act lays down is that the correct valuation of the property is to be arrived at in all cases, where the suit has been wrongly valued by the plaintiff. I do not think that the learned Judges intended to lay down a rule, which will have the effect of superseding the provisions of the statute", the underlying suggestion being that the Court in L.P.A. No. 13 of 1963 laid down a rule contrary to the provisions of the Court-fees Act, which, to say the least, is hardly fair to the learned Judges. It is almost elementary that the function of the Court is to construe and not to legislate. With all respect to the learned Judge, neither s. 8 nor s. 10 lays down any special procedure for the inquiry. As pointed out above, s. 8 only gives discretion to the Court to hold "such inquiry as it deems proper" and s. 10 only confers powers of a Court upon the Court or the Commissioner holding the inquiry. The word "ordinarily" in our judgment in the case referred to is indicative enough. Mr. Lulla for the respondent practically disowned the argument.

Now, in the present case, it is true that in 1954 the plaintiff had paid approximately Rs. 10,000 for this property. But then that was six years before the date when the question arose. Evidently, if the property was being acquired, the plaintiff herself would not have relied upon the purchase price paid by her in view of the fact that the prices of properties in Bombay are rising by leaps and bounds. Even Mr. Lulla while addressing us on the reasonableness of the compensation stated that the prices had risen very high during the six years and in fixing the amount of compensation the price of the property at that date was taken into account. If that is so, we do not see what injustice can there be in applying the rule that we have laid down. It was suggested by Mr. Lulla before the learned Judge that the compensation for the furniture should be assessed at Rs. 75. Before such figure can reasonably be accepted, one must be put on an inquiry as to what is the value of the furniture, because very often furniture is used as a pretext for earning very high compensation and avoiding the payment of taxes to the Municipal Corporation. The Rent Act which defines the word "premises" includes by s. 5, cl. (8) in the word, "any furniture supplied by the landlord for use in such building or part of a building". If that is so, the framers of the Act clearly intended that the furniture should earn only reasonable compensation and not any exaggerated compensation for its use. In the present case, the document between the parties mentions five pieces of furniture—a cupboard, kitchen cupboard, 1 ceiling fan, 2 chairs and 1 bed—and having regard to the fact that we are not valuing the

furniture of a millionaire in a palatial flat, the value of the furniture can hardly be about Rs. 1,000 even on a liberal basis. As we said, however, that is a matter of evidence and this is only a conjecture.

However, we do not think that any useful purpose can now be served by going further into this question. After all, in assessing the market value, one has to some extent enter into the realms of conjecture. The defendant had not raised the question of valuation in the trial Court and raised it for the first time in the Court of appeal. In order to arrive at the net income, the outgoings such as taxes and other charges of which there is no evidence have to be ascertained. In the case decided by the Bench, the licence fee was the net income of the tenant. We do not think, therefore, on the whole, that we will be justified in holding that the market value is more than Rs. 15,000, fixed by the learned Judge.

Even assuming that the value of the property is Rs. 25,000 or more, Mr. Patel is concluded by s. 11 of the Suits Valuation Act, which requires that before a judgment can be set aside on the ground of over or under-valuation of the property and consequential want of jurisdiction in the Court, it must be shown that prejudice is caused to the appellant. None has been pointed out by Mr. Patel and accordingly his contention must fail.

The third and the most important contention is whether the agreement between the parties creates relationship of landlord and tenant.

It is well to bear in mind the relevant definitions in our law. Section 105 of the Transfer of Property Act defines a lease of immovable property as a transfer of a right to enjoy the property for a certain time in consideration for a price paid or promised. The price paid is called rent. On the other hand, under s. 52 of the Indian Easements Act, licence is

"Where one person grants to another ... a right to do or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of such a right be unlawful, and such right does not amount to an easement or an interest in the property, the right is called a licence",

the underlying assumption in the case of a licence being that the owner continues to be in possession and control of the property. But this is not all. The attributes of a licence can be seen from some of the subsequent provisions in the Easements Act. By s. 56 a licence except one to attend a public place of entertainment is made non-transferable and it is not exercisable even by servants or agents. By s. 60 the licensor's transferee of the property is not bound as such by the licence. By this section it is also made revocable except in certain cases. In the case of a licence, therefore, there is something less than a right to enjoy the property in the licensee; it cannot be exercised by servants and agents, is terminable and a transferee of the property is not as such bound by the licence. On the other hand, in the case of a lease, there is a transfer of a right to enjoy the property or in other words the lessee is entitled to enjoy the property. Having regard to the statutory provisions, we think that the test of exclusive possession must be regarded as a very important test of tenancy.

The question has come before Courts since very early times and the test then adopted was that if exclusive possession was given to a party, the agreement between the parties must be regarded as a lease. Difficulties were felt in the application of this principle by reason of the stringent provisions of the Rent Acts and in order to meet these, the test has since been modified. In *Booker v. Palmer*,³ the owner had allowed as a matter of concession the appellant whose home was destroyed to live in one of the cottages belonging to him. The appellant then claimed right of tenancy. This claim was negatived by the Court. The learned Judge said (at p. 676):

"...Whether or not parties intend to create as between themselves the relationship of landlord and tenant, under which an estate is created in the tenant and certain

mutual obligations arise by implication of law, must in the last resort be a question of intention".

It was held there that having regard to all circumstances no tenancy was intended. It is needless in this connection to refer to all the cases, but we may refer to *Errington v. Errington and Woods*⁴ where after referring to decided cases, Denning L. J. says (p. 298):

"The result of all these cases is that, although a person who is let into exclusive possession is prima facie to be considered to be a tenant, nevertheless he will not be held to be so if the circumstances negative any intention to create a tenancy. Words alone may not suffice. Parties cannot turn a tenancy into a licence merely by calling it one. But if the circumstances and the conduct of the parties show that all that was intended was that the occupier should be granted a personal privilege, with no interest in the land, he will be held to be a licensee only."

In this connection, we may refer with advantage to the case of *Addiscombe Garden Estate Ltd. v. Crabbe*⁵ wherein the observations of Denning L. J. in *Facchini v. Bryson*^{5a} to the following effect are referred to. He says (p. 1389):

"...We have had many cases lately where an occupier has been held to be a licensee and not a tenant. In addition to those which I mentioned in *Errington v. Errington* we have recently had three more, *Gorham (Contractors) Ltd. v. Field*,⁶ *Forman v. Rudd*,⁷ and *Cobb v. Lane*.⁸ In all the cases where an occupier has been held to be a licensee there has been something in the circumstances, such as a family arrangement, an act of friendship or generosity, or such like, to negative any intention to create a tenancy. In such circumstances it would be obviously unjust to saddle the owner with a tenancy, with all the momentous consequences that that entails nowadays, when there was no intention to create a tenancy at all. In the present case, however, there are no special circumstances. It is a simple case where the employer let a man into occupation of a house in consequence of his employment at a weekly sum payable by him...."

The Court held that the relationship was that of a service tenant and landlord and that their relationship was determined by the law and not by the label which they chose to put on it. After citing the case of *Customs and Excise Commissioners v. Pools Finance (1937) Ltd.*,⁹ the learned Judge proceeds:

"It is not necessary to go so far as to find the document a sham. It is simply a matter of finding the true relationship of the parties. It is most important that we should adhere to this principle, or else we might find all landlords granting licences and not tenancies, and we should make a hole in the Rent Acts through which could be driven—I will not in these days say a coach and four, but an articulated vehicle."

If one has regard to the conditions prevailing in Bombay and also at some other places, there can be no doubt about the truism of the remarks. In the city of Bombay, in the case of new premises, the Act practically is non-existent. There are also unscrupulous tenants who make huge profits out of their tenancies by inducting what are called licensees. While, therefore, construing the terms of a document, the Court would not lose sight of the fact that ingenious attempts are made to circumvent the provisions of the statute. Indeed, in such cases, it may even be possible to say that the document is bogus or sham. However, ultimately, as the relationship is determined by law irrespective of the label attached to it by the parties, one need not go so far. It is possible that when exclusive possession is given having regard to the special circumstances mentioned by Denning L. J., it can be said that in a given case a right to enjoy the property was not intended to be transferred or given.

In the case of *Associated Hotels of India Ltd. v. R. N. Kapoor*,¹⁰ the question arose before our Supreme Court, in respect of the occupation of two rooms by the respondent which were described as Ladies' and Gents' Cloak Rooms where he carried on the business of a hair-dresser. S. K. Das and Sarkar JJ.

4 [1952] 1 K.B. 290.

5 [1958] 1 Q.B. 513.

5a [1952] 1 T.L.R. 1336, at p. 1389.

6 [1952] C. P.L. 266.

7 Unreported.

8 [1952] 1 T.L.R. 1037, [1952] 1 All E.R. 1199.

9 [1952] 1 T.L.R. 792.

10 [1960] S.C.R. 368.

held that the rooms let, being rooms in the hotel were excluded from the operation of the Ajmer-Merwara Rent Control Act, 1947. Subba Rao J. dissenting from the above view considered the question whether the relationship was of landlord and tenant. After referring to s. 52 of the Easements Act, the learned Judge in connection with licence says (p. 383):

"...The legal possession, therefore, continues to be with the owner of the property, but the licensee is permitted to make use of the premises for a particular purpose. But for the permission, his occupation would be unlawful."

The learned Judge ultimately formulates the test of intention of the parties. In this case the terms of agreement between the parties as said by Subba Rao J. were apparently appropriate for a licence. Yet he was of the opinion that the legal relationship was that of landlord and tenant.

The terms of the agreement in the present case are:

Whereas the Licensor has agreed to grant leave and licence to use and occupy the flat, furniture and fittings for eleven months renewable at the option of the Licensee every eleventh month... and whereas the said leave and licence... does not confer on the Licensee any right or title, whether as tenant or sub-tenant, on the following terms:

1. That the Licensee shall pay monthly compensation for use and occupation;
2. that the premises shall be used for residence and business by her and her family;
3. that the Licensee shall deposit Rs. 675/- without any interest for the due performance of the terms and indemnifying the Licensor for loss or damage;
4. that the Licensor shall pay all taxes except the Chowkidar's charges of Rs. 10/- which shall be paid by the Licensee;
5. that if the Licensee fails to observe the terms of the agreement or if she commits any nuisance, the licence shall stand revoked and the Licensor shall have the right to eject the Licensee forcibly;
6. that the Licensee shall not allow any other person to use and occupy the premises except...;
7. that the Licensee shall not claim any right as a tenant; and
8. that the Licensee shall not make any additions and alternations in the flat without the written permission of the Licensor.

In the present case, there are many circumstances connected with the transaction that have to be considered. The plaintiff had inserted an advertisement in the newspaper that a licence was intended to be granted; but then it is hardly likely that a person who wants to circumvent the provisions of the Rent Act would say that the property is to be leased. The giving of the advertisement, in our view, would indicate that she wanted to give out the property to whosoever was prepared to take it and pay the price. Merely from the language employed in the advertisement, it cannot be inferred that a licence was intended. The second circumstance which emerges from the evidence is that admittedly the services of a broker were employed by the plaintiff. It is obvious, therefore, that the intention was not to accommodate any person who was known to the plaintiff, but to have anyone who was needy enough to agree per force to the terms proposed by the plaintiff. The employment of the broker must necessarily suggest that the intention was to earn whatever could be earned out of the property and no other. The amount paid to the broker is also not less. This circumstance also, therefore, cannot support the inference that it was because the plaintiff intended to give a licence only that she had employed the broker. A fair reading of the agreement between the parties leaves no room for doubt that the flat was given in the exclusive possession of the defendant for the use of herself and the members of her family and its use was intended to be for 11 months. The parties, however, did intend that the term was renewable at the end of 11 months at the option of the licensee. It was, therefore, not a short term accommodation. The learned advocate for the respondent says that as the term appears in the main body

of the agreement and not in the subsequent clauses which lay down the terms, it should be held that it was not intended to be acted upon, a contention which found favour with the learned Judge. We cannot agree. As long as the agreement between the parties is clear, the place where the term is to be found cannot matter much. While construing the document, the Court has to consider the whole document and cannot refuse to give effect to a term of the document on the ground that it is placed at one place and not at the other. It specifically says:

"Whereas the said Licensor has agreed to grant the leave and licence... for the period of 11 (eleven) months renewable every eleventh month at the option of the Licensee,... the terms and conditions... are as follows:".

The main and the important term was embodied in that paragraph and the details were worked out in the subsequent paragraphs and it is no wonder, therefore, that we do not find a repetition of that term in the details. To show that licence was intended, a crude attempt is made by adding the recital that "the parties had cordial relations". The evidence of both the plaintiff and the defendant shows that they did not know each other prior to that date. In fact, the plaintiff had inserted an advertisement for finding a person likely to occupy the flat and the defendant was told about the vacancy of the premises by someone who had gone to see the premises for himself but found them to be unsuitable. This recital is untrue and it shows the working of the mind of the broker and that of the plaintiff. Indeed, the rest of the terms are such as are to be found in most tenancy agreements, the only difference being that instead of rent the occupational charges are described as compensation. No circumstances such as those described by Denning L. J. in the case cited above are disclosed either by the document or by the evidence of the parties. Why then one must construe the agreement between the parties as a licence and allow the evasion of the Rent Act merely because the plaintiff has chosen to apply the label that it is a licence?

Mr. Lulla has very strenuously argued that some of the terms show an intention that licence was intended by both parties and also relied upon the decision in *Ramjibhai Virpal v. Gorāhandas*.¹¹ Clause 6 makes possession non-transferable to anyone else; in clause 5 there is a condition that if the defendant commits any act of nuisance the licence shall be deemed to have been cancelled and it would be lawful for the licensor without prejudice to any other remedy to forcibly remove the defendant from the flat; the defendant would have to pay a deposit of Rs. 675 which works out compensation for 3 months and that the monthly payment is called compensation. Evidently, there are leases between landlords and tenants which may prescribe many such similar conditions, but merely because of the existence of such conditions, leases are not converted into licences. Calling the occupational price compensation does not make it a licence. *Ramjibhai Virpal's* case has no application. The principles formulated there are the same as in other cases and having regard to circumstances in the case it was held that tenancy was not intended to be created.

Mr. Lulla tried to take us through the evidence of the parties and relying on certain statements made by the defendant argued that she also intended that there should be a licence and not a tenancy. Now, one cannot forget the circumstances in which the defendant was. The hardships of finding accommodation in Bombay are well-known. One need not, therefore, wonder at a needy person agreeing to sign whatever document is required to be signed by him so long as he gets the premises and is able to live in the same. The defendant admitted that she agreed to execute the document as desired by the plaintiff as that of a licence, but she said that she was to be tenant. It is true that she has not said that she did so because she was in difficulties. But then this fact cannot be overlooked. Apart from this, as we have stated, oral evidence of prior communings between the parties cannot be allowed to influence

the judgment of the Court in deciding the relationship between the parties. See *Bomanji v. Secretary of State*.¹² Now, what is to be determined is the legal relationship between the parties and, therefore, what they called it is not much material. Giving our best consideration to the terms between the parties and the surrounding circumstances, we hold that the relationship between the parties was that of landlord and tenant. In view of this conclusion, we must hold that the Court had no jurisdiction to decide the dispute between the parties.

In the result, the suit must fail and is dismissed.

The appeal has been filed in *forma pauperis*. Looking to the condition of the plaintiff herself, we do not think that we should require her to pay the Court-fee which she ought to pay. We also do not think that the circumstances demand that we should make an order for costs in these proceedings. We, therefore, direct the parties to bear their own costs throughout.

Suit dismissed.

Before the Hon'ble Mr. H. K. Chainani, Chief Justice, and Mr. Justice Gokhale.

DATTU BALA NIKAM

v.

VINAYAKRAO SHRIPATRAO PATWARDHAN.*

Bombay Tenancy and Agricultural Lands Act (Bom. LXVII of 1948), Secs. 29, 14—Notice terminating tenancy for default in payment of rent served on 29-12-1954—Application for possession made on 23-3-1957—Whether application time-barred—Right to obtain possession whether accrues on expiry of period of notice or date on which default made.

The petitioner who was a tenant of certain lands made defaults in payment of rent to the opponents-owners for the years 1951-52, 1952-53 and 1953-54. A notice terminating the tenancy was served on the petitioner on December 29, 1954 and on March 23, 1957 the opponents made an application under s. 29 of the Bombay Tenancy and Agricultural Lands Act, 1948, for obtaining possession of the lands. The petitioner contended that the opponents' application was time-barred under s. 29(2) of the Act, whereas the opponents contended that as the right to obtain possession of the lands accrued to them on the expiry of the period of notice terminating the tenancy i.e. on March 29, 1955, their application was in time:—

Held, that the period of limitation must be counted from the date on which there were defaults in the payment of rent,

that the last default which took place being for the year 1953-54, the last date for payment of rent under s. 14 of the Act as it then stood, was April 20, 1954, which was the date on which the right to obtain possession must be deemed to have accrued to the opponents, and

that as the application for possession was made more than two years later i.e. on March 23, 1957, it was beyond the period of limitation and was consequently not maintainable.

Chinnabai Rama v. Ganpat Jagannath,¹ followed.

*Ganpati Appa v. Maruti Bala*² and *Raja Ram v. Aba Maruti*,³ explained.

THE facts appear in the judgment.

H. D. Gole, for *S. B. Bhasme*, for the petitioner.

R. A. Jahagirdar, with *G. N. Vaidya*, for opponents Nos. 1 and 2.

R. B. Kotwal, Government Pleader, as per Court's order.

CHAINANI C. J. The petitioner's father was a tenant of two lands belonging to opponents Nos. 1 and 2 (hereinafter referred to as the opponents). As there were defaults in the payment of rent for the years 1951-52, 1952-53 and

12 (1928) 31 Bom. L.R. 256, P. C.

*Decided, March 11, 1965. Special Civil

Application No. 1615 of 1963.

1 (1958) 60 Bom. L.R. 975, F.B.

2 (1960) 62 Bom. L.R. 802, F.B.

3 (1962) 64 Bom. L.R. 569, S.C.

1953-54, the opponents gave a notice terminating the tenancy on December 27, 1954. This notice was served on the petitioner's father on December 29, 1954. It appears that there were further defaults in the payment of rent for the years 1954-55 and 1955-56. On March 23, 1957, the opponents made an application under s. 29 of the Tenancy Act for obtaining possession of the lands. The petitioner's father died during the pendency of the proceedings and the petitioner was brought on record as his heir. The Additional Tenancy Awai Karkun who heard the application came to the conclusion that there had been defaults for more than three years. He, therefore, directed that possession of the lands should be restored to the opponents. This order has been confirmed in appeal by the Prant Officer and in revision by the Revenue Tribunal.

Mr. Gole, who appears on behalf of the petitioner, has contended that the application made by the opponents for possession of the lands was time-barred. He has relied on the Full Bench decision of this Court in *Chimnabai Rama v. Ganpat Jagannath*.¹ This decision has been considered by the Revenue Tribunal. The Tribunal was, however, of the opinion that the matter must be decided in the light of the decision of another Full Bench of this Court in *Ganpati Appa v. Maruti Bala*,² in which it was held that the right to obtain possession of a land accrues to the landlord on the expiry of the period of notice terminating the tenancy given by him. Under s. 14 of the Tenancy Act a landlord has to give three months notice informing the tenant of his decision to terminate the tenancy, before the tenancy can be terminated on the ground that the tenant has failed to pay the rent due from him. The period of notice expired on March 29, 1955. The application for possession was made by the opponents on March 23, 1957, i.e., within two years from the date on which the notice terminating the tenancy expired. The Tribunal, therefore, held that the application was in time.

Sub-section (2) of s. 29 of the Tenancy Act provides that for obtaining an order for possession from the Mamlatdar the landlord shall make an application in the prescribed form within two years from the date on which the right to obtain possession of the land is deemed to have accrued to him. As pointed out in *Chimnabai Rama v. Ganpat Jagannath*, the section fixes as the starting point of limitation not the date on which the right to obtain possession has actually accrued to the landlord, but the date on which this right must be deemed to have accrued to him. At page 978 it has been observed:

"...The one fact that immediately strikes the reader of this section is that the Legislature has advisedly not made the time, when the actual right to take possession accrues to the landlord, the starting point of limitation... the Legislature has inserted a legal fiction and the legal fiction is that you have not to consider for the purpose of limitation when the right to obtain possession actually accrued to the landlord, but what you have to consider is when the right to obtain possession accrued to him fictionally by reason of the fiction introduced by the Legislature. Therefore, it is clear that under s. 29(2) limitation does not begin to run from the time when the right to obtain possession actually accrues to the landlord... It begins to run from a point of time when in fact he has no right to obtain possession, but the Legislature for the purpose of limitation considers that he has a right to obtain possession."

Later on, on the same page, it has been observed:

"...Therefore we must look to something antecedent to the actual moment of time when the right to possession accrues to the landlord and that antecedent point of time is the creation of the sub-tenancy. What the Legislature says is that when the tenant creates a sub-tenancy, although the right to obtain possession has not accrued to the landlord, for the purpose of limitation look upon the creation of the sub-tenancy as the starting point of limitation."

It was, therefore, held in this case that having regard to the language used in s. 29(2) limitation runs not from the date on which the right to obtain possession has actually accrued to the landlord but from the date on which it

¹ (1958) 60 Bom. L.R. 975, F.B.

² (1960) 62 Bom. L.R. 802, F.B.

can be deemed to have accrued to him, i.e., when the sub-tenancy was created. On the same reasoning the right to obtain possession on account of the tenant's failure to pay rent within the prescribed time must be deemed to have accrued to the landlord on the date when there was a default in the payment of rent and limitation will run from this date.

Mr. Jahagirdar has urged that the authority of this decision is considerably shaken by *Ganpati Appa v. Maruti Bala*. In that case the Court was not considering the question of limitation under s. 29(2). The Court in that case had to determine the scope of sub-s. (2) of s. 25, as amended in 1956, and whether this section applied to cases in which tenancies had been terminated before August 1, 1956, when the sub-section, as amended, came into force. For the purpose of deciding this question the Court had to consider when the right to obtain possession accrues to a landlord. It was held that it is on the expiration of the period of notice that the tenancy is terminated and the landlord gets a right to obtain possession of the land. Even in the earlier decision of the Full Bench in *Chinnabai Rama v. Ganpat Jagannath* it was held that the right to obtain possession does not accrue when the sub-letting takes place but only after the landlord has given a notice indicating his intention to terminate the tenancy. This is clear from the following observations (p. 978) :—

“...When does the right to obtain possession actually accrue to the landlord? In view of what we have already said that sub-letting by itself does not bring about a termination and that the tenancy is only liable to be terminated, it is clear that when a tenant sub-lets there is no right in the landlord to obtain possession. Some further act is necessary on his part before the right to obtain possession can arise and that further act is either the giving of a notice or the taking of some unequivocal act indicating his intention to terminate the tenancy.”

In our opinion, there is no conflict between *Chinnabai Rama v. Ganpat Jagannath* and *Ganpati Appa v. Maruti Bala*, nor is the authority of the earlier decision shaken by the later decision. In the first case the question which has been decided is when the right to obtain possession can be said to have accrued to the landlord within the meaning of s. 29(2). In the latter case, the question decided is as to when the right to obtain possession actually accrues to the landlord.

Mr. Jahagirdar has also referred to the observation of the Supreme Court in *Raja Ram v. Aba Maruti*³ which is as follows (p. 573) :—

“The statute having provided for the termination of the tenancy would by necessary implication create a right in the landlord to recover possession... Indeed, s. 29(2) itself mentions this right expressly for it says that the application shall be made within two years from the date on which ‘the right to obtain possession of the land’ accrued to the landlord.”

Mr. Jahagirdar has relied on the words “accrued to the landlord” in this observation and has urged that the Supreme Court has interpreted the words “deemed to have accrued” in s. 29(2) as equivalent to “accrued”. We do not think that Mr. Jahagirdar is right on this point. The Supreme Court was not considering the question of limitation under s. 29(2). The question before the Supreme Court was whether a tenant is entitled to relief when he has committed more than three defaults in the payment of rent. The Supreme Court has pointed out that as there was a statutory right in the landlord to obtain possession, it could not be made subject to an equitable relief. Consequently no inference such as has been suggested by Mr. Jahagirdar can be drawn from the above observation of the Supreme Court.

Having regard to the decision in *Chinnabai Rama v. Ganpat Jagannath*, we must, therefore, hold that the period of limitation must be counted from the date on which there were defaults in the payment of rent. The last default which took place before the opponents gave a notice terminating the tenancy was for the year 1953-54. Under s. 14 of the Act, as it stood at the material

time, the last date for the payment of rent was April 20, 1954. This was, therefore, the date on which the right to obtain possession must be deemed to have accrued to the opponents. The application for possession was made more than two years later, on March 23, 1957. It was, therefore, beyond the period of limitation and was consequently not maintainable.

Mr. Jahagirdar has urged that defaults for subsequent years, 1954-55 and 1955-56, should also be taken into consideration. These could, at the most, be considered for the purpose of deciding whether the case falls under sub-s. (1) of s. 25 or sub-s. (2) of that section. They have no bearing on the question as to whether the application for possession made by the opponents was in time.

We, therefore, allow the application, set aside the orders made by the Additional Tenancy Aval Karkun, the Prant Officer and the Revenue Tribunal and direct that the application for possession of the lands made by the opponents should be dismissed. No order as to costs.

Application allowed.

Before the Hon'ble Mr. H. K. Chainani, Chief Justice, and Mr. Justice Gokhale.

BHAGIRTHIBAI SHANKAR JADHAV

v.

POPAT SHANKAR BHUSAL.*

Bombay Tenancy and Agricultural Lands Act (Bom. LXVII of 1948), Secs. 33B, 31, 29—Application under s. 29 read with s. 31 pending when tenancy terminated and application under s. 33B(3) made—Subsequent order under s. 31—Applicability of s. 33B(5)(a).

Section 33B(5)(a) of the Bombay Tenancy and Agricultural Lands Act, 1948, can only apply if the other land is resumed before the application is made under this section. It will have no application if the order under s. 31 of the Act is made after the application under s. 33B was filed, and the landlord will not be deprived of his right to have his application under s. 33B disposed of in accordance with the provisions of the Act.

THE facts appear in the judgment.

V. M. Limaye, for the petitioner.

N. D. Hombalkar, for *D. S. Nargolkar*, for opponent No. 1.

CHAINANI C. J. The petitioner had made an application for obtaining possession of the land S. No. 380/1 held by opponent No. 1, hereinafter referred to as the opponent, under s. 29 read with s. 31 of the Tenancy Act. In that application an order for possession of half of the land was finally made by the Deputy Collector on October 26, 1962. Before then, on March 30, 1962, the petitioner had also made an application for obtaining possession of the land under s. 33B of the Act. In this application the Tenancy Aval Karkun made an order on August 21, 1962, that possession of the whole land should be given to the petitioner. Against this order the opponent appealed to the Deputy Collector. The Deputy Collector held that as an order for possession of half of the land had been made in favour of the petitioner under s. 29 read with s. 31 of the Act, the application made by the petitioner under s. 33B of the Act was not tenable. He, therefore, allowed the appeal and set aside the order of the Tenancy Aval Karkun directing that possession of the whole land should be handed over to the petitioner. The petitioner then applied in revision to the Revenue Tribunal. The Revenue Tribunal took the view that as the petitioner had already resumed half of the land, she could not obtain possession of any more land under s. 33B(5)(a) of the Act. That view is being challenged before us in this application.

*Decided, March 22, 1966. Special Civil Application No. 1822 of 1963.

Sub-section (1) of s. 33B provides that notwithstanding anything contained in s. 31, 31A or 31B a certificated landlord may, after giving notice and after making an application for possession as provided in sub-s. (3), terminate the tenancy of an excluded tenant, if the landlord bona fide requires such land for cultivating it personally. This sub-section, therefore, removes the bar on the right of a certificated landlord to terminate the tenancy, if he requires the land bona fide for personal cultivation. It also lays down the mode in which the tenancy can be terminated. Two things are necessary before a tenancy can be terminated under this sub-section: (1) a notice must be given to the tenant, and (2) an application for possession must be made as provided in sub-s. (3). Sub-section (2) states that a notice may be given and an application made by a certificated landlord under sub-s. (3), notwithstanding that in respect of the same tenancy an application of the landlord made in accordance with sub-s. (2) of s. 31 is pending before the Mamlatdar or in appeal before the Collector or in revision before the Maharashtra Revenue Tribunal. An application under s. 33B may, therefore, be made during the pendency of an application under s. 31. The application made by the petitioner under s. 33B was, therefore, maintainable, even though the application made by her under s. 31 was then pending in appeal before the Deputy Collector.

Sub-section (5)(a) states that the right of a certificated landlord to terminate a tenancy shall be subject to the condition that if any land is left over from a tenancy in respect of which other land has already been resumed by the landlord for cultivating it personally under s. 31, the tenancy in respect of any land so left over shall not be liable to be terminated under sub-s. (1). This sub-section, therefore, imposes a limitation on the right conferred by sub-s. (1) and that is that if the landlord has already resumed some land covered by the same tenancy, he will not be entitled to terminate the tenancy in respect of the remaining land. The termination of the tenancy under sub-s. (1) however requires the making of an application for possession as provided in sub-s. (3). Consequently sub-s. (5)(a) can only apply if the other land is resumed before the application is made under this section. It will have no application if, as in the present case, the order under s. 31 is made after the application under s. 33B was filed. It will, of course, be desirable to hear both the applications together if the application under s. 33B is made during the pendency of the application under s. 31. But since under sub-s. (2) the application under s. 33B can be made even when the application under s. 31 is pending in revision before the Revenue Tribunal, the fact that an order under s. 31 has been made subsequently will not deprive the landlord of his right to have his application under s. 33B disposed of in accordance with the provisions of the Act. In any case, sub-s. (5)(a) will not come in his way.

Our attention has been invited to the judgment of the Full Bench of the Revenue Tribunal in Tenancy Application No. 708 of 1962 and other connected applications, dated July 9, 1963, in which a contrary view has been taken. In para. 9 of the judgment the Revenue Tribunal has observed:—

“The word ‘already’ has reference to the commencing words of clause (5) which relates to the right of a landlord. That right is to terminate a tenancy. The right is not acquired by a landlord until a competent authority terminates the tenancy and directs the delivery of possession under this section i.e. in the proceedings under s. 33B. The said right is not merely the giving of notice or the institution of an application.”

The observation of the Revenue Tribunal that the commencing words of sub-s. (5) relate to the right of a landlord to terminate a tenancy is correct. But the right in regard to which this sub-section imposes a condition is the right of the landlord to terminate a tenancy under sub-s. (1). This is clear from the last words in cl. (a), “shall not be liable to be terminated under sub-section (1)”. Under sub-s. (1) one of the things necessary for terminating a tenancy is the making of an application as provided in sub-s. (3). Sub-section (5)(a) can, therefore, only operate when the application under s. 31

has been disposed of before the application has been made under s. 33B. In other words, the bar imposed by this sub-section is to the making of an application under this section.

In the present case the application made by the petitioner under s. 29 read with s. 31 was pending when the petitioner terminated the tenancy of the opponent and made the application as provided by sub-s. (3) of s. 33B. No final order for possession had been made in that application. Consequently cl. (a) of sub-s. (5) of s. 33B has no application in the present case. The view taken by the Revenue Tribunal is consequently not correct.

We set aside the orders made by the Revenue Tribunal and by the Deputy Collector and restore the order made by the Tenancy Aval Karkun on August 21, 1962, by which he directed that possession of the entire land should be handed over to the petitioner. The petitioner should get her costs from opponent No. 1.

Orders set aside.

Before the Hon'ble Mr. H. K. Chatnani, Chief Justice, and Mr. Justice Gokhale.

RAGHUMAL BUDHUMAL v. TIKAMDAS GEHIMAL.*

Displaced Persons (Compensation and Rehabilitation) Rules, 1955. Rule 39—Whether word "may" in rule 39 mean "shall"—Claimant whether can claim open plot as matter of right.

Under rule 39 of the Displaced Persons (Compensation and Rehabilitation) Rules, 1955, there is no obligation to sell an open plot by public auction; it is open to the appropriate authority to allot it if he so deems proper. But a claimant cannot claim as a matter of right that an open plot must be allotted to him. The authority has a discretion in the matter and he may pay compensation by the allotment of a Government plot, but he is not bound to do so.

THE facts are stated in the judgment.

B. J. Mulchandani and B. B. Dhanwani, for the petitioner.

S. A. Desai, with *K. C. Mandvikar*, for respondents Nos. 1 to 4.

R. W. Adik, for respondent No. 5.

CHAIANANI C. J. The facts in this application are briefly these: There was an open Government land in Ulhasnagar Township. In 1949-50 portions of this land were given for temporary use to several displaced persons in order to enable them to carry on business. On January 23, 1950, the Administrator and Managing Officer, Ulhasnagar Township, authorised the petitioner to use a plot of land for the construction of a temporary structure, subject to certain conditions, two of which were that the grant was temporary and that the structure was subject to a short removal notice when required by the Government at owner's cost. The petitioner, thereafter, put up a structure on the plot which he was authorised to occupy. We are informed that he is using this structure for a charcoal shop. In 1954-55 the area was demarcated into several plots and the plot occupied by the petitioner now forms part of Plot No. 266. After the plots were demarcated, the plots, including plot No. 266, have been reserved for residential purposes. According to the Regional Settlement Commissioner, these plots could not be allotted to the persons who were occupying them, as they were neither evacuee property nor Government built property. Under rule 39 of the Displaced Persons (Compensation and Rehabilitation) Rules, 1955, these plots were to be sold by public auction. In 1960 tenders were, therefore, invited for sale of plot No. 266. The petitioner then made an application that the plot should be allotted to him. On September 24,

**Decided, February 19, 1965. Special Civil Application No. 1865 of 1963.*

1962, the Managing Officer informed the petitioner that his request had been rejected. The petitioner appealed to the Regional Settlement Commissioner, but his appeal was dismissed. He applied in revision to the Chief Settlement Commissioner, but his revision application was rejected. Thereafter the petitioner applied to the Government of India under s. 33 of the Displaced Persons (Compensation and Rehabilitation) Act, but his application was rejected. After respondent No. 1 had rejected the petitioner's application for allotment of the plot to him, tenders were invited for the sale of this plot. The petitioner did not submit any tender. The highest tender submitted was that of respondent No. 5. His tender was accepted on December 15, 1962 and a deed of conveyance was issued to him on December 20, 1962. Thereafter the petitioner filed the present Special Civil Application under art. 226 of the Constitution.

Mr. Mulchandani, the learned advocate of the petitioner, has first contended that the authorities were wrong in rejecting the petitioner's application for the allotment of the plot to him. Chapter V of the Displaced Persons (Compensation and Rehabilitation) Rules provides for allotment of acquired evacuee properties, while Chapter VI contains rules which provide for allotment of Government built properties. Rule 36 specifies the classes of Government built properties which may be allotted. The plot, which the petitioner is occupying, is neither evacuee property nor is it Government built property. No other rule has been pointed out to us, which provides for the payment of compensation by the allotment of an open plot belonging to Government. Rule 39 states that a Government plot forming part of the Compensation Pool may be sold by public auction. There has been some argument before us as to whether the word "may" in this rule means "shall". Mr. Mulchandani has pointed out that while the word "may" has been used in this rule and some rules such as rules 25 and 42, the word "shall" has been used in some other rules. For instance, the relevant words in rule 41(I) are "shall be paid compensation by transfer". In rules 22 and 36 the material words are "shall ordinarily be allotable". It has, therefore, been urged by him that whenever it was intended not to give a discretion to the authority concerned, the word "shall" has been used. Mr. Mulchandani has also referred to rule 43, which states that the provisions of rules 25 to 34 shall apply to the transfer of any Government built property or Government plot under this Chapter. Rules 25 to 34 lay down the mode in which the properties can be transferred. As these rules also apply to the transfer of a Government plot under Chapter VI, which contains rule 39, it necessarily follows that even though there is no specific rule providing for the allotment of a Government plot, the rules contemplate the transfer or allotment of a Government plot. For, otherwise it would not have been necessary to apply the provisions of rules 25 to 34 to the transfer of a Government plot. We, therefore, accept Mr. Mulchandani's argument that the word "may" in rule 39 does not mean "shall". The position, therefore, is that there is no obligation to sell an open plot by public auction. This is not the only mode in which such property can be disposed of and it is open to the appropriate authority to dispose of it in some other manner. He may allot it, if he so deems proper, and if he decides to do so, the provisions of rules 25 to 34 will become applicable. But a claimant cannot claim as a matter of right that an open plot must be allotted to him. The authority has a discretion in the matter and he may pay compensation by the allotment of a Government plot, but he is not bound to do so. Consequently we are unable to accept Mr. Mulchandani's contention that there was an obligation on the Regional Settlement Commissioner to allot to the petitioner the plot in his occupation.

[The rest of the judgment is not material to this report.]

Rule discharged.

CRIMINAL REVIEW.

Before Mr. Justice Patel.

STATE v. BHALCHANDRA WAMAN PETHE.*

Indian Penal Code (Act XLV of-1860), Sec. 304A—Rules for Regulating Traffic in streets by surface markings, 1963. Rule 4—Charge of negligence—Burden of proof—Distinction between rashness and negligence—Motorist's duty to public at pedestrian crossing—Sentence—Whether limits to it could be fixed by judicial precedents.

In order to establish a charge of negligence under s. 304A of the Indian Penal Code, 1860, it must be shown that the accident was the direct cause of the negligence or rashness of the accused. The guilt of the accused must be proved beyond reasonable doubt.

*Vishwanath Vishnu v. The King*¹ and *Rustom Sheriar Irani v. The State of Maharashtra*,² referred to.

There is a distinction between rashness and negligence. When one does an act with utter indifference to the consequences of which the doer may be conscious and which he hopes may not take place, one is said to be rash, while criminal negligence is neglect to take that precaution which a reasonable and prudent person is expected to take under the circumstances obtaining in a given case. In order to infer whether or not there is criminal rashness or negligence on the part of the accused, all relevant facts must be considered.

A person who is driving a motor car owes a duty to the members of the public to keep a look-out on the road and more so when approaching a pedestrian crossing where he would normally expect a pedestrian to cross the road. He should be able to stop the car when it reaches it, if necessary. In other words he must not continue the normally high speed when he is nearing a crossing.

London Passenger Transport Board v. Upson,³ *Fardon v. Harcourt-Rivington*⁴ and *Leicester v. Pearson*,⁵ referred to.

Sentence is a matter of discretion and the limits cannot be fixed by judicial precedents for all time in the future.

THE facts are stated in the judgment.

R. Jethmalani and *R. W. Adik*, with *Shetty*, for the accused.

Y. S. Chitale, Assistant Government Pleader, for the State.

PATEL J. The accused in this case was convicted under s. 304A and s. 337 of the Indian Penal Code and sentenced to pay a fine of Rs. 2,000 and Rs. 200 in default to suffer rigorous imprisonment for six months and two months on each of these counts respectively. As it was felt that the sentence was inadequate, the case was directed to be placed before the Court dealing with criminal matters when a notice of enhancement was issued by Palekar J.

On February 15, 1964, the accused was driving his motor car on the Marine Drive, now known as Netaji Subhash Road, from North to South. At about 5.30 p.m. that day Kunda the deceased, who was aged about twenty-one years, and her younger sister, Vidya, aged about ten were crossing, it is said, the pedestrian crossing near 'B' Road, Churchgate, at which the accused's car knocked down Kunda and Vidya. As a result of this Kunda died and Vidya received some injuries.

There is a pedestrian crossing situated at the junction of 'B' Road and Netaji Subhash Road. There is a Bus Stop at the northern side of 'B' Road corner, and Natraj Hotel is at the southern corner of that road. The pedestrian crossing was indicated by two broken transverse lines opposite the Bus Stop and two transverse broken lines opposite the Natraj Hotel on the southern side.

*Decided, March 11, 1965. Criminal Review Application No. 793 of 1964.

1 [1948] A.I.R. P.C. 183.

2 (1964) Criminal Appeal No. 315 of 1964 (with Review Application No. 910 of 1964)

decided by Patel and Bal JJ., on December 18, 1964 (Unrep.).

3 [1949] A.C. 155.

4 (1932) 146 L.T. 391.

5 [1952] 2 Q.B. 668.

There is a board "Pedestrian Crossing" on the northern side near where the pedestrian crossing begins and similar board is displayed on the southern side of the second set of transverse broken lines.

The story as given by Vidya is that they had gone to the University Club House situated at 'B' Road as there was some function. They were a bit early and as there was some time for the function to start, they decided to go for a walk at the sea wall. They were crossing the road between the northern side of transverse lines when they were knocked down by the accused just about the time that they were near the hedge. According to her, the car was proceeding at a fast pace. The accused was driving the car. She did not hear the sound of a horn and she did not remember now if she heard the sound of the application of brakes. In cross-examination her story was that before stepping on to the crossing, they looked and saw that there were no vehicles near but there was only one car at a long distance away from them approaching them from the right side. She could not say its position on the road. A suggestion was made to her whether on seeing the cars they ran. This suggestion was denied. She also denied that they dashed against the car while running.

In connection with this incident two witnesses were examined, one Rupsingh Sundarsingh and another Vishram Vithoo, prosecution witnesses Nos. 2 and 3. Vishram Vithoo has not been accepted by the learned trial Magistrate as a reliable witness as he was serving in the University of Bombay where the father of the deceased was employed, and his presence at the scene appeared to be doubtful. Rupsingh, the learned Magistrate observes, was an independent witness. He is a professional driver and is employed at Churchgate. At the time of the incident he came out of the 'C' Road which is to the north of 'B' Road, similarly joining the Netaji Subhash Road as does 'B' Road. He entered from this road Netaji Subhash Road and he was on the left side in the third row. There was one car on his right and beyond that on the further right was the car of the accused. These three cars formed one line but they were at a distance from one another. According to him, the car of the accused was proceeding at a fast pace of near about forty miles per hour. The accused applied the brakes the sound of which he heard but the car knocked down the two girls. The car halted after about five to seven feet near the hedge. In cross-examination he said that he had approached the entrance to 'B' Road when the accident occurred. He did not stop his car as he had to go to Congress House—a conduct displayed usually in such cases. He further asserted in answer to Court question that the girls were knocked down on the pedestrian crossing opposite the Bus Stop.

The accused in his written statement and in his oral statement before the learned Magistrate said that, he was driving his car at a speed of twenty to twenty-five miles per hour when the girls were knocked down, that the girls came running from the front of the cars on his left hand and then directly into the path of his car. He applied his brakes. At the time of the incident the girls were in between the space between the two sets of broken lines and not in the northern set of transverse lines. He applied the brakes hard and they made a screeching sound. He applied the brakes after he had crossed over the northern set of transverse lines. The tyre mark because of the application of the brakes started from the north of northern set of lines and ended within the sets. Some broken pieces of glass were behind his car. It may be mentioned that the car stopped between the two sets of the transverse lines. He examined his sister who was in the car as a defence witness.

Mr. Jethmalani has exercised his privilege of challenging the conviction.

Mr. Jethmalani contended that witness Rupsingh cannot be regarded as an independent witness but must be a got-up witness inasmuch as the incident occurred on February 15, 1964, while his statement came to be recorded on March 2, 1964, after about seventeen days. No doubt, the statement was recorded late but, on the other hand, it cannot be regarded as the fault of the police that his statement came to be recorded late. There is usually apathy of

people to be involved in criminal cases even as witnesses and the police must have some difficulty in tracing the witness. In my view the learned Magistrate is right in regarding him as an independent witness.

Mr. Jethmalani contended that an attempt has been made to shift the point of impact. For this purpose he relies upon the statement of Kunda which was recorded on the next day, i.e. February 16, 1964, where she has stated that she was crossing the road from East to West in front of Natraj Hotel and she did not remember whether she was crossing through the pedestrian crossing. But then it is clear from the evidence of the medical witnesses that she was in shock and naturally, therefore, her notions must have been hazy. The fact that the marks of the brakes started from a point to the north of the northern set of the two transverse lines and stopped in the middle of those lines must necessarily show that the point of impact was at a place somewhere between the northern set of lines. The accused, finding that already an impact had taken place may have released the brakes and thereafter the car came to rest. It may also be that when she refers to the Natraj Hotel, she intended to refer to the only well-known point of identification and not exactly the southern set of transverse lines. In fact, the broken glasses of the lamps were lying near about the northern set of lines. The evidence of the police officer who has deposed to what he actually saw when he went to the scene of offence clearly shows that these two girls were knocked down only within the northern set of lines.

In connection with the evidence of the police officer regarding what he saw when he visited the scene of offence, Mr. Jethmalani made a grievance that he has practically tried to prove all the facts stated in the *panchnama* without examining the *panchas* which he says ought not to be permitted. The learned Magistrate was not prepared to rule out his evidence nor am I prepared to do so merely on this ground. The evidence shows that the two *panchas* and one eye-witness who was examined by the police officer almost immediately have not been traced. There is no reason why a police officer should not be able to depose to what he actually saw at the scene of offence immediately on his going there. His evidence coincides practically with the statements made by the accused himself. Having regard to these facts and having regard to the further fact that there is nothing taken out from the cross-examination of Vidya in connection with the actual site of the incident and its manner of happening, I have no doubt that the incident occurred in the northern set of transverse lines as deposed to by her and by the independent witness Rupsingh.

Mr. Jethmalani contended that even assuming that Rupsingh was driving his own car as stated by him, it is wrong to suppose that he would be in a position to speak about the speed at which the accused was driving his car. It is not possible to accept the suggestion that a man who actually drives the car would not be able to judge the speed of another car which is going almost parallel to him. Though the witness has been cross-examined, nothing substantial has been taken out to show that his estimate of the speed is very far wrong. Even assuming that his estimate of the speed of the car of the accused at forty miles cannot be exact, he cannot be said to be wrong in his estimate. The learned Magistrate has estimated the speed at which the accused was driving to be at 48 miles per hour. Mr. Jethmalani has made a grievance that the learned Magistrate was wrong in estimating the speed by adding the length of skid marks and the distance between the point where the tyre mark ended and the one where the car had halted from the table furnished by rule No. 147 framed under the Motor Vehicles Rules. To some extent there is some justification in the grievance. That would be correct if the car had stopped with a continuous application of the brakes. But apparently that is not so. It may be that after the impact the accused released the brakes and again reapplied them in which case there must be some time during which the car rolled on its own due to its momentum. Be that as it may, it seems to me that the accused must be driving at about thirty-five miles or more though probably not forty-eight miles per hour.

The question in all such cases is whether the accused was going at a reasonable speed and whether he was not sufficiently circumspect in the driving. In order to establish a charge of negligence under s. 304A of the Penal Code, it must be shown that the accident was the direct cause of the negligence or rashness of the accused. English Courts require a far higher standard of proof of negligence or rashness in a criminal prosecution as the offence in England is that of manslaughter if death is caused. The same standard cannot obtain in respect of the offence under ss. 304A and 337 of the Penal Code though no doubt the guilt must be proved beyond reasonable doubt. (See *Vishwanath Vishnu v. The King*¹ and *Rustom Sheriar Irani v. The State of Maharashtra*²).

There is a distinction between rashness and negligence. When one does an act with utter indifference to the consequences of which the doer may be conscious and which he hopes may not take place, one is said to be rash, while criminal negligence is neglect to take that precaution which a reasonable and prudent person is expected to take under the circumstances obtaining in a given case. In order to infer whether or not there is criminal rashness or negligence on the part of the accused, all relevant facts must be considered.

At one time it was suggested by Mr. Jethmalani that the pedestrian crossing was intended as a restriction for the pedestrians and not for a motor driver meaning thereby that a pedestrian must cross a road only at that point and at no other point and only when there was no car in sight. However, he ultimately gave it up. Mr. Chitale supplied me the regulations framed by the Commissioner of Police under the Bombay Police Act which define respective duties of the pedestrian and the driver of the car at these crossings. Mr. Jethmalani is right in saying that these rules were not even referred to in the trial Court. I must also confess that I myself did not know that such rules existed. When the case was first argued before me, even Mr. Chitale was not aware of them. Be that as it may, these regulations have been made under a statute and they have to be obeyed. These are published in Maharashtra Government Gazette, Part I, dated September 12, 1963, at page 1316†. Rule 4 is as follows:

"4. *Pedestrian crossings*.—(A) Pedestrian crossings shall be denoted by means of transverse broken lines.

(B) Prohibitions in regard to pedestrian crossings.

(i) No driver of a vehicle shall have precedence over a pedestrian who is actually on the carriageway at such crossing. The driver or rider shall stop before reaching the crossing till such pedestrian has crossed the carriageway provided that there is no policeman controlling traffic at or near such crossing or no signal is installed.

(ii) No driver of a vehicle while approaching a road intersection where for the time being traffic is controlled by a policeman or by signalling device, shall proceed till the pedestrians who were on the carriageway before he received the signal to proceed, have crossed safely to the kerb.

(iii) No driver of any vehicle shall cause such vehicle or any part thereof to stop upon any crossing unless either:—

(a) he is prevented from proceeding by circumstances beyond his control; or

(b) it is necessary for him to stop in order to avoid accident.

(iv) No foot passenger shall remain upon any crossing longer than is necessary for the purpose of passing from one side of the street to the other with reasonable despatch.

(v) No pedestrian shall cross any street except at the demarcated pedestrian crossings where they exist. Pedestrians shall obey all reasonable directions given by the Police at these crossings.

(vi) *Prohibition of walking on driveway*.—No person shall walk on the driveway of a street where footpaths exist."

In law, a clear duty is imposed on the driver of a motor vehicle to allow the

1 [1948] A.I.R. P.C. 183.

2 (1964) Criminal Appeal No. 315 of 1964 (with Review Application No. 910 of 1964), decided by Patel and Bal JJ., on December 18, 1964 (Unrep.).

† "Rules for Regulating Traffic in Streets by Surface Markings", 1963 (Made under s. 33 (1)(b)(c) of the Bombay Police Act, 1951).

pedestrian to cross the road. Having regard to cl. (v) of the Regulation which imposes a restriction on the pedestrian, the least that one can say is that the driver of a vehicle approaching a pedestrian crossing must keep a look out to see if any pedestrian is trying to cross the road at that point. Even if one assumes that these rules may not be known to all motor drivers, which they are bound to know, even so, the ordinary prudent man would approach a pedestrian crossing in such a way that he should be able to stop the car when it reaches it if necessary. In other words he would not continue the normally high speed when he is nearing a crossing. Mr. Jethmalani referred me to *London Passenger Transport Board v. Upson*³ where English Regulations came to be considered. We have a different set of regulations and the case could not be very relevant. But some of the general observations are useful. Lord Porter at p. 162 says:

"...if the driver could and ought to have seen the plaintiff hurrying towards the crossing before she reached the taxi-cab and to have anticipated that she was about to or might hasten across the crossing and did not do so, undoubtedly he would be guilty of negligence at common law."

At p. 176 Lord du Pareq referred to the following observations of Lord Dunedin with approval in *Fardon v. Harcourt-Rivington*:⁴

"...If the possibility of the danger emerging is reasonably apparent, then to take no precautions is negligence; but if the possibility of danger emerging is only a mere possibility which would never occur to the mind of a reasonable man, then there is no negligence in not having taken extraordinary precautions."

Lord Morton of Henryton said (p. 181):

"...To my mind, the failure of the driver to keep a look-out on the near-side pavement, coupled with his failure either to slow down or to sound his horn, afford ample evidence to support a finding of negligence at common law."

It seems to me that the principles involved in these statements are applicable in the present case. These observations suggest that a person who is driving a motor car owes a duty to the members of the public to keep a look-out on the road and more so when approaching a pedestrian crossing where he would normally expect a pedestrian to cross the road. The reasoning in this case also suggests that regard must be paid to the habits of the public.

Mr. Jethmalani contended that in any event as there were two other cars to the left of the accused, his vision was obstructed. But it is wrong to say that he could not have seen the girls crossing the road. It is not his case that he was behind any of the cars travelling on his left because he says that he was not overtaking any of the cars. Rupsing says they were in a line. Now, if that is so, when the width of the road which the girls had to cross was about 12.8 meters i.e. at least about forty feet if not more, it cannot be pretended that he did not notice them. If the girls were walking at ordinary pace of four miles per hour then if the accused were travelling even at thirty miles per hour he would be at a distance of about eighty meters when the girls entered the crossing from the kerb. If he had been watchful he would have seen the girls entering the road from a distance of about eighty meters.

The day was a Saturday, it was 5.30 P.M. and the accused was nearing a pedestrian crossing. The boards notifying the same could be seen from quite a distance. The accused was, therefore, bound to have his car under such control that he could stop if necessary at the crossing. If he had been on the look-out he could, even from a distance of about eighty meters of the crossing, have seen the girls entering the road between the two lines. It was too late when he applied the brakes. If he had seen them and still continued at the same speed at which he was going, he was too rash. Though Mr. Jethmalani has not referred to the evidence of Padma (D.W. 1), the sister of the accused, I have read the evidence. She does not carry his case any further. On the contrary she admits that the "girls did not run. They walked against the

mudguard". Having regard to all the circumstances I have no doubt that the accident was the result of negligence and rashness on the part of the accused.

Mr. Adik, who took over on the second occasion, relied upon the decision of *Leicester v. Pearson*⁵ where the Court was construing the provisions of English regulations. The circumstances under which the case arose were as follows:

"The lighting in the neighbourhood of the crossing was poor, it was raining, and the road surface was in poor condition. At about 5.30 p.m. a woman, pushing an empty perambulator, and accompanied by her child, aged two, started to cross the pedestrian crossing from the east side. That side of the road was flanked by trees which cast shadows on the road. On the west side, to which the pedestrian was crossing, light showed through the windows of shops. While the pedestrian was within the limits of the crossing, the defendant, driving a motor-car at a reasonable and proper speed in the prevailing circumstances, approached the crossing from the south. The defendant did not see the pedestrian till she was on the crown of the road although there was no physical obstruction which prevented him from seeing either the woman or the crossing. When the defendant saw her he was seven or eight yards from the crossing. He applied his brakes and the car skidded and collided with the perambulator, thereby causing the child to be knocked over."

Devlin J. observed that it would be quite unreasonable to suppose that an absolute prohibition or an absolute obligation would be intended by saying to a driver: "You shall let so-and-so go first," or, "You shall accord so-and-so precedence." Assuming that I would be justified in importing such meaning into our regulations, even so, having regard to the manner in which the accused was driving at the time and place and on the day in question without the disabilities in that case, I must agree with the finding made by the learned Magistrate that the accident occurred as the accused was negligent and rash in driving his car, even if the above regulations are disregarded and it is impossible to sustain the contention of Mr. Jethmalani that the conviction was erroneous.

The next question is about the sentence. The learned Magistrate has observed that Kunda and Vidya themselves contributed in a measure to the accident. In other words, he finds contributory negligence on the part of these two girls. I do not see how the learned Magistrate could find contributory negligence on their part. He does not even refer to the evidence of Vidya whose evidence appears to be straightforward. She denied that on seeing the cars they ran. Padma (D.W. 1) also says so. There is no substance in the suggestion that there was contributory negligence on their part. It is not the law and it cannot be the law that unless there was no car on the road no pedestrian is to cross the road even at a pedestrian crossing since the condition can rarely be satisfied. In view of what I have stated above, once the reason for imposing only a sentence of fine, which, according to the learned Magistrate, was the contributory negligence on the part of the girls disappears, the sentence of only fine is highly inadequate even if the fine might otherwise appear comparatively to be heavier. Mr. Jethmalani has referred me to *Emperor v. Khan-Mohamed*⁶ and urged that merely because death is caused, sentence of imprisonment need not be imposed. Sentence is a matter of discretion and the limits cannot be fixed by judicial precedents for all time in the future. True, the discretion is of the trial Court and the High Court would not ordinarily interfere with the exercise thereof. Yet having regard to what I have stated above and the fact that the sentence must be such as to serve as a deterrent to others, as also what Mr. Adik has said about the accused it is necessary to impose substantive sentence of imprisonment.

Having regard to all the circumstances of the case, I direct that the accused do suffer simple imprisonment for a period of six months for the offence under s. 304A of the Penal Code in addition to the sentences in respect of both the offences imposed by the learned trial Magistrate. Warrant to issue.

5 [1952] 2 Q.B. 663.

6 (1936) 38 Bom. L.R. 1111.

CRIMINAL REFERENCE.

Before Mr. Justice Naik and Mr. Justice Palekar.

SHANKERRAO BASWANAPPA v. TEJABAI.*

Criminal Procedure Code (Act V of 1898), Sec. 488—Woman living separate from husband whether entitled to maintenance on ground that he has contracted marriage with another—Desertion by wife at anterior date whether disentitles her to maintenance—Marriage referred to in explanation to proviso in s. 488(3) whether refers to only second marriage.

A wife living separate from her husband on the ground that her husband has contracted marriage with another wife, is entitled to maintenance under s. 488 of the Criminal Procedure Code, 1898.

The proper approach to the case of such a husband's offer to maintain on condition of his wife's living with him, whether made before the issue of any order under s. 488(1) of the Code, or, after the issue of the order under s. 488(3) of the Code, would be to hold that there was no valid offer by the husband to maintain his wife. And, if there was no such offer, it must be held in view of the contest raised to the claim that there had been either neglect or refusal to maintain the wife within the meaning of s. 488(1) of the Code.

Thagubai v. Vedu Khusal Patil,¹ *Ramji Malviya v. Smt. Munni Devi*,² *Sm. Bela Rani v. Bhupal Chandra*³ and *Kuppa Mudali*,⁴ referred to.

Desertion by the wife at some anterior date is not made a ground under s. 488 of the Code for disallowing maintenance. It is her refusal to go back to her husband, when a genuine offer is made which disentitles her to maintenance.

*Ishar v. Soma Devi*⁵ and *Ramji Malviya v. Smt. Munni Devi*,⁶ doubted.

The marriage referred to in the explanation to the proviso under s. 488(3) of the Criminal Procedure Code, 1898, may have been contracted at any time and will refer to the first as well as the second marriage.

Kunti Bala Dassi v. Nabin Chandra,⁷ agreed with.

THE facts appear in the judgment.

V. T. Gumbhirwala, Assistant Government Pleader, for the State.

K. H. Kulkarni, for the original opponent.

R. G. Nandapurkar, for the respondent-applicant.

PALEKAR J. This is a reference by the learned Additional Sessions Judge, Latur, arising out of an order passed under s. 488, Criminal Procedure Code, by the learned Judicial Magistrate, F.C., Udgir, awarding separate maintenance at the rate of Rs. 30 per month to the wife. The wife, Tejabai, was married to Shankarrao Baswanappa in about 1954, when she was a minor. Shankarrao had a first wife living at the time. Tejabai filed the application under s. 488, Criminal Procedure Code, on November 29, 1963, alleging that she was treated well for about a year after the marriage, and that, she was ill-treated thereafter, and, finally, beaten and driven out of the house on November 23, 1963. She, therefore, claimed maintenance at the rate of Rs. 50 p.m., pointing out that her husband had an annual agricultural income of Rs. 3,000 and used to earn Rs. 90 p.m. by way of salary as a Talathi. The allegations of ill-treatment were denied by the husband. He alleged that Tejabai lived with him for about eight years after her marriage, and that she had left him and gone away to her parent's house at the time of *Nagpanchami* in the year before the application was filed. He further alleged that he had called her to his house, but, she was

*Decided, March 3, 1965. Criminal Reference No. 108 of 1964.

1 (1959) Criminal Reference No. 140 of 1959, decided by Naik J., on December 16, 1959 (Unrep.).

2 [1959] A.I.R. All. 767.

3 [1956] A.I.R. Cal. 134.

4 (1883) 2 Weir 630.

5 [1959] A.I.R. Punj. 295.

6 [1959] A.I.R. All. 767.

7 [1955] A.I.R. Cal. 108.

refusing to return to him. He, therefore, contended that she was not entitled to any maintenance.

The learned Judicial Magistrate held that the alleged ill treatment had not been proved. At the same time he was of the opinion that she was entitled to claim separate maintenance, "neglect or refusal to maintain" being presumed on account of the husband having another wife. He, therefore, ordered that the husband Shankarrao should pay Rs. 30 p.m. as maintenance to her.

Shankarrao, thereupon, filed a revision petition in the Court of the Sessions Judge at Latur. The learned Additional Sessions Judge held that the Magistrate had no jurisdiction to pass the order of maintenance merely on the ground of Shankarrao having a second wife. He was of the view that the amendment to sub-s. (3) of s. 488, Criminal Procedure Code, by Act IX of 1949 did not enlarge the ambit of the provision of s. 488(1) of the Criminal Procedure Code and did not supply a new ground for claiming maintenance.

Both the Courts have held that there was no ill-treatment of the wife. That is a finding of fact and is binding on this Court. The wife Tejabai had put forward the ground of ill-treatment as the cause of her staying with her parents, but, since the ill-treatment has not been proved, it must be held that she had voluntarily left her husband's house to stay with her parents. The question is whether, living separate from her husband, she is entitled to claim maintenance under s. 488, Criminal Procedure Code, on the ground that her husband has contracted marriage with another wife.

Sub-section (1) of s. 488, Criminal Procedure Code, provides that, if any person having sufficient means neglects or refuses to maintain his wife ... a magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife ... Sub-section (2) of s. 488 provides for payment of such allowance from the date of the order or of the application for maintenance. Sub-section (3) is important. It says—

"If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due ... and may sentence such person, for the whole or any part of each month's allowance remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made:

Provided that, if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing.

If a husband has contracted marriage with another wife or keeps a mistress, it shall be considered to be just ground for his wife's refusal to live with him."

This last provision, which explains the words "just ground" in the proviso in its application to a particular situation, has been added by s. 2 of Act IX of 1949. That brings us to sub-s. (4) of s. 488 which provides that, no wife shall be entitled to receive an allowance from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.

There has been considerable divergence of opinion as to whether the proviso under sub-s. (3) referred to above is a proviso to sub-s. (3) only or, to sub-s. (1). This Court has taken the view that it is a proviso to sub-s. (1) ... See, for example, *Thagubai v. Vedu Khusal Patil*.¹ Some other High Courts have taken the view that it is a proviso to sub-s. (3) only and will come into play when the offer has been made after an order has been passed granting maintenance under sub-s. (1). The point of view put forward is that the order for maintenance can be made only under sub-s. (1) of s. 488 when two requirements have been fulfilled, viz., that the husband, in the case of a wife, has sufficient means, and yet

¹ (1959) Criminal Reference No. 140 of 1959 (Unrep.).
1959, decided by Naik J., on December 16,

neglects or refuses to maintain her. Once an order has been passed under sub-s. (1), sub-s. (3) deals with the case, where, in execution of that order, the husband comes forward and offers to maintain his wife, and, that sub-section permits the magistrate to consider if there are any "just grounds" for the wife to refuse to live with her husband. If "just grounds" are made out, he may issue an order under sub-s. (3). But, if just grounds are not made out for living separately from the husband, the magistrate, notwithstanding the order made under sub-s. (1), may pass an order disallowing the maintenance by the execution of that order. What was "just ground" under the proviso to sub-s. (3) was always a matter of opinion on the facts of each case, but, after the Hindu Married Women's Right to Separate Residence and Maintenance Act, XIX of 1946, made provision for separate maintenance to a wife whose husband took a second wife, the Legislature thought that a similar provision should be made by suitably amending s. 488 to meet a similar situation. In other words, if after an order had been passed granting maintenance under sub-s. (1), that order was sought to be executed under sub-s. (3), it would be no longer open to the Magistrate to refuse execution of that order on the ground that the wife refuses to live with her husband due to his having contracted marriage with another wife. In that view, some High Courts have held that the explanation cannot be made a ground for granting maintenance but must be regarded as making special provision in relation to the execution proceedings, when an order for maintenance has already been made under sub-s. (1).

But, what happens when the husband offers to maintain his wife on condition of living with him before any order under sub-s. (1) is passed? Sub-section (4) is the answer. That sub-section says that, no wife shall be entitled to receive an allowance from her husband under this section . . . if, without any sufficient reason, she refuses to live with her husband. It will be seen that in the proviso to sub-s. (3), the words used are "just ground", and, in sub-s. (4), the words used are "sufficient reason". In view of the enactment of 1946, already referred to, it may be taken as a principle of general acceptance that, if a husband contracts marriage with another wife, the wife would be justified in refusing to live with him, and, what is a "just ground" for the proviso under sub-s. (3) would also be a "sufficient reason" under sub-s. (4). In *Ramji Malviya v. Smt. Murni Devi*,² Desai J., as he then was, observed, with reference to the proviso under sub-s. (3) and sub-s. (4), as follows (p. 768):

"...Sub-section (4) governs the whole section including sub-s. (1); no maintenance can be granted to a wife under sub-s. (1) if she is living in adultery, or if without any sufficient reason she refuses to live with her husband, or if she and her husband are living separately by mutual consent. In the face of sub-s. (4) it was unnecessary for the legislature to apply the first proviso [to sub-s. (3)] to sub-s. (1) also. The proviso seems to have been enacted in order to give the husband one more opportunity of offering to maintain the wife on condition of her living with him. He might not have made such an offer while the application for maintenance under sub-s. (1) was pending against him; he might have thought that the wife would not succeed in proving a sufficient reason for her living separately from him.

So the legislature might have enacted the proviso [to sub-s. (3)] to give him the right to make such an offer when an order made against him under sub-s. (1) was sought to be enforced through issue of a warrant...

...Though the proviso governs only sub-s. (3), the provision that remarriage by the husband is a just ground for the wife's refusal to live with him lays down a general principle, which must be borne in mind when it is to be considered whether the wife's refusal to live with her husband is without any sufficient reason within the meaning of sub-s. (4). A just ground for refusal to live with the husband must necessarily be a sufficient reason. A sufficient reason may not be a just ground, but a just ground must always be a sufficient reason."

It is, therefore, really not necessary to decide whether the proviso to sub-s. (3) governs sub-s. (1), or, only sub-s. (3), so far as the ground of the wife's refusal to stay with her husband is concerned. As pointed out in the case cited above (*Ramji Malviya v. Smt. Munni Devi*), it is open to the husband to make his offer to maintain his wife on condition of her living with him before any order under sub-s. (1) is passed, and, when such an offer is made, the wife is entitled to point out that the husband has contracted a marriage with another wife, and, therefore, it was a sufficient reason for her not to live with him. It will be, therefore, seen that, in view of sub-s. (4), it will make no material difference to the situation arising from the wife's refusal to live with her husband on the ground that he has contracted another marriage, whether the proviso in sub-s. (3) is read as a proviso to sub-s. (1) or to sub-s. (3).

In *Sm. Bela Rani v. Bhupal Chandra*³ a Division Bench of the Calcutta High Court took the view that, the mere fact of a second marriage cannot *ipso facto* establish "such neglect or refusal" within the meaning of sub-s. (1) of s. 488, Criminal Procedure Code, the reason given being that, a man may marry a second time and still not refuse to maintain his first wife. It was held that the mere fact that a husband has contracted marriage with another wife or keeps a mistress cannot, without more, be said to amount to neglect or refusal on the part of the husband to maintain his wife within the meaning of sub-s. (1) of s. 488, Criminal Procedure Code. This view has been expressly dissented from in this Court by my learned brother, Mr. Justice Naik, in *Thagubai v. Vedu Khusal Patil*. The learned Judge observed:

"...The very fact that the wife is entitled to live separately from the husband is sufficient to show that she has a right to claim maintenance from the husband. Of course, it will be open to the husband to provide separate maintenance for the wife if she is living away from him. In case, however, the husband does not provide separate maintenance, then the only conclusion that would follow is that he is refusing or neglecting to perform his duty *qua* husband. On this basis, it can even be said that the case would fall within the ambit of the words 'neglects or refuses to maintain'..." It may not be quite accurate to say that the explanation to the proviso to sub-s. (3) supplies a further ground to the wife for claiming maintenance under s. 488. The basis for passing an order under sub-s. (1) of s. 488 is 'neglect or refusal to maintain' by a person having the means. There can be no two opinions on the question that there should be either neglect or refusal to maintain before a wife is entitled to claim maintenance under that section. The question, therefore, is not whether the explanation to the proviso to sub-s. (3) gives a new ground for claiming maintenance, but the question is, whether the offer made by the husband to a wife, entitled to live separately, that, he will maintain her on condition of living with him does or does not virtually amount to a refusal to maintain her. We think, there could be only one answer to that question. When the husband knows that the wife has 'sufficient reason' or 'just ground' to live separately from him, the offer to maintain her on condition of living with him is not a valid offer at all. It is merely an evasion of his liability to maintain his wife who is destitute. That, in our opinion, really amounts to a refusal within the meaning of s. 488(1). When the wife makes an application for maintenance, the husband contests that application by making an offer to maintain her on condition that she lives with him, though, he knows that she was entitled to remain separate from him by reason of his contracting another marriage. The offer is made with the knowledge that the refusal would be the only answer. In such a case, therefore, the offer cannot be considered a valid offer, but, only an indirect way of refusing to maintain. The proviso to sub-s. (3) read with its explanation does not create a new ground for claiming maintenance but requires the magistrate to test the validity of the offer made by the husband to the wife to live with him. Similar is the position when the offer is made under sub-s. (4). If the offer is not valid, there is

nothing for the magistrate to consider further, and, in view of the fact that a destitute wife is entitled to maintenance from a husband having sufficient means, an order for maintenance or for its execution must be passed. It makes no difference whether the offer is made before the issue of any order under sub-s. (1), or, after the issue of the order under sub-s. (3). As already stated, the question to be considered is whether there has been neglect or refusal to maintain within the meaning of sub-s. (1) of s. 488. It has been long held that a refusal or neglect must be a refusal or neglect *in presenti*, that is, at the time of the proceedings... (See *Kuppa Mudali*)⁴. The magistrate having jurisdiction under s. 488(1) will have to consider whether at the time of the proceeding before him, there has been a neglect or refusal to maintain the wife. If he comes to that conclusion, he has no alternative but to pass an order of maintenance.

Considerations extraneous to the requirements of that section cannot be entertained. Observations have been made in some of the reported cases to the effect that a husband is relieved from the obligation to maintain his wife so long as she voluntarily remains absent. (See *Ishar v. Soma Devi*)⁵. Or, that, where a wife deserts her husband first without any sufficient reason and the desertion continues for 4-5 years in spite of the husband pressing her to live with him with the result that the husband remarries and the desertion continues thereafter, the wife, in such a case, is not entitled to claim maintenance under sub-s. (1) merely because of her husband's remarriage. (See *Ramji Malviya v. Smt. Munni Devi*). It is, undoubtedly, true that in a majority of cases, where the wife voluntarily leaves her husband and refuses to return to her husband without a just ground or sufficient reason, it may be a good ground for refusing maintenance to her. But, the situation may radically change if the husband remarries. In the last mentioned case the wife was held to be disentitled to maintenance from the husband, because, she had deserted him and he was required to take a second wife, after several years, to look after their minor daughter. We doubt very much, with respect, if such considerations can legitimately enter into the question as to whether maintenance should be allowed under sub-s. (1) of s. 488. It would appear that the wife had been penalised, because, she had deserted her husband. It may be that, on account of the callous manner in which she deserted her husband while their child was young, she deserved no better treatment. But, these are extraneous considerations for the purpose of sub-s. (1). Desertion by the wife at some anterior date is not made a ground under the section for disallowing maintenance. It is her refusal to go back to her husband when a genuine offer is made which disentitles her to maintenance. For the purposes of that section, the Magistrate has to see whether the wife is destitute, and, the husband having means has refused or neglected to maintain her. If he finds that these requirements are fulfilled *in presenti*, that is, at the date of the proceeding, it would be no answer to her claim that some five years previously, she had voluntarily deserted her husband. In our opinion, the proper approach to the case of a husband's offer and wife's refusal to live with her husband on account of the remarriage would be to hold that there was no valid offer by the husband to maintain his wife. And, if there was no such offer, it must be held for the purposes of s. 488(1) that there had been either neglect or refusal to maintain the wife.

In the present case, the learned magistrate had rightly come to the conclusion that the wife was entitled to stay away from her husband and claim separate maintenance, because, a refusal to maintain her could be spelt out from the written-statement filed by the husband and the contest he raised to the application.

It is next contended that the 'just ground' or 'sufficient reason' of a husband contracting marriage with another wife was only available to the first wife *vis-*

a-vis the second, and, not the second wife *vis-a-vis* the first. It is contended that the provision was not made for the benefit of the wife, who, with open eyes, marries a husband, who has already contracted a marriage. We do not think that we can accept this argument. We know that the second wife is many a time a minor when she is married, and, is hardly responsible for her marriage. It may also happen in some cases that a man may marry a second wife keeping her in ignorance of his first marriage. To refuse a second wife maintenance on this ground would, therefore, be clearly unjustified. Moreover, there is nothing in the explanation to the proviso which compels us to put the particular interpretation suggested. The words "if a husband has contracted marriage with another wife" are quite general in terms. The dichotomy between "has contracted marriage with another wife" and "keeps a mistress" is obvious. So far as the keeping of the mistress is concerned, the verb "keep" is used in its present tense. But, so far as the contracting of marriage is concerned, the verb is present perfect viz. "has contracted". The marriage may have been contracted at any time and will refer to the first as well as the second marriage. Much the same view has been taken of this provision by the Calcutta High Court in *Kunti Bala Dasi v. Nabin Chandra*.⁶ There too, the application for maintenance under s. 488 had been made by a second wife. It was held that there was nothing in the explanation to the proviso under sub-s. (3) of s. 488 which prevented a second wife from making an application for separate maintenance on the ground that the first wife had been living. The learned Judge observed (p. 108) :

"...This proviso obviously places the wife on a stronger footing. It has been contended, however, on behalf of the husband that this proviso means that its benefit can be taken only by the first wife when her husband marries for the second time and that so far as the second wife is concerned she is not entitled to the benefit of it except where the husband takes one wife or more after her (that is, the second wife's) marriage. In my opinion, there is nothing in the proviso justifying such limited construction of it. The phrase used in the proviso is 'has contracted' and not 'contracts'. The former phrase is, in my opinion, sufficiently wide to entitle the second wife to its benefit even in case where the husband has not married for the third time during the lifetime of the second wife. That being the position, when on the facts of the present case it has been proved that the husband is living with the first wife, that would be just ground on the part of the second wife to refuse to live with him even if he made an offer to the second wife inviting her to live with him at the same house with the first wife." We agree, with respect, with the view stated above. In our opinion, the order passed by the learned Magistrate is correct.

The rule is, therefore, discharged.

Rule discharged.

CRIMINAL APPELLATE

Before Mr. Justice Naik and Mr. Justice Palekar.

LALJI MULJI v. THE STATE OF MAHARASHTRA.*

Bombay Municipal Corporation Act (Bom. III of 1888), Sec. 394—Petroleum Act (XXX of 1934), Secs. 2(a)(b)(c), 7, 8, 31—Constitution of India. Arts. 246, 254, 19(1)(f)(g); Seventh Schedule, List I Entry 53, List II Entries 1, 5, 6, 23—Whether s. 394 of Bom. Act III of 1888 ultra vires—Entry 53 in List I of Constitution whether in conflict with entries 1, 5 & 6 in List II.

Section 394 of the Bombay Municipal Corporation Act, 1888, is *intra vires* the State Legislature.

Calter (India) Ltd. v. Director W. B. F. Services,¹ agreed with.

The provisions of Entry No. 53 in List I of the Seventh Schedule to the Constitution of India, and the provisions of Entries Nos. 1, 5 and 6 in List II of the Constitution do not stand in conflict with one another.

It will be clear from the object, scheme and design of the impugned legislation that the Legislature wanted to provide for topics which clearly fall in List II. The pith and substance of the impugned legislation, therefore, is not to deal with or dabble in petroleum and petroleum products as such, but to devise special measures for ensuring the protection and safety of the citizens of a crowded city like Bombay. In so far as the Parliament has passed a legislation which makes provision for these matters, it can, in a sense, be said that there is some amount of impingement or encroachment or trespass into the field of legislation reserved for the Parliament. But the extent of invasion is insignificant and the provisions made have no relation to the field which has already been occupied by the Central Legislation (the Petroleum Act, 1934), but they concern the field which has been left unoccupied by the Central Legislation.

Quære: Whether the provisions contained in clauses (a) and (b) of s. 31 of the Petroleum Act, 1934, are valid after the promulgation of the Constitution of India.

THE facts appear in the judgment.

V. B. Ganatra and P. M. Doshi, for the accused.

R. B. Kotwal, Government Pleader, for the State.

NAIK J. The appellant, who would hereafter be called the accused, was convicted under s. 471 read with s. 394(1)(a)(ii) of the Bombay Municipal Corporation Act and sentenced to pay a fine of Rs. 201, in default, to undergo 15 days' rigorous imprisonment. The accused has preferred an appeal from the order of conviction and sentence. It was noticed that the *vires* of s. 394 of the Bombay Municipal Corporation Act was called in question, and, therefore, a notice was issued to the Advocate-General. The learned Government Pleader has appeared on behalf of the State as also on behalf of the Advocate-General. When the matter came up for hearing before me sitting singly, a request was made by Mr. Ganatra on behalf of the accused, and also by the learned Government Pleader that, in view of the importance of the question involved, the case may be referred to a Division Bench. Accordingly, the criminal appeal has been referred to a Division Bench, and, that is how, the matter has come up before us for final decision.

The accused has been keeping lubricating oil in Plot No. 56-58 at Mazgaon without a valid permit from the Municipal Commissioner. On November 26, 1962, an inspector visited the premises and found that lubricating oil was kept stored in 162 drums. It was found that each of these drums contained 45 gallons. The total quantity of lubricating oil came to 7290 gallons. A com-

*Decided, January 21/22, 1965. Criminal Appeal No. 1788 of 1963, against the order of conviction and sentence passed by M. Y. Gupte,

Presidency Magistrate, VI Court, Mazgaon, Bombay, in Case No. 134/4 & 135/M of 1963. 1 [1960] A.I.R. Cal. 219.

plaint was lodged on February 8, 1963, against the accused for contravention of the provisions of s. 394(I) (a) (ii).

The accused pleaded not guilty to the charge. He contended that s. 394(I) (a) (ii) read with Schedule M of the Bombay Municipal Corporation Act was *ultra vires* Entry No. 53, List I, of Seventh Schedule of the Constitution of India. He also contended that the provisions of s. 394 are in conflict with the provisions of the Petroleum Act, 1934 (Central Act No. XXX of 1934). The trying Magistrate rejected the defence set up on behalf of the accused and found the accused guilty of the offence with which he was charged and convicted and sentenced him as stated above. It is against that judgment that the accused has come up in appeal.

The points urged by Mr. Ganatra on behalf of the accused may be outlined as follows:—

(1) The provisions of s. 394(I) (a) (ii) read with Schedule M, Part II (a), (b) and (c) are *ultra vires* art. 246 read with Entries 53, 93 and 95 of List I, Seventh Schedule, of the Constitution of India.

(2) Assuming that the impugned legislation fell in any of the entries in List II, the impugned section substantially and seriously encroached upon the Union field of legislation, viz., Entry No. 53 and the Petroleum Act of 1934.

(3) The impugned section is inconsistent with the provisions of the Petroleum Act of 1934 and, therefore, void.

(4) In view of s. 31 of the Petroleum Act and the notification issued thereunder, the provisions of the impugned section must be read subject to all the provisions of the Petroleum Act.

(5) The impugned section infringes the fundamental right of the accused guaranteed under art. 19(I) (f) and (g).

Before proceeding to discuss the merits of these contentions, it will be convenient to set out the arguments advanced by the learned Government Pleader. They are—

(1) The impugned Act is within the legislative competence of the State Legislature under Entries 1, 5, 6, 25, 64 and 65. According to the doctrine of pith and substance, the object, purpose and design of the impugned Act is not to legislate on petroleum or petroleum products, but to legislate for the purposes of securing public order, public health and hygiene and to regulate trade and commerce for that purpose and confer necessary powers to the municipality in that regard, and, also to provide for penalties for contravention of the regulations.

(2) As petroleum happens to be a hazardous article, the impugned Act makes provision for controlling or regulating the storage and possession of the petroleum for achieving the objects mentioned above, viz., securing of the public order, public health and hygiene and to regulate trade and commerce. These provisions, however, are ancillary to the main purpose of the Act. At best, the provisions may make an incidental inroad or entrenchment on the topic of petroleum, but such incidental encroachment does not constitute usurpation of the powers of the Union Legislature.

(3) Once it is held that the Act is within the competence of the State Legislature, the question of repugnancy raised on behalf of the accused does not survive for consideration.

(4) Assuming that the question of repugnancy is relevant, in fact, there is no repugnancy nor any collision between the impugned Act and the Petroleum Act.

(5) That in respect of heavy oil (flashing point of which is above 200°F), all that the impugned Act does is to occupy a field which has been left unoccupied by the Petroleum Act. It will not be correct to say that the impugned provision reoccupies a field already occupied by the Petroleum Act.

(6) In respect of petroleum, the flashing point of which is below 200°F, the Petroleum Act is silent and makes no provisions. In fact, s. 31 contemplates

occupation of the field left unoccupied by the State enactments. Such occupation, therefore, is clearly permissible.

(7) The impugned provision in no way infringes the fundamental right guaranteed under art. 19(1) (f) and (g).

In order to appreciate the rival contentions raised on behalf of the parties, it is necessary first of all to see what is the nature, scope and ambit of the impugned provision. In every case, where the *vires* of an enactment are challenged, the proper approach is to consider the real nature, purpose and design of the impugned enactment and see whether the enactment falls within any of the items assigned to the Legislature which has passed the enactment.

The first provision to be considered in that connection is s. 394 of the Bombay Municipal Corporation Act, the *vires* of which have been called in question in these proceedings. Section 394, as it stood before its amendment by Maharashtra Act No. XXXII of 1962, in effect provided—

“(1) Except under and in conformity with the terms and conditions of a licence granted by the Commissioner, no person shall—

(a) keep, in or upon any premises, for any purpose whatever,

(i) any article specified in Part I of Schedule M, or

(ii) any article specified in Part II of Schedule M, in excess of the quantity therein prescribed as the maximum quantity of such article which may at any one time be kept in or upon the same premises without a licence.”

The sub-s. (1) of s. 394 as amended after 1962 is substantially similar to the section before amendment. Important changes, however, have been effected in the Schedule. So far as Part II of Schedule M is concerned the quantity of petroleum, which was permissible for being kept with a licence in any premises, was upto 10 gallons. Schedule M has been completely overhauled by the Amending Act No. XXXII of 1962. The “Statement of Objects and Reasons” runs as follows:

“Section 394 of the Bombay Municipal Corporation Act provides that certain articles shall not be kept, and certain trades shall not be carried on, without a licence, because they are dangerous or likely to create a nuisance. Since it is noticed that fires and explosions occur in the City due to unauthorised or negligent storage and handling of explosive or dangerous materials in or near residential buildings resulting in considerable loss of life and property, the question of tightening up the law was engaging the attention of Government. It is now proposed to make better provision for the prevention of fire, explosion and other danger to life, health and property where such articles are stored or such trades and processes are carried on. The control and supervision of the Commissioner will be stricter and the punishment for defaulters more severe.”

The preamble to Act No. XXXII of 1962 substantially incorporates these objects. The preamble runs thus:

“WHEREAS, it is expedient to make better provision for the prevention of fire, explosion and other danger to life, health and property in premises where certain articles are stored, and certain trades and processes are carried on, and for that and certain other purposes further to amend the Bombay Municipal Corporation Act;...”

Turning to Schedule M Part II, mineral oils with which we are concerned in this case fall under the category “A—Combustible Liquids”. Schedule M, Part II (b) provides that, mineral oils of all kinds (Flash point above 76°F); oils of all kinds excluding essential and mineral oils; paints of all kinds (Flash point above 76°F); ...shall not be kept without a licence in or upon any premises exceeding 50 litres. Part II (c) of Schedule M provides that, mineral oils of all kinds (Flash point below 76°F); paints of all kinds (Flash point below 76°F); varnish (Flash point below 76°F); ...shall not be kept without a licence in or upon any premises exceeding 10 litres.

It was contended by Mr. Ganatra that s. 394, in effect, legislates upon a topic which falls in Entry 53 of List I, Seventh Schedule of the Constitution of India. Entry No. 53 runs thus:

“Regulation and development of oilfields and mineral oil resources; petroleum and

petroleum products; other liquids and substances declared by Parliament by law to be dangerously inflammable”.

In this connection, Mr. Ganatra pointed out that the Indian Legislature had passed an Act known as Petroleum Act, 1934, which relates to the import, transport, storage, production, refining and blending of petroleum and other inflammable substances. It is necessary to refer to some of the provisions of this Act without which it will be difficult to understand the significance of the expressions “Flashing Point above 76°F” and “Flashing point below 76°F”, etc. “Flashing Point” has been defined in s. 2(c) of the Petroleum Act, 1934, as—

“‘flashing point’ of any petroleum means the lowest temperature at which it yields a vapour which will give a momentary flash when ignited, determined in accordance with the provisions of Chapter II and the rules made thereunder;”.

Chapter II of the Petroleum Act, 1934, relates to “Testing of Petroleum”. “Dangerous Petroleum” has been defined in s. 2(b) to mean, “petroleum having its flashing-point below seventy six degree Fahrenheit”. We will refer to the other relevant provisions of this Act as we proceed with the discussion of the points urged and also when we will consider the arguments advanced by Mr. Ganatra relating to the possible conflict or repugnancy of the provisions of the legislation of the State Legislature and the legislation of the Indian Legislature of 1934.

In addition to the Petroleum Act, 1934, the Parliament had passed another enactment known as “Inflammable Substances Act, 1952” (Act No. XX of 1952). It will be recalled that Entry No. 53 of List I, Seventh Schedule, not only relates to petroleum and petroleum products but also relates to other liquids and substances declared by Parliament by law to be dangerously inflammable. The object of the Inflammable Substances Act, 1952, is to declare certain substances to be dangerously inflammable. It is not necessary to refer to the provisions of this enactment any further so far as the decision of the present case is concerned.

Mr. Ganatra contended that the entry “petroleum and petroleum products” must be interpreted liberally, and, not in a doctrinaire, restricted and pedantic sense. These are words of wide amplitude and his argument was that these words are not qualified by words, such as regulation and development, which qualify the first Part of the entry relating to the oilfields and mineral oil resources. Mr. Ganatra, therefore, contended that it is the exclusive jurisdiction of the Parliament to pass legislation on every aspect relating to petroleum and petroleum products, such as, storage, import, possession, transport, etc. He also pointed out that the Indian Legislature has actually passed a comprehensive legislation covering import, transport, storage, production, refining and blending of petroleum and other inflammable substances. The word “petroleum” has been defined in s. 2(a) of the Petroleum Act, 1934, to mean

“any liquid hydrocarbon or mixture of hydrocarbons, and any inflammable mixture (liquid, viscous or solid) containing any liquid hydrocarbon”.

The comments by the Chief Inspector of Explosives show that crude oil and lubricating oils fall within the general description “liquid hydrocarbon or mixture of hydrocarbons”. Chapter I of the Petroleum Act, 1934, relates to “control over petroleum”. Section 3(1) provides—

“No one shall import, transport or store any petroleum save in accordance with the rules made under section 4”.

Sub-section (2) of s. 3 provides—

“Save in accordance with the conditions of any licence for the purpose which he may be required to obtain by rules made under section 4, no one shall import any dangerous petroleum, and no one shall transport or store any petroleum”.

Mr. Ganatra emphasized the word “store” and pointed out that even for the purpose of storage, a licence is required, and the storing is required to be made in accordance with the conditions of the licence. Section 4 empowers the

Central Government to make rules for the import, transport and storage of petroleum. Clauses (a), (b) and (c) of s. 4 relate to the import and the conditions governing the import. Clauses (d) and (e) relate to the regulation of the transport. Clauses (f) and (g) relate to regulations about storage. It is necessary to set out these clauses in full:

"The Central Government may make rules ...

(f) regulating the places at which and prescribing the conditions subject to which petroleum may be stored;

(g) specifying the nature, situation and condition of all receptacles in which petroleum may be stored."

Clause (h) relates both to transport and storage and the form and conditions of licence for the import in regard to the same. It is not necessary to refer to cls. (i), (j) and (k). Clause (I) runs thus:—

"(1) generally, providing for any matter which in its opinion is expedient for proper control over the import, transport and storage of petroleum".

Section 7 provides:—

"Notwithstanding anything contained in this Chapter, a person need not obtain a licence for the transport or storage of non-dangerous petroleum if the total quantity in his possession at any one place does not exceed five hundred gallons and none of it is contained in a receptacle exceeding two hundred gallons in capacity".

Section 8(I) provides:—

"Notwithstanding anything contained in this Chapter, a person need not obtain a licence for the import, transport or storage of dangerous petroleum not intended for sale if the total quantity in his possession does not exceed six gallons".

Section 11 speaks of exemption of heavy oils and provides:—

"Nothing in this Chapter shall apply to any petroleum which has its flashing-point not below two hundred degrees Fahrenheit".

Chapter II of the said Act relates to "The Testing of Petroleum". Chapter III relates to "Penalties and Procedure". Chapter IV incorporates what are called supplemental provisions. Section 29 makes supplemental provisions relating to the rules and, in effect, provides that, in making any rules, the Central Government may provide for any matter ancillary to such rules. Section 31 is important and runs thus:

"Power to limit powers of local authorities over petroleum.—Where any enactment confers powers upon any local authority in respect of the transport or storage of petroleum, the Central Government may, by notification in the Official Gazette,—

(a) limit the operation of such enactment, or

(b) restrict the exercise of such powers, in any manner it deems fit."

It is not necessary to refer to the rules framed by the Central Government under the said Act, except to point out that "heavy petroleum" has been defined to mean "petroleum which has its flashing-point not below 150°F", (i.e. 150°F and above). Chapter IV of the Rules makes provisions for the storage of petroleum requiring licence. Chapter V of the Rules relates to the storage of petroleum not requiring licence. Rule 109, which is the first rule of Chapter V, provides for exemption of heavy petroleum. It is as under:

"Exemption of heavy petroleum.—(1) Notwithstanding anything contained in these rules, it shall be permissible to store without licence, subject to the conditions of this Chapter, heavy petroleum in quantities not exceeding 10,000 gallons which is not stored in the same installation or storage shed as other petroleum".

The learned Government Pleader, without disputing the correctness of the proposition pressed by Mr. Ganatra, viz., that the petroleum and petroleum products mentioned in Entry No. 53 of List I, Schedule 7, must receive their widest connotations, and without challenging the position that it would be open to the Parliament to legislate regarding the storage of petrol in any place in India, pointed out that, it is competent to State Government to pass legislation regulating the storage of petroleum and petroleum products in certain

localities and empowering the local authority to make rules in that regard. He argued that, whereas the object of the Indian Legislature or the Parliament would be to make appropriate provisions about petroleum and petroleum products, in various aspects of these matters, it would still be competent for the State Government to pass a legislation for the storage of the petrol under Entries 1, 5, 6, 26, 64 and 65 of List II of the Seventh Schedule. As stated above, all that s. 394 of the Bombay Municipal Corporation Act provides is that, no person shall keep petroleum and petroleum products, except in accordance with the terms and conditions of licence granted by the Commissioner, in excess of the quantities specified as the maximum quantity in Schedule M. The object of the State legislation which empowers the Municipal Commissioner to issue licences setting out such terms and conditions as he finds necessary and desirable is to ensure the purposes set out in the various items mentioned above in List II.

Before coming to the entries in List II on which reliance is placed on behalf of the Government Pleader, it is necessary to discuss the general principles of the construction of the various items in the Schedule attached to the Constitution of India. The essence of a federal constitution consists in the distribution of powers between the federating units and the federal centre. With this end in view, the Constitution of India has prepared three lists setting out the items which fall in one or the other of these lists. List I of Seventh Schedule sets out the topics which fall within the exclusive domain of the Parliament. List II relates to the subjects which fall within the exclusive jurisdiction of the State Legislature. And List III covers the topics over which both the Parliament and the State Legislature would exercise concurrent jurisdiction. The object of setting out various items and assigning them to separate lists is to make the division of power as clear cut and as exhaustive as possible. Notwithstanding any attempt at meticulous enumeration of the various topics and of arranging them in different lists, there is bound to be an amount of overlapping between the topics of the same list and also overlapping between topics of one list and those of the other. Article 246 of the Constitution of India is divided into three clauses. The first clause provides—

“(1) Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the ‘Union List’).”

Clause (1) begins with what is known as the “non obstante clause”. The power of the Parliament in respect of the topics mentioned in List I is absolute and paramount and is not trammelled by anything set out in cls. (2) and (3). Clause (2) runs thus:

“(2) Notwithstanding anything in clause (3), Parliament, and, subject to clause (1) the Legislature of any State also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the ‘Concurrent List’).”

It is clear from cl. (2) that even in respect of the subjects mentioned in the Concurrent List, the power of the Parliament is paramount and superior to the power of the State Legislature. The Parliament can exercise its legislative functions in regard to the topics in the Concurrent List notwithstanding anything stated in cl. (3) which deals with the powers of the State Legislature to legislate on topics in the State List. The power of the Legislature of the State is qualified with the word “also”. We will discuss the significance of cl. (2) at a later stage of the judgment, while discussing the question of the field of legislation occupied by a parliamentary legislation. Clause (3) of art. 246 runs thus:

“(3) Subject to clauses (1) and (2), the Legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (in this Constitution referred to as the ‘State List’).”

It is clear from the opening words of this clause that the power of the State Legislature is subject to cls. (1) and (2). It is not necessary to consider cl. (4) of art. 246 for our present discussion. At this stage, we may conveniently refer to the provisions of art. 254, sub-s. (1). It runs thus:—

“254. (1) If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of any existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void”.

Article 254 embodies the doctrine of repugnancy. There is some controversy as to when this doctrine of repugnancy can be invoked,—one authority holding that the doctrine can come into play only when the topics are mentioned in the Concurrent List and another holding that there can be repugnancy even if the rival legislations relate to topics falling in different lists. It is not necessary for us to probe into this controversy, and, we may touch upon it in passing so far as it becomes necessary for the advancement of the point of view which is adopted in our judgment.

We have already pointed out that the proper approach in considering the question as to whether a particular legislation is *ultra vires* the powers of the Legislature is to take the legislation as it is, consider the pith and substance thereof, or the real nature and substance of the legislation, or the purpose, design and scheme thereof, and see whether, in its real sense, the legislation can legitimately fall in any of the items of the list over which the Legislature wields powers. If it is found that, in pith and substance, the legislation relates to a topic falling within the jurisdiction of the Legislature, then even if there is an incidental trenching upon the powers of the rival Legislature, still the legislation will continue to remain valid. In *State of Bombay v. R. M. D. Chamarbaughwala*,¹ Das C. J., who delivered the judgment for the Court, has set out the correct approach to be adopted in a case like the present one. He says:

“When the validity of an Act is called in question, the first thing for the Court to do is to examine whether the Act is a law with respect to a topic assigned to the particular Legislature which enacted it. If it is, then the Court is next to consider whether, in the case of an Act passed by the Legislature of a Province (now a State), its operation extends beyond the boundaries of the Province or the State, for under the provisions conferring legislative powers on it such Legislature can only make a law for its territories or any part thereof and its laws cannot, in the absence of a territorial nexus, have any extra-territorial operation. If the impugned law satisfies both these tests, then finally the Court has to ascertain if there is anything in any other part of the Constitution which places any fetter on the legislative powers of such Legislature. The impugned law has to pass all these three tests.”

So far as the principles of construction of the words used in the items are concerned, the earliest and most important pronouncement comes from the Federal Court in *In re The Central Provinces and Berar Act. No. XIV of 1938*.² At page 36, Sir Maurice Gwyer, C. J., who gave the judgment for the Court, stated:

“This is the first case of importance that has come before the Federal Court; and it is desirable, more particularly in view of some of the arguments addressed to us during the hearing, to refer briefly to certain principles which the Court will take for its guidance. It will adhere to canons of interpretation and construction which are now well-known and established. It will seek to ascertain the meaning and intention of Parliament from the language of the statute itself; but with the motives of Parliament it has no concern. It is not for the Court to express, or indeed to entertain, any opinion

¹ [1957] A.I.R. S.C. 699, s.c. 59 Bom. L.R. 945. ² [1939] F.C.R. 18.

on the expediency of a particular piece of legislation, if it is satisfied that it was within the competence of the Legislature which enacted it;...

The Judicial Committee have observed that a Constitution is not to be construed in any narrow and pedantic sense. The rules which apply to the interpretation of other statutes apply, it is true, equally to the interpretation of a constitutional enactment. But their application is of necessity conditioned by the subject-matter of the enactment itself; and I respectfully adopt the words of a learned Australian Judge:—"Although we are to interpret the words of the Constitution on the same principles of interpretation as we apply to any ordinary law, these very principles of interpretation compel us to take into account the nature and scope of the Act that we are interpreting,—to remember that it is a Constitution, a mechanism under which laws are to be made, and not a mere Act which declares what the law is to be: ... it (Federal Court) may rightly reflect that a Constitution of government is a living and organic thing, which of all instruments has the greatest claim to be construed *ut res magis valeat quam pereat*..."

Again, at page 38, His Lordship observed:—

"In *Attorney-General for Ontario v. Attorney-General for Canada*,³ the Committee observed that in the interpretation of the British North America Act, 'if the text is explicit, the text is conclusive, alike in what it directs and what it forbids'..."

At page 39, his Lordship has referred to the case of *Citizens Insurance Company of Canada v. Parsons*; *Queen Insurance Company v. Parsons*⁴ and, has quoted a passage therefrom, which runs thus:

"In these cases it is the duty of the Courts, however difficult it may be, to ascertain in what degree, and to what extent, authority to deal with matters falling within these classes of subjects exists in each Legislature, and to define in the particular case before them the limits of their respective powers. It would not have been the intention that a conflict should exist; and in order to prevent such a result, the two sections must be read together and the language of one interpreted, and, where necessary, modified by that of the other. In this way it may, in most cases, be found possible to arrive at a reasonable and practical construction of the language of the sections, so as to reconcile the respective powers they contain, and to give effect to all of them. In performing this difficult duty it will be a wise course for those on whom it is thrown, to decide each case which arises as best they can, without entering more largely upon an interpretation of the statute than is necessary for a decision of the particular question in hand."

Again, in *The United Provinces v. Atiqua Bagum*,⁵ Sir Maurice Gwyer, C. J. observed (p. 134):

"...I think however that none of the items in the Lists is to be read in a narrow or restricted sense, and that each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it."

In *Subrahmanyam Chettiar v. Muttuswami Goundan*,⁶ the Court approved of the doctrine of pith and substance which had been evolved in interpreting items in the Lists defining the distribution of powers between the Centre and the States in a Federal Constitution. In that case, the validity of the Madras Agriculturists Relief Act passed by the Provincial Legislature was called in question. The Act provided for the scaling down of the decretal debt. The question arose as to whether the provision entrenched upon the power of the Central Legislature to legislate on a topic with respect to negotiable instruments. Sir Maurice Gwyer C. J. and Varadachariar J. held that it did not. After referring to the provisions of s. 100(1) of the Government of India Act, 1935, which are similar to the provisions of art. 246 of the Constitution of India, their Lordships proceeded to observe (p. 201):

"It must inevitably happen from time to time that legislation, though purporting to deal with a subject in one list, touches also on a subject in another list, and the different provisions of the enactment may be so closely intertwined that blind adherence to a strictly verbal interpretation would result in a large number of statutes being declared

3 [1912] A.C. 571, at p. 583.

4 (1881) 7 App. Cas. 96, at p. 108.

5 [1940] F.C.R. 110.

6 [1940] F.C.R. 188.

invalid because the Legislature enacting them may appear to have legislated forbidden sphere. Hence the rule which has been evolved by the Judicial Committee whereby the impugned statute is examined to ascertain its 'pith and substance', or 'true nature and character', for the purpose of determining whether it is legislation in respect to matters in this list or in that..."

Applying the doctrine of pith and substance, the majority of the Federal Court held that the Madras Act cannot be regarded as legislating in respect of negotiable instruments, a subject falling within the domain of the Central Legislature. They dismissed the argument that the Act will affect the majority of the debts evidenced by or based upon negotiable instruments as quite material, observing, "That is an accidental circumstance which cannot affect the question". Sulaiman J. who gave a dissenting judgment, but, who agreed on the general principles of interpretation, observed at page 208 as follows:

"...Nevertheless, in view of the large number of items in the three Lists, it is almost impossible to prevent a certain amount of overlapping. Absolutely sharp and distinct lines of demarcation are not always possible..."

After referring to the doctrine of pith and substance at page 210, his Lordship referred to the possibility of an incidental encroachment and stated that such an encroachment is not really forbidden.

The most important case dealing with the question of the extent of invasion is to be found in *Prafulla Kumar v. Bank of Commerce, Khulna*.⁷ In this case, the validity of the Bengal Money-lenders Act was called in question on the ground that it entrenched upon a topic of negotiable instruments which falls within the domain of the Federal Lists. At page 65, their Lordships of the Privy Council cite with approval a passage from the judgment of Sir Maurice Gwyer, C. J. in *Subrahmanyam Chettiar v. Muttuswami Goundan* which has been already reproduced above, and stated in paras. 36, 37 and 38

"Their Lordships agree that this passage (which is already set out above by us) correctly describes the grounds upon which the rule is founded, and that it applies to Indian as well as to Dominion legislation. No doubt experience of past difficulties has made the provisions of the Indian Act more exact in some particulars and the existence of the Concurrent List has made it easier to distinguish between those matters which are essential in determining to which list particular provisions should be attributed and those which are merely incidental. But the overlapping of subject-matter is not avoided by substituting three lists for two or even by arranging for a hierarchy of jurisdictions.

Subjects must still overlap and where they do the question must be asked what in pith and substance is the effect of the enactment of which complaint is made and in what list is its true nature and character to be found. If these questions could not be asked, much beneficent legislation would be stifled at birth, and many of the subjects entrusted to Provincial Legislation could never effectively be dealt with.

Thirdly, the extent of the invasion by the Provinces into subjects enumerated in the Federal List has to be considered. No doubt it is an important matter, not, as their Lordships think, because the validity of an Act can be determined by discriminating between degrees of invasion, but for the purpose of determining what is the pith and substance of the impugned Act. Its provisions may advance so far into Federal territory as to show that its true nature is not concerned with Provincial matters, but the question is not, has it trespassed more or less, but is the trespass, whatever it be, such as to show that the pith and substance of the impugned Act is not money-lending but promissory notes or banking? Once that question is determined the Act falls on one or the other side of the line and can be seen as valid or invalid according to its true content..."

It will be clear from the above that overlapping of the topics cannot be avoided in spite of the arrangement of the topics in three separate Lists. That being the case, it is necessary to look to the substance and the pith of each legislation remembering that some invasion into the domain reserved for the rival Legislature is unavoidable. The real point to be considered is the extent of that

invasion, but, even the extent of invasion is material for the purpose of determining whether, in substance, the legislation is in respect of a topic reserved for the Provincial or the State Legislature, or, covers a topic which has been assigned to the Central Legislature or the Parliament. In other words, the question for consideration would be, whether the State Legislature, under the guise of legislating upon a topic falling into their domain, has really legislated upon a topic which falls in the domain of the Central Legislature or the Parliament.

Pausing here for a moment, let us try to examine the impugned legislation with a view to find out the pith and substance underlying that legislation. We have already referred to the Statement of Objects and Reasons and also the preamble of the Act which introduced the present s. 394 into the Bombay Municipal Corporation Act. The concern which has motivated the amended s. 394 is to prevent an outbreak of fire, and, with that end in view, to provide for certain precautionary measures or safeguards. It is true that the Petroleum Act, which is a Central legislation, also deals with the question of storage of petroleum and petroleum products. It is also true that it provides for certain precautions and safeguards which were required to be taken in the matter of transport and storage of petroleum and petroleum products. With that end in view, rules have been made requiring the taking of a licence. Rules framed under the Act also regulate the place at which and the conditions subject to which petroleum may be stored, and, also specify the nature and condition of receptacle in which petroleum may be stored. The provisions of the Petroleum Act are based on the fundamental distinction between dangerous petroleum and non-dangerous petroleum. A dangerous petroleum is petroleum the flashing-point of which is below 76°F. In regard to non-dangerous petroleum, s. 7 provides that, no licence would be necessary for storing petroleum upto 500 gallons. In regard to dangerous petroleum, s. 8 provides that, no licence is necessary for the possession of petroleum not exceeding six gallons. Section 11 makes it clear that the provisions of the Act do not apply to petroleum whose flashing-point is 200°F and above. Such petroleum falls within the category of "heavy petroleum" as defined in the Rules. Heavy petroleum is exempted from the operation of the provisions of the Petroleum Act. It will thus be seen that the precautions envisaged in the Act are based upon the intrinsic character of the petroleum and the degree at which its flashing-point is reached. If the flashing-point is reached at a higher temperature than 150°F, then no licence would be necessary. The impugned provision is designed to meet a different set of situation. It not only takes into account the intrinsic character of the petroleum, but it also takes into account the conditions prevailing in a crowded city. The cumulative effect of the intrinsic character of the product and the special conditions prevailing in a crowded city form the basis of the additional precautions which are envisaged in s. 394, that is, the impugned section. It is settled law that the objects and reasons which have motivated a legislation are relevant for the purpose of finding out the conditions which prevailed at the time the legislation is passed, and the evil which it sought to remedy.

"The statement of objects and reasons is certainly not admissible as an aid to the construction of a statute. But it can be referred to for the limited purpose of ascertaining the conditions prevailing at the time which actuated the sponsor of the Bill to introduce the same and the extent and urgency of the evil which he sought to remedy": (*M. K. Ranganathan v. Govt. of Madras.*)

The objects and reasons have referred to the fact of the occurrence of fires and explosions in the city due to unauthorized or negligent storage and handling of explosive or dangerous material in or near residential buildings resulting in considerable loss of life and property. It further says that, because of this, the question of tightening of the law was engaging the attention of the Government. It proceeds to say:

"It is now proposed to make better provision for the prevention of fire, explosion

and other danger to life, health and property where such articles are stored or such trades and processes are carried on".

The expression "better provision for the prevention of fire, explosion and other danger to life, health and property" is extremely significant. It emphasizes the need for additional precautions, that is to say, precautions which must be superimposed upon the precautions called upon by the Petroleum Act because of the situation prevailing in a crowded city. The Petroleum Act extends to the entire land. The provisions, therefore, are of a general character and are not designed to meet peculiar situations prevailing in crowded towns.

Turning to the preamble, we notice that emphasis has been laid upon the need to make better provision for the prevention of fire, explosion and other danger to life, health and property in premises where certain articles are stored. It is with that end in view that the impugned provision has been designed. The provision does not relate to petroleum and petroleum products, nor it is in respect of petroleum and petroleum products as described in Entry 53 of List I of the Seventh Schedule. The legislation has nothing to do with petroleum and petroleum products as such. It is true that it will be open to the Parliament to make legislation ancillary or subsidiary to matters, such as, the storage of petroleum or petroleum products. Even the learned Government Pleader did not challenge such a position. But it is clear that, any provision relating to the storage or any precaution required by the Act for the purpose of storage or for subsidiary or ancillary character, made by the Central Legislature, has been made by it with the object of advancing the main purpose of the Central Act. The object of preventing the occurrence of fire and preventing consequent danger to life and property evidently falls within entry No. 1 of List II (State List). The expression "public order" mentioned in this entry has been authoritatively interpreted by the Supreme Court as being synonymous with public peace, safety and tranquillity.... (vide *The Supdt., Central Prison v. Dr. Lohia*.)⁹ So, the question of public safety is a concern of the State Government, and it is open to the State Government to pass a legislation to safeguard public safety. Item No. 5 of List II runs thus:

"Local government, that is to say, the constitution and powers of municipal corporations, improvement trusts, district boards, mining settlement authorities and other local authorities for the purpose of local self-government or village administration".

Under this item, it is competent to the State Legislature to constitute a local authority and to confer powers of local self-government or village administration on that body. A Municipal Corporation is such a local authority which is entrusted with powers of local self-government. One of the duties and functions of a municipal body will be to ensure the safety of the citizens from sporadic fires breaking out as a result of disorganized and chaotic storage of dangerous and inflammable materials. Item No. 6 in the List relates to public health, sanitation, hospitals and dispensaries. The task of ensuring sanitation and public health also can be and usually are delegated to the local authority. In this connection, it is interesting to refer to the provisions of s. 61 of the Bombay Municipal Corporation Act, which falls under Chapter III relating to duties and powers of the municipal authorities. Section 61 is the first amongst the sections falling under the sub-heading "Obligatory and discretionary duties of the Corporation". Section 61 relates to the obligatory duties and, in effect, provides that,

"It shall be incumbent on the corporation to make adequate provision, by any means or measures which it is lawfully competent to them to use or to take, for each of the following matters".

The matters are thereafter enumerated from cl. (a) to cl. (t). Matter (g) relates to measures for preventing and checking the spread of dangerous diseases. Matter (j) relates to regulation of offensive and dangerous trade. Matter (k) relates to the entertainment of a fire-brigade and protection of life and property

in case of fire. These are the obligatory duties cast upon the municipal corporation, and, it is not suggested that the duties do not fall within the purview of the powers of the State Legislature. The State Legislature is, undoubtedly, competent to transfer these powers and obligations enumerated in s. 61 upon a corporation. Just as the adoption of certain precautionary measures are found necessary in the interest of the prevention of the breaking out of fire, it may be equally necessary to take certain measures for preventing spread of contagious diseases as a result of the chaotic storage in large quantities of lubricating oil. Mr. Ganatra contended that there is no evidence to show that the storage of lubricating oil would be responsible for spreading any virus or bacteria. He further argued that the Corporation has not led any expert evidence on that point. It is not necessary to consider this question at any length, and, it is sufficient to observe that in certain extreme contingencies, the possibility of the spread of contagious diseases or virus cannot be ruled out. Mr. Ganatra contended that s. 394 itself does not lay down the conditions of the licence and leaves the matter entirely to the discretion of the Commissioner. He suggested that if the object of the legislation was to provide for certain precautions for preventing fires or the spread of diseases, etc., it was the duty of the Legislature to set out the precautions which are designed for that purpose. We do not think that it makes any difference in substance whether provisions have been made in the section itself for the precautions required to be taken or they are left to the discretion of the Municipal Commissioner. A copy of the licence containing the condition was placed in our hands in the course of the arguments by the learned Government Pleader, and we notice that a distinction has been made between "dangerous" and "non-dangerous" mineral oils, with reference to the flashing-points. The conditions of the licence in respect of non-dangerous mineral oils are materially different from the conditions in respect of dangerous mineral oils. The licence for keeping mineral oils of all kinds (flash point above 76°F), etc., lays down two conditions: (1) any of the above articles licensed herein should be kept either in vessels of sufficient strength with lid on the top and made of non-fragile material or in bottles tightly closed; and (2) no unauthorised person should have an access to the storage. The licence, on the other hand, for keeping mineral oils of all kinds, flash-point of which is below 76°F, lays down six conditions, which are more stringent than the conditions in the case of "non-dangerous" mineral oils. In addition to the requirement of a suitable receptacle or vessels in which these oils are required to be kept, other precautions have been envisaged, such as the distance from the residential buildings and the construction of storage premises. It has been provided that the premises should be of R.C.C. type or a metal enclosure where there are no structures around these premises. The conditions also provide that other licensable articles should not be kept side by side with the mineral oils etc. They also provide that the manufacturing or packing in smaller receptacles or processing etc. should not be done near the storage. Finally it is laid down that the storage should not be near the main entrance of the premises or of any room. The conditions of the licences give us a clear picture of the precautions which were considered necessary for the storage of petroleum products in the City of Bombay.

Turning now to the Items, Item No. 26 in List II relates to trade and commerce within the State. Items Nos. 64 and 65 relate to offences against laws with respect to any of the matters in the List and jurisdiction and powers of Courts, of course, except the Supreme Court, with respect to any of the matters in this List respectively. Under Item No. 26, the State can delegate its powers and functions to the local authority in respect of trade and commerce. It is under this delegation that it is open to the corporation to make provisions for regulating certain kinds of dangerous trades and provisions.

Before leaving the question of the scheme, design and purpose of the enactment, it is necessary to note that petroleum and petroleum products are but small fraction of items falling within Schedule M. Part I of the Schedule M relates to alloys and metals and other substances of explosive nature. Part II

falls into four parts. A-Combustible Liquids, B-Combustible Solids and Semi Solids, C-Oxidising Substances; and D-Corrosive or poisonous Substances. In respect of articles falling within Part II, different quantities have been prescribed for different kinds of materials. It is evident that these quantities have been determined on the basis of the danger emanating therefrom for the safety of the locality.

It will be clear from the object, scheme and design of the impugned legislation that the Legislature wanted to provide for topics which clearly fall in List II. The pith and substance of the impugned legislation, therefore, is not to deal with or dabble in petroleum and petroleum products as such, but to devise special measures for ensuring the protection and safety of the citizens of a crowded city like Bombay. It is true that, in so far as the Central Legislation can also provide for storage and the conditions in respect thereof, and in so far as they have actually passed a legislation which makes provision for these matters, it can be said that there is some amount of impingement or encroachment or trespass into the field of legislation reserved for the Parliament. But the extent of invasion is insignificant, and, as we will labour to point out at a later stage, the provisions made have no relation to the field which has already been occupied by the Central legislation, but they concern the field which has been left unoccupied by the Central legislation. As has been rightly pointed out by the Privy Council in *Prafulla Kumar's* case, the extent of invasion is relevant not for the purpose of determining or discriminating between degrees of invasion, but for determining the pith and substance. If the invasion is extensive and on a large scale, then the reasonable inference would be that the State Legislature is passing a colourable legislation, that is to say, under the guise of legislating on a topic falling within their domain, they have invaded or trespassed upon the topics reserved for the Parliament.

Mr. Ganatra contended that petroleum and petroleum product has always been the exclusive sphere of the Central legislation. He argued that this legislative history and the background of the various laws passed in respect thereof has to be taken into account in considering the question of the pith and substance. The first Petroleum Act was passed in 1881, which is Act No. VIII of 1881. The preamble stated that this is an Act to regulate the importation, possession and transport of petroleum and other fluids of a like nature. This Act was repealed and replaced by the Petroleum Act XII of 1886, the preamble of which was similarly worded. It is, however, interesting to note that, in both these Acts, viz. the Act of 1881 and the Act of 1886, power was given to the local government to make rules consistent with the Act for regulating the importation of petroleum, of course, with the previous sanction of the Governor-General. The third Act was Act No. VIII of 1889. The purpose of the Act as set out in the preamble was to consolidate and amend the law relating to the importation, possession and transport of petroleum and other substances. Section 9 of this Act also gave power to local government to make rules to regulate the importation of petroleum and the granting of licences to possess or to transport petroleum within the Province. In the same connection, Mr. Ganatra pointed out that the Bombay Municipal Corporation Act, which is Act No. III of 1888, was passed after the first two Petroleum Acts were enacted. The last Act, which is still in force, is the Petroleum Act XXX of 1934, which consolidates and amends the law relating to the import, transport, storage, production, refining and blending of petroleum and other inflammable substances. We have been unable to understand how the legislative history and the fact that the Central Legislature have made provisions for the storage of petroleum in all its Acts in any way help Mr. Ganatra in the point he has advanced before us. It is necessary to note that before the Government of India Act of 1935, the Indian Government was unitary in form. The entire power was concentrated in the Central Government, and the Provinces enjoyed such power as was delegated to them. The principle of devolution and decentralization of power was given effect to in small measure by the Government of India Act, 1919. Section 45A of the Gov-

ernment of India Act, 1919, empowered the Central Government to make rules for classification of central and provincial subjects. Accordingly, rules known as "devolution rules" were framed under s. 45A. One of these rules relates to the classification of the subjects as Central and Provincial. Entry No. 23 in the Central subjects relates to control of petroleum and explosives. Among the Provincial subjects are mentioned local self-government, which is entry No. 1, and, public health and sanitation, which is entry No. 3. Even in respect of the Provincial subjects, the Government of India Act, 1919, envisaged a diarchical form of government, that is to say, a distinction was made between reserved subjects and transferred subjects. Transferred subjects were the subjects which were transferred to the control of the Legislative Council. The Petroleum Act of 1934 was passed during the prevalence of Government of India Act, 1919. At that time, the Government was unitary, and notwithstanding the devolution and classification of subjects between Central and Provincial subjects, the power of the Centre was supreme in all fields and could not be called into question in any Court of law. The classification of subjects is not the same thing as the rigid division of powers as envisaged in Federal Constitution. Under the latter, authority is vested in the Courts to maintain delicate balance of power between the Centre and the States. This is not to suggest that even under the Constitution, the Union is not competent to pass a legislation similar to the Petroleum Act, 1934, nor is it suggested that the provisions of Petroleum Act, 1934, are in any way *ultra vires* the Constitution. The object in referring to the various provisions of the Government of India Act, 1919, and the constitutional position prevailing thereunder is to demonstrate the futility of any argument based upon the legislative history. The legislative history is not going to give us any guidance or clue in determining the powers of the respective Legislatures. Before concluding this topic, it is somewhat interesting to refer to the entry relating to petroleum in List I of the Government of India Act, 1935. It is entry No. 32 which runs thus:

"Petroleum and other liquids and substances declared by Dominion law to be dangerously inflammable, so far as regards possession, storage and transport".

It is evident that the scope of this entry is much more narrow and limited than the entry No. 53 in List I of the Constitution of India. Entry No. 53 envisages regulation and development of oil fields and mineral oil resources, and mentions petroleum and petroleum products *simpliciter* without any qualifying words. The enlargement in the scope is obviously due to the fact that India is now a free and sovereign country. Any way, the legislative history affords no clue to find out an answer to the question which has been raised in this proceeding about the *vires* of the impugned legislation. Reliance has been placed on the decision of the Supreme Court in *Navinchandra v. Commr. of I.-T., Bombay*,¹⁰ in which it has been held that, the

"reference to legislative practice may be admissible for cutting down the meaning of a word in order to reconcile two conflicting provisions in two legislative Lists as was done in *In re the Central Provinces and Berar Act XVI of 1938*¹¹ or to enlarge their ordinary meaning as in *State of Bombay v. F. N. Balsara*¹²..." (p. 61).

In fact, according to us, the provisions of entry No. 53 in List I, and the provisions of entries Nos. 1, 5 and 6 in List II do not stand in conflict with one another and, therefore, the question of resolving that conflict does not arise. Again, the legislative practice does not help us in resolving the conflict for reasons set out above. After referring to the rule in *C. P. and Berar Act* case, their Lordships have proceeded to observe (p. 61):

"...The cardinal rule of interpretation, however, is that words should be read in their ordinary, natural and grammatical meaning subject to this rider that in construing words in a constitutional enactment conferring legislative power the most liberal con-

¹⁰ [1955] A.I.R. S.C. 58, s.c. 57 Bom. L.R.
628.

¹¹ [1939] F.C.R. 18.

B.L.R.—32

¹² [1951] S.C.R. 682, s.c. 53 Bom. L.R.
982.

struction should be put upon the words so that the same may have effect in their widest amplitude".

On the same page, their Lordships have approved of the decisions of the Federal Court to which reference has already been made, so far as the principles of interpretation are concerned.

We have already pointed out that some overlapping between the topics in the same Lists as also topics in different Lists is unavoidable. In *Union Colliery Company of British Columbia v. Bryden*,¹³ a question arose as to whether s. 4 of the British Columbian 'Coal Mines Regulation Act, 1890', which prohibits Chinamen of full age from employment in underground coal workings, is in that respect *ultra vires* of the Provincial Legislature, in view of the exclusive authority of the Dominion Parliament in regard to 'naturalization and aliens'. The Privy Council after examining the provisions of the impugned legislation pointed out that:

"...the leading feature of the enactments consists in this that they have, and can have, no application except to Chinamen who are aliens or naturalized subjects, and that they establish no rule or regulation except that these aliens or naturalized subjects shall not work, or be allowed to work, in underground coal mines within the Province of British Columbia". (p. 587).

They further held that, the whole pith and substance of the enactments of s. 4 of the Coal Mines Regulation Act consists in establishing a statutory prohibition which affects aliens or naturalized subjects and therefore trench upon the exclusive authority of the Parliament of Canada. We are unable to understand how this decision in any way helps Mr. Ganatra in the point he is urging before us. Emphasis was laid upon the leading feature of the enactment, which affords a guide or clue in arriving at the pith and substance. So far as the impugned legislation is concerned, the leading feature is to provide for the need of securing licences for storing mineral oils under certain conditions. It is only incidental that the Act also relates to a topic which falls under the jurisdiction of the Parliament. The extent of encroachment and the significance to be derived therefrom has been discussed by the Supreme Court in the case of *A. S. Krishna v. Madras State*.¹⁴ Venkatrama Ayyar J., who delivered the judgment of the Court, after referring to the overlapping of the fields of legislation and the need for evolving the doctrine of pith and substance for resolving the conflict, observes (p. 301):

"...The extent of the encroachment on matters beyond its competence may be an element in determining whether the legislation is colourable, that is, whether in the guise of making a law on a matter within its competence, the legislature is, in truth, making a law on a subject beyond its competence. But where that is not the position, then the fact of encroachment does not affect the vires of the law even as regards the area of encroachment."

He has further laid down that the statute must be approached as an organic whole and it is not permissible to disintegrate it into different parts. To ascertain the true character of the legislation which is impugned on the ground that it is *ultra vires* the powers of the Legislature which enacted it, one must have regard to the enactment as a whole, to its objects and to the scope and effect of its provisions. It would be quite an erroneous approach to the question to view such a statute not as an organic whole, but as a mere collection of sections, then disintegrate it into parts, examine under what heads of legislation those parts would severally fall, and by that process determine what portions thereof are *intra vires*, and what are not. In that case, their Lordships were considering the vires of the Madras Prohibition Act which made certain sub-rules and the argument was that in making these rules, it made inroad upon a topic which was in the exclusive domain of the Central Government.

Mr. Ganatra relied upon the decision of the Federal Court in *Ralla Ram v.*

13 [1899] A.C. 580.

14 [1957] A.I.R. S.C. 297.

Province of East Punjab,¹⁵ and argued that the extent of encroachment is very much material in determining the pith and substance of the impugned Act. Their Lordships were considering the *vires* of the provisions of the Punjab Urban Immoveable Property Tax Act levying certain tax as property tax. It was contended that this legislation conflicted with the item of income-tax which falls within the domain of the Central Legislature. At page 88, their Lordships observe:

"...The conclusion we have arrived at is that in substance the impugned tax is not a tax on income, that it is not impossible to reconcile the seeming conflict between the provisions of the two Acts, and that the extent of the alleged invasion by the Provincial Legislature into the field of the Federal Legislature is not so great in the present case as to justify the view that in pith and substance the impugned tax is a tax on income".

This passage again shows that the object of referring to the extent of invasion is to see whether in pith and substance the Legislature passes a legislation which will affect a topic reserved for the Centre under the guise of legislating on the topic falling within its own field. In the same context he referred to the decision of the Supreme Court in *State of Rajasthan v. G. Chawla*,¹⁶ to emphasize the argument that what is tolerated is slight transgression and nothing more. Although the expression "slight transgression" has been used in the aforesaid ruling (*State of Rajasthan v. G. Chawla*), we do not think that it makes any departure from the principles laid down in the rulings referred to above, viz., that the extent of encroachment is material only for the purpose of determining or ascertaining the pith and substance, and the degree of encroachment in itself is not decisive of the point. The entire legal position in this respect has been summed up in *Cal. Gas Co. (Prop.) Ltd. v. State of W. B.*¹⁷ Their Lordships observed:

"In the matter of construing entries in the Lists given in Sch. VII of the Constitution, the following rules of interpretation are now well settled. The power to legislate is given to the appropriate Legislatures by Art. 246 of the Constitution. The entries in the three Lists are only legislative heads or fields of legislation, they demarcate the area over which the appropriate Legislatures can operate. It is also settled that widest amplitude should be given to the language of the entries. But some of the entries in the different lists or in the same list may overlap and sometimes may also appear to be in direct conflict with each other. It is then the duty of the Court to reconcile the entries and bring about harmony between them. The underlying principle in such cases is that a general power ought not to be so construed as to make a nullity of a particular power conferred by the same Constitution and operating in the same field, when by reading the former in a more restricted sense effect can be given to the latter in its ordinary and natural meaning. Thus, every attempt should be made to harmonize the apparently conflicting entries not only of different Lists but also of the same List and to reject that construction which will rob one of the entries of its entire content and make it nugatory."

It would be thus seen that it is the duty of the Court to try to reconcile the conflict, if there is any, between the entries. In doing so, one of the principles to be borne in mind is that an entry which is specific would take precedence over the entry which is general. The general power ought not to be so construed as to make a nullity of a particular power conferred by the same Constitution and operating in the same field. Applying this principle to the present case, the power to deal with the question of possession and storage of petroleum and petroleum products under entry No. 53 is of a general character; whereas the power under entries Nos. 1, 5 and 6 of the State List is of a special character so far as the regulations relating to the storage are concerned, because these regulations have a bearing upon the question of public order, health and hygiene, and local self-government which fall within the domain of the

15 [1949] A.I.R. F.C. 81.

16 [1959] A.I.R. S.C. 544.

17 [1962] A.I.R. S.C. 1044.

State List. To similar effect is the decision of the Supreme Court in *Jagan-nath Baksh Singh v. State of U. P.*¹⁸ In addition to the rule about the need of harmonizing the entries and reconciling the conflicts, another rule has been laid down by the Supreme Court in *Waverly Jute Mills v. Raymon & Co.*¹⁹ That rule has been set out by Venkatarama Aiyar J. in the following terms:

"The entries in the Lists in the Seventh Schedule should be so construed as to give effect to all of them and a construction which will result in any of them being rendered futile or otiose must be avoided. Where there are two entries, one general in its character and the other specific, the former must be construed as excluding the latter. This is only an application of the general maxim that *Generalia specialibus non derogant*".

We must, therefore, make an attempt to give effect not only to entry No. 53 in List I, but also to entries 1, 5 and 6 of the State List. Applying these principles, we feel no hesitation in holding that the impugned legislation fairly and squarely falls within entries 1, 5, 6 and 23 of List II of the Constitution of India.

The above conclusion would be strengthened by reference to the decision of the Privy Council in *Gallagher v. Lynn*.²⁰ The facts were as follows: The appellant was a dairy farmer in the county of Donegal in the Irish Free State, where, for many years, he had carried on business and had been selling milk by retail in the city of Londonderry for human consumption, and since the imposition of customs duty on milk imported into Northern Ireland he had paid the appropriate duty on the milk so brought in by him. By s. I, sub-s. I, of the Milk and Milk Products (Northern Ireland) Act, 1934, passed by the Parliament of Northern Ireland, it was provided that

"a person shall not, either by himself or by any servant or agent... (c) sell or offer or expose for sale any milk except under and in accordance with this Act and such licence, if any, as may be required under this Act", and by s. I, sub-s. 6, it was provided that

"milk shall not be sold or offered or exposed for sale for the purpose of human consumption unless it is milk of Grade A, Grade B, or Grade C". By s. 2, sub-s. I, it was provided that

"a person shall not sell milk of Grade A, Grade B or Grade C unless he holds a licence under this section, being either (a) a Producer's licence, that is to say, a licence for the production and sale of milk; or (b) a Distributor's licence, that is to say, a licence for the purchase and resale of milk, whether by wholesale or by retail"; and by sub-s 2,

"the Ministry of Agriculture shall, on application being made in the prescribed manner, and on payment of the appropriate fee specified in this section, grant to any person upon the prescribed conditions a licence under this section".

After the passing of the Act the appellant applied for but was refused, a Producer's licence under the Act so as to enable him to continue to sell in Londonderry milk for human consumption produced at his dairy in the county of Donegal. The licence was refused by the Ministry of Agriculture on the ground that licences under the Act could be granted only to persons whose dairies where the milk was produced were situate in Northern Ireland. Licences were also refused to other dairy farmers for the same reason.

As the appellant sold milk in Londonderry without having obtained a licence under the Act, proceedings were taken against him and he was convicted, and on appeal that conviction was upheld. At the hearing of the appeal it was contended *inter alia* that the Milk Act, 1934, was *ultra vires* as being an undue interference with trade and so in violation of s. 4 of the Government of Ireland Act, 1920, which provides that

"Subject to the provisions of this Act...the Parliament of Northern Ireland shall...

18 [1962] A.I.R. S.C. 1563.

19 [1963] A.I.R. S.C. 90.

20 [1937] A.C. 863.

have power to make laws for the peace, order, and good government of...Northern Ireland with the following limitation..."

The Court of Appeal of Northern Ireland held that the primary object of the Milk Act, 1934, was not interference with trade, and therefore the Act did not come within the limitation imposed by s. 4, sub-s. 7, of the Government of Ireland Act, 1920. The House of Lords relied upon the expression, "have power to make laws for the peace, order, and good government of" ...Northern Ireland for justifying the Milk and Milk Products (Northern Ireland) Act, 1934. Lord Atkin emphasized that,

"...the Milk Act is not a law 'in respect of' trade; but is a law for the peace, order and good government of Northern Ireland 'in respect of' precautions taken to secure the health of the inhabitants of Northern Ireland by protecting them from the dangers of an unregulated supply of milk". (p. 869).

He then proceeded to refer to the well established general principles and observed (p. 870):

"...It is well established that you are to look at the 'true nature and character of the legislation'... 'the pith and substance of the legislation'. If, on the view of the statute as a whole, you find that the substance of the legislation is within the express powers, then it is not invalidated if incidentally it affects matters which are outside the authorized field. The legislation must not under the guise of dealing with one matter in fact encroach upon the forbidden field...In the present case any suggestion of an indirect attack upon trade is disclaimed by the appellant. There could be no foundation for it. The true nature and character of the Act, its pith and substance, is that it is an Act to protect the health of the inhabitants of Northern Ireland; and in those circumstances, though it may incidentally affect trade with County Donegal, it is not passed, 'in respect of' trade, and is therefore not subject to attack on that ground..."

Applying these principles, it is clear to us that the impugned section is not a legislation in respect of petroleum and petroleum products. The words conferring power upon the Parliament of Northern Ireland were of a general character, viz. "the Parliament shall have power to make laws for peace, order and good government". It is on the basis of these general words that the Milk Products Act was held *intra vires* as the dominant object was to take precautions to secure the health of the inhabitants of Northern Ireland by protecting them from the danger of unregulated supply of milk. The entry 1 of List II specifically refers to public order, entry 5 to local government and entry 6 to public health and sanitation. The words employed in these entries are far more specific and clear than the general words "peace, order and good government". Therefore, if the legislation of the Irish Parliament could be justified on the basis of the general words "peace, order and good government", there can be no doubt that the present impugned legislation could be justified with greater force and strength on the basis of the more specific words used in the entries referred to above.

Having come to the conclusion that, in pith and substance, the impugned legislation falls within any one or more of the entries in List II, all that is necessary now to see is whether by reason of certain overlapping on a narrow field, viz., the field of storage of petroleum and petroleum products, there can arise a clash between the State legislation and the Central legislation, particularly, on the ground that the Central legislation, is occupying the whole of the same field. If the encroachment is incidental and is confined to a narrow ground, that would not introduce a serious infirmity in the enactment except when it relates to a field which has been already occupied by a Central legislation. If the encroachment is on unoccupied field and the encroachment is also of a minor character, then the legislation would not be invalid. Before considering the question as to whether, as a matter of fact, the whole field is occupied, and whether there has been any encroachment by the State Legislature over the occupied part of the field, it is necessary to consider some of the general principles that have been evolved on this point. Mr. Ganatra contend-

ed that the provisions of the impugned section are inconsistent or repugnant with some of the provisions of the Petroleum Act, 1934. Nicholas in his Australian Constitution, 2nd edn., p. 303, has laid down three tests of inconsistency or repugnancy:—(1) There may be inconsistency in the actual terms of the competing statutes; (2) Though there may be no direct conflict, a State law may be inoperative because the Commonwealth law, or the award of the Commonwealth Court, is intended to be a complete exhaustive code; and (3) Even in the absence of intention, a conflict may arise when both State and Commonwealth seek to exercise their powers over the same subject-matter. These principles have been approved of by the Supreme Court in *Ch. Tika Ramji v. The State of Uttar Pradesh*²¹ and in *Deep Chand v. State of U. P.*²² As has been explained by Bhagwati, J. in *Ch. Tika Ramji's* case,

"...Repugnancy falls to be considered when the law made by Parliament and the law made by the State Legislature occupy the same field because, if both these pieces of legislation deal with separate and distinct matters though of a cognate and allied character, repugnancy does not arise."

At page 425, he has cited a passage from the judgment of Dixon, J. in *Ex. parte Mclean*,²³ with approval, which is as under:

"When the Parliament of the Commonwealth and the Parliament of a State each legislate upon the same subject and prescribe what the rule of conduct shall be, they make laws which are inconsistent, notwithstanding that the rule of conduct is identical which each prescribes, and sec. 109 applies. That this is so is settled, at least when the sanctions they impose are diverse...But the reason is that, by prescribing the rule to be observed, the Federal statute shows an intention to cover the subject matter and provide what the law upon it shall be. If it appeared that the Federal law was intended to be supplementary to or cumulative upon State law, then no inconsistency would be exhibited in imposing the same duties or in inflicting different penalties. The inconsistency does not lie in the mere coexistence of two laws which are susceptible of simultaneous obedience. It depends upon the intention of the paramount Legislature to express by its enactment, completely, exhaustively, or exclusively, what shall be the law governing the particular conduct or matter to which its attention is directed. When a Federal statute discloses such an intention, it is inconsistent with it for the law of a State to govern the same conduct or matter."

At page 427, Bhagwati J. has cited a passage from the judgment of Sulaiman J. in *Shyamakant Lal v. Rambhajan Singh*,²⁴ in which the following sentence occurs:

"Further, repugnancy must exist in fact, and not depend merely on a possibility". In *Deep Chand v. State of U. P.*, Subba Rao J., after citing the three tests laid down by Nicholas in his Australian Constitution, has explained the meaning of the three tests in the following terms (p. 665):

"Repugnancy between two statutes may thus be ascertained on the basis of the following three principles:

(1) Whether there is direct conflict between the two provisions;

(2) Whether Parliament intended to lay down an exhaustive code in respect of the subject matter replacing the Act of the State Legislature; and

(3) Whether the law made by Parliament and the law made by the State Legislature occupy the same field."

These three propositions are virtually the paraphrase of the propositions laid down by Nicholas.

Bearing these principles in mind, let us examine the provisions of the Petroleum Act to see, firstly, whether it was intended to be an exhaustive code and what field it has occupied. We have already pointed out that the dominant object of the Petroleum Act is not to make regulation relating to storage. The object of the Central legislation is far wider and covers several other matters,

21 [1956] S.C.R. 393, at p. 424.

22 [1959] A.I.R. S.C. 648.

23 (1930) 43 C.L.R. 472.

24 [1939] F.C.R. 193, at p. 212.

viz., import, export, production, refining and blending petroleum and other inflammable substances. On the other hand, the object of the impugned legislation is to make regulations relating to the storage of petrol in the City of Bombay with a view to protect life and property. Mr. Ganatra contended that the two legislations are made on one point, viz., the storage of petroleum and petroleum products, and this field has been occupied by Central legislation. He further argued that in so far as the State Legislature undertakes to cover the same field, it makes a serious and substantial invasion upon the field occupied by the Central legislation, viz., the Petroleum Act. We have already referred to the various provisions relating to the storage of the Petroleum Act. The most important provision to be considered on this aspect of the problem is s. 31 which runs thus:

"Power to limit powers of local authorities over petroleum.—Where any enactment confers powers upon any local authority in respect of the transport or storage of petroleum, the Central Government may, by notification in the official Gazette,—

(a) limit the operation of such enactment, or

(b) restrict the exercise of such powers, in any manner it deems fit."

It is evident from the language of s. 31 that the Central Legislature envisaged the possibility of Provincial Legislature passing enactments conferring powers upon local authority in respect of transport or storage of petroleum. In other words, it evinces a clear intention of not occupying or covering the entire field. The intention to operate in a limited field is implicit in the wording of s. 31. Of course, it is open to the Central Government to limit the operation of any such enactment or to restrict exercise of such powers in any manner it deems fit by issuing an appropriate notification. How far the provisions contained in cls. (a) and (b) of s. 31 would be valid after the promulgation of the Constitution of India is a matter, which, it is not necessary for us to consider. It is possible to argue that, after the promulgation of the Constitution, the Parliament has lost the jurisdiction to limit the operation of the State legislations in regard to the storage of petroleum. For the purpose of discussion, however, we are assuming that the powers of the Parliament in the matter of limiting the operation of the State enactments remain intact. Even so, it is clear that the Parliament had no intention of occupying the entire field in so far as it has allowed the Provincial Legislatures to confer upon the local authorities certain powers relating to the transport or storage of petroleum. In this connection, it is interesting to note that a notification has been issued under s. 31 on April 1, 1950, in exercise of the powers conferred by s. 31 of the Petroleum Act. In effect, the notification declares that the Central Government is pleased to limit the operation of the enactments specified in the Schedule annexed, in so far as the said enactments relate to the storage or transport of petroleum other than petroleum which has its flashing point not below 200°F to specified quantities.... It is significant to note that s. 394 has operated on the field which was left open by this notification. One of the enactments referred to in this Schedule of the notification is the City of Bombay Municipal Act, 1888 (Bombay Act III of 1888). We are, therefore, unable to understand how it is open to contend that the entire field relating to the regulation of storage has been occupied by the Central Legislature. In this connection, we may refer to another important provision of the Act, viz. s. 11 which lays down that, nothing in this Chapter shall apply to any petroleum which has its flashing-point not below two hundred degrees Fahrenheit, that is, 200° and above. In other words, heavy oils, the flashing point of which is 200 degrees, are wholly excluded from the operation of the Petroleum Act, and in so far as s. 394 and Schedule M lay down the need of a licence in respect of certain quantities, it provides for a matter which has been left out of consideration by the Central Act. Mr. Ganatra contended that there is a clear contradiction in the terms of the two statutes. Whereas the Central enactment lays down in ss. 7 and 8 respectively that no licence is needed for small stocks of non-dangerous petroleum, and, for small quantities of dangerous petroleum, s. 394 of the Bombay Municipal Corpora-

tion Act prescribes a licence precisely in respect of the same material. We have already explained that the motivation and purpose of the Central enactment was to take certain precautions in respect of petroleum and petroleum products in so far as they arise out of the intrinsic quality of the material. The licence which is required under s. 394 is based on a different consideration, viz. ensuring safety of the lives of persons inhabiting a crowded city. In our view, there is no contradiction whatsoever in the Central enactment under which no licence is required for certain cases, and s. 394 under which licence is required in respect of these very cases. It appears to us that far from there being any contradiction between the two statutes, one is supplementary to or cumulative of the other (to borrow the phraseology of Dixon, J. in *Ex parte Mclean*.) According to us, none of the three tests laid down by Nicholas applies to the present case. There is no direct conflict between the two provisions. The Central Act was in no sense of the term intended to be an exhaustive code. Finally the two legislations viz. the Petroleum Act and s. 394 of the Bombay Municipal Corporation Act do not occupy the same field.

Mr. Ganatra then referred to the decision of the Privy Council in *Att.-Gen. for Alberta v. Att.-Gen. for Canada*,²⁵ and contended that the impugned section constitutes a serious and substantial invasion of the exclusive powers of the Parliament as set out in entry No. 53. The question that arose for consideration before the Privy Council was whether the Debt Adjustment Act, the main purpose of which was to relieve persons from an enforceable liability to pay debts and, in many cases, to compel the creditors to accept compositions, was *ultra vires* the Provincial Legislature. The Act purported to preclude persons from any access to the Courts to enforce their rights without the permission of the Board. It is on that account that it was held that, in so far as the access to Courts was barred, the Provincial enactment was, in pith and substance, a legislation in relation to insolvency and as a whole constitutes a substantial invasion of the exclusive legislative powers of the Parliament of Canada. It is also held that it obstructs and interferes with the actual legislation of the Dominion Parliament on those matters. It is on these grounds that the invasion by the Provincial Legislature was treated as a serious and substantial invasion so as to make it *ultra vires*. It must be remembered that by applying the doctrine of pith and substance, their Lordships came to the conclusion that it constituted a substantial and serious invasion over the right of the Parliament to legislate in respect of bankruptcy and insolvency. Furthermore, there was another enactment passed by the Parliament on the topic with which it came with serious clash. The observations of the Privy Council which were made in this context are of no assistance to Mr. Ganatra on the facts of the present case in determining the question on hand.

We do not think that the question of colourable legislation falls to be considered in the present case. The doctrine of colourable legislation is based on the well-recognized principle that the Legislatures cannot do indirectly what they have been prohibited from doing directly. As has been pointed out by Mukherjea J. in *K. C. Gajapati Narayan Deo v. The State of Orissa*:²⁶

"...The whole doctrine resolves itself into the question of competency of a particular legislature to enact a particular law. If the legislature is competent to pass a particular law, the motives which impelled it to act are really irrelevant... Such transgression may be patent, manifest or direct, but it may also be disguised, covert and indirect and it is to this latter class of cases that the expression 'colourable legislation' has been applied in certain judicial pronouncements. The idea conveyed by the expression is that although apparently a legislature in passing a statute purported to act within the limits of its powers, yet in substance and in reality it transgressed these powers, the transgression being veiled by what appears, on proper examination, to be a mere pretence or disguise."

We have discussed all the aspects that were urged by Mr. Ganatra in support

of his proposition that the provisions of the impugned legislation and those of the Central Legislature are repugnant and that there is a collision between the two, and also the question as to whether and how far the field of storing petrol has been occupied by the Legislature, and, we feel no hesitation in holding that there is no repugnancy or inconsistency between the two. The two legislations operate in different fields, and there is no clash, much less, a collision between the two.

The learned Government Pleader referred us to a decision of the Calcutta High Court reported in *Caltex (India) Ltd. v. Director, W. B. F. Services*,²⁷ where the questions raised by Mr. Ganatra were directly brought in issue and answered. In that case, the petitioner was a company which had installations on certain roads in Calcutta for the storage of petroleum, petroleum products and kerosene. The company stored petroleum by virtue of licences issued under the Petroleum Act. In May 1952, the Corporation of Calcutta demanded licence-fees from the petitioner-company for 1950-51 for storage of petroleum at the same place. The licence was demanded under the West Bengal Fire Services Act, 1950, and the question that was canvassed before the Court was whether the provisions of the West Bengal Fire Services Act were repugnant to the provisions of the Petroleum Act. In the course of the judgment, a reference was made to the earlier decisions of the Division Bench of the Calcutta High Court in which the same question had come up for consideration and decided. It was held that the Fire Services Act is in pith and substance an Act which comes within the subject-matter of items 5 and 6, certainly item 6 in list II, 7th Schedule of the Constitution. It was further held that the Petroleum Act, 1934, if it comes under the Union List can only come under item 53 and the subject-matter thereof is not identical with items 5 and 6 in the State List. It was, therefore, decided that even if the State Act made an incidental encroachment upon the Central Act, it was not rendered invalid thereby. The subject-matter of the two legislations are not the same although some of the provisions overlap. It is also held that, even if the provisions overlap, there is no repugnancy, between the two Acts, because by its own premises the Petroleum Act, 1934, is not meant to be exclusive but is supplementary to, and contemplates the existence of, State Acts relating to the storage of petroleum. Therefore, there is no repugnancy. For the same reasons, the argument of the 'occupied field' also fails. A reference was made to s. 31 as also the notification issued thereunder. We respectfully agree with the view taken by the Calcutta High Court and hold that the impugned provision is *intra vires*.

Mr. Ganatra contended that the provisions of s. 394 of the Bombay Municipal Corporation Act must be read subject to the notification issued under s. 31 of the Petroleum Act. We have already pointed out that the question as to whether the Parliament continues to have the power of limiting the operations of the State enactment after the promulgation of the Constitution by issuing a notification is a moot one. Assuming, however, that such a notification can be issued so as to limit the operation of the State enactments, still, we are unable to understand how the notification comes in the way of the requirement of a licence as laid down by s. 394 of the Bombay Municipal Corporation Act. The notification expressly states that the Government is pleased to limit the operation of the enactments specified in the Schedule in so far as the said enactments relate to the storage or transport of petroleum other than petroleum which has its flashing point not below 200°F. In other words, the operation of the enactments set out in the Schedule are limited only in respect of petroleum which has its flashing point below 200°F. In the present case, the flashing point of the article stored is 360°F, that is, above 200°F. That being the case, the question of limitation of the operation of provision in s. 394 by reason of the notification does not arise at all.

Mr. Ganatra finally contended that the impugned provision violates the accused's fundamental right guaranteed by art. 19(1)(f) and (g) of the Constitution of India. Article 19(1)(f) provides that, all citizens shall have the right to acquire, hold and dispose of property, and art. 19(1)(g) provides that they shall have the right to practise any profession, or to carry on any occupation, trade or business. The Government Pleader referred to art. 358 of the Constitution and argued that since the proclamation of emergency is still in force, the operation of art. 19 is suspended, and it is not open to any citizen to invoke that article in aid of the rights guaranteed thereby. We are not disposed to pronounce any verdict on this aspect of the matter, because we find that the question can be answered by reference to cls. (5) and (6) of art. 19 relating to reasonable restrictions in the interest of general public. The requirement of securing a licence from the Municipal Commissioner appears to us clearly a reasonable restriction in the interest of general public. It is necessary to remember that the quantity of gallons stored by the accused is 7290 gallons. If Mr. Ganatra's contention is accepted, it means that he will be free to store even thousands of gallons or millions of gallons of heavy oil without a licence in any part of the Bombay City irrespective of the local situation prevailing therein. In our view, the restriction imposed by s. 394 is not only not unreasonable but is also called for in the interest of general public to safeguard their lives and property.

In the result, the appeal fails and is dismissed.

Appeal dismissed.

SUPREME COURT.

Present: The Hon'ble Mr. P. B. Gajendragadkar, Chief Justice, Mr. Justice K. N. Wanchoo, Mr. Justice M. Hidayatullah, Mr. Justice J. C. Shah and Mr. Justice N. Rajagopala Ayyangar.

RANJIT D. UDESHI v. THE STATE OF MAHARASHTRA.*

Indian Penal Code (XLV of 1860), Sec. 292—Constitution of India, Arts. 19(1)(a), 19(2)—Whether s. 292 void by reason of art. 19(1)(a)—Whether knowledge of obscenity ingredient of offence under s. 292(a)—Mens rea whether required before offence of selling or keeping for sale obscene object completed—Obscenity and pornography, difference between—Test of obscenity in India—Whether test laid down in Hicklin's case to be discarded—Obscenity and art.

Section 292 of the Indian Penal Code, 1860, is not invalid in view of art. 19(2) of the Constitution of India.

Section 292 of the Code embodies a reasonable restriction in the interest of the general public because the law against obscenity seeks no more than to promote public decency and morality.

Section 292(a) of the Code does not make *knowledge* of obscenity an ingredient of the offence but absence of such knowledge may be taken in mitigation.

Mens rea will be required before the offence of selling or keeping for sale of an obscene object can be said to be complete. The offender must have actually sold or kept for sale, the offending article. The circumstances of the case will then determine the criminal intent and it will be a matter of a proper inference from them.

*Manual Enterprises v. Day*¹ and *Nico Jacobellis v. State of Ohio*,² referred to

There is some difference between obscenity and pornography in that the latter denotes writings, pictures etc. *intended* to arouse sexual desire while the former may include writings etc. not intended to do so but which have that *tendency*. Both offend against public decency and morals but pornography is obscenity in a more aggravated form.

*Decided, August 19, 1964. Criminal Appeal No. 178 of 1962.

1 (1962) 370 U.S. 478, 8 Law ed. 2nd, 639.

2 Decided on June 22, 1964.

The test of obscenity to adopt in India (regard being had to community *mores*) is that obscenity without a preponderating social purpose or profit cannot have the constitutional protection of free speech and expression and obscenity is treating sex in a manner appealing to the carnal side of human nature, or having that tendency. Such a treating with sex is offensive to modesty and decency but the extent of such appeal in a particular book etc. are matters for consideration in each individual case.

The test of obscenity laid down by Cockburn C. J. in *The Queen v. Hicklin*³ should not be discarded. It makes the Court the judge of obscenity in relation to an impugned book etc. and lays emphasis on the potentiality of the impugned object to deprave and corrupt by immoral influences. It will always remain a question to decide in each case and it does not compel an adverse decision in all cases.

An overall view of the obscene matter in the setting of the whole work would be necessary, but the obscene matter must be considered by itself and separately to find out whether it is so gross and its obscenity so decided that it is likely to deprave and corrupt those whose minds are open to influences of this sort and into whose hands the book is likely to fall. In this connection the interests of our contemporary society and particularly the influence of the book etc. on it must not be overlooked.

Where obscenity and art are mixed, art must be so preponderating as to throw the obscenity into a shadow or the obscenity so trivial and insignificant that it can have no effect and may be overlooked. In other words, treating with sex in a manner offensive to public decency and morality, judged of by the national standards and considered likely to pander to lascivious, prurient or sexually precocious minds, must determine the result. A balance should be maintained between freedom of speech and expression and public decency and morality but when the latter is substantially transgressed the former must give way.

THE facts appear at 64 *Bombay Law Reporter* 356.

R. K. Garg, S. C. Agarwal, D. P. Singh, M. K. Ramamurthi, and B. A. Desai, for the appellant.

C. K. Daphtary, Attorney General for India, with *O. P. Rana* and *R. H. Dhebar*, for the respondent.

HIDAYATULLAH J. The appellant is one of four partners of a firm which owns a book-stall in Bombay. He was prosecuted along with the other partners under s. 292, Indian Penal Code. All the facts necessary for our purpose appear from the simple charge with two counts which was framed against them. It reads:

"That you accused Nos. 1, 2, 3, 4 on or about the 12th day of December, 1959 at Bombay being the partners of a bookstall named Happy Book Stall were found in possession for the purpose of sale copies of an obscene book called *Lady Chatterley's Lover* (unexpurgated edition) which *inter alia* contained, obscene matter as detailed separately and attached herewith and thereby committed an offence punishable u/s 292 of the I.P. Code.

And

That you Gokuldas Shamji on or about the 12th day of December 1959 at Bombay did sell to Bogus Customer Ali Raza Sayeed Hasan a copy of an obscene book called *Lady Chatterley's Lover* (unexpurgated edition) which *inter alia* contained obscene matter as detailed separately and attached herewith and thereby committed an offence punishable u/s.292 of the I.P. Code."

The first count applied to the appellant who was accused No. 2 in the case. The Additional Chief Presidency Magistrate, III Court, Esplanade, Bombay convicted all the partners on the first count and fined each of them Rs. 20 with one week's simple imprisonment in default. Gokuldas Shamji was additionally convicted on the second count and was sentenced to a further fine of Rs. 20 or like imprisonment in default. The Magistrate held that the offending book was obscene for purposes of the section. This present appellant filed a revi-

sion in the High Court of Bombay. The decision of the High Court was against him. He has now appealed to this Court by special leave and has raised the issue of freedom of speech and expression guaranteed by art. 19. Before the High Court he had questioned the finding of the Magistrate regarding the novel.

It is convenient to set out s. 292 of the Indian Penal Code at this stage:

"292. *Sale, etc., of obscene books, etc.*—Whoever—

(a) sells, lets to hire, distributes, publicly exhibits or in any manner puts into circulation, or for purposes of sale, hire, distribution, public exhibition or circulation, makes, produces or has in his possession any obscene book, pamphlet, paper, drawing, painting, representation or figure or any other obscene object whatsoever, or

(b) imports, exports or conveys any obscene object for any of the purposes aforesaid, or knowing or having reason to believe that such object will be sold, let to hire, distributed or publicly exhibited or in any manner put into circulation, or

(c) takes part in or receives profits from any business in the course of which he knows or has reason to believe that any such obscene objects are, for any of the purposes aforesaid, made, produced, purchased, kept, imported, exported, conveyed, publicly exhibited or in any manner put into circulation, or

(d) advertises or makes known by any means whatsoever that any person is engaged or is ready to engage in any act which is an offence under this section, or that any such obscene object can be procured from or through any person, or

(e) offers or attempts to do any act which is an offence under this section, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.

Exception.—This section does not extend to any book, pamphlet, writing, drawing or painting kept or used *bona fide* for religious purposes or any representation sculptured, engraved, painted or otherwise represented on or in any temple, or on any car used for the conveyance of idols, or kept or used for any religious purpose."

To prove the requirements of the section the prosecution examined two witnesses. One was the test purchaser named in the charge and the other an Inspector of the Vigilance Department. These witnesses proved possession and sale of the book which facts are not denied. The Inspector in his testimony also offered his reasons for considering the book to be obscene. On behalf of the accused Mr. Mulkraj Anand, a writer and art critic gave evidence, and in a detailed analysis of the novel, he sought to establish that in spite of its apparent indelicate theme and the candidness of its delineation and diction, the novel was a work of considerable literary merit and a classic and not obscene. The question does not altogether depend on oral evidence because the offending novel and the portions which are the subject of the charge must be judged of by the Court, in the light of s. 292, Indian Penal Code, and the provisions of the Constitution. This raises two broad and independent issues of law—the validity of s. 292, Indian Penal Code, and the proper interpretation of the section and its application to the offending novel.

Mr. Garg, who argued the case with ability, raised these two issues. He bases his argument on three legal grounds which briefly are:

(i) that s. 292 of the Indian Penal Code is void as being an impermissible and vague restriction on the freedom of speech and expression guaranteed by art. 19(1)(a) and is not saved by cl. (2) of the same article;

(ii) that even if s. 292, Indian Penal Code, be valid, the book is not obscene if the section is properly construed and the book as a whole is considered; and

(iii) that the possession or sale to be punishable under the section must be with the intention to corrupt the public in general and the purchasers in particular.

On the subject of obscenity his general submission is that a work of art is not necessarily obscene if it treats with sex even with nudity and he submits that a work of art or a book of literary merit should not be destroyed if the interest of society requires that it be preserved. He submits that it should be viewed as a whole, and its artistic or literary merits should be weighed against

the so-called obscenity, the context in which the obscenity occurs and the purpose it seeks to serve. If on a fair consideration of these opposite aspects, he submits, the interest of society prevails, then the work of art or the book must be preserved, for then the obscenity is overborne. In no case, he submits, can stray passage or passages serve to stamp an adverse verdict on the book. He submits that the standard should not be that of an immature teenager or a person who is abnormal but of one who is normal, that is to say, with a *mens sana in corpore sano*. He also contends that the test adopted in the High Court and the Court below from *The Queen v. Hicklin*¹ is out of date and needs to be modified and he commends for our acceptance the views expressed recently by the Courts in England and the United States.

Article 19 of the Constitution which is the main plank to support these arguments reads:

"19.(1) All citizens shall have the right—

(a) to freedom of speech and expression;...

(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of... public... decency or morality..."

No doubt this article guarantees complete freedom of speech and expression but it also makes an exception in favour of existing laws which impose restrictions on the exercise of the right in the interests of public decency or morality. The section of the Penal Code in dispute was introduced by the Obscene Publications Act, 1925 (VII of 1925) to give effect [to Article] I of the International Convention for the suppression of or traffic in obscene publications signed by India in 1923 at Geneva. It does not go beyond obscenity which falls directly within the words "public decency and morality" of the second clause of the article. The word, as the dictionaries tell us, denotes the quality of being obscene which means offensive to modesty or decency; lewd, filthy and repulsive. It cannot be denied that it is an important interest of society to suppress obscenity. There is, of course, some difference between obscenity and pornography in that the latter denotes writings, pictures etc. *intended* to arouse sexual desire while the former may include writings etc. not intended to do so but which have that *tendency*. Both, of course, offend against public decency and morals but pornography is obscenity in a more aggravated form. Mr. Garg seeks to limit action to cases of intentional lewdness which he describes as dirt for dirt's sake and which has now received the appellation of hardcore pornography by which term is meant libidinous writings of high erotic effect unredeemed by anything literary or artistic and *intended* to arouse sexual feelings.

Speaking in terms of the Constitution it can hardly be claimed that obscenity which is offensive to modesty or decency is within the constitutional protection given to free speech or expression, because the article dealing with the right itself excludes it. That cherished right on which our democracy rests is meant for the expression of free opinions to change political or social conditions or for the advancement of human knowledge. This freedom is subject to reasonable restrictions which may be thought necessary in the interest of the general public and one such is the interest of public decency and morality. Section 292, Indian Penal Code, manifestly embodies such a restriction because the law against obscenity, of course, correctly understood and applied, seeks no more than to promote public decency and morality. The word obscenity is really not vague because it is a word which is well-understood even if persons differ in their attitude to what is obscene and what is not. Lawrence thought James Joyce's *Ulysses* to be an obscene book deserving suppression but it was legalised and he considered *Jane Eyre* to be pornographic but very few people will agree with him.

The former he thought so because it dealt with the excretory functions and the latter because it dealt with sex repression. (See *Sex, Literature, Censorship* pp. 26, 201). Condemnation of obscenity depends as much upon the *mores* of the people as upon the individual. It is always a question of degree or as the lawyers are accustomed to say, of where the line is to be drawn. It is, however, clear that obscenity by itself has extremely poor value in the propagation of ideas, opinions and informations of public interest or profit. When there is propagation of ideas, opinions and photographs collected in book form without the medical text would may become different because then the interest of society may tilt the scales in favour of free speech and expression [*sic.*] It is thus that books on medical science with intimate illustrations and photographs, though in a sense immodest, are not considered to be obscene but the same illustrations and photographs collected in book form without the medical text would certainly be considered to be obscene. Section 292, Indian Penal Code, deals with obscenity in this sense and cannot thus be said to be invalid in view of the second clause of art. 19. The next question is when can an object be said to be obscene?

Before dealing with that problem we wish to dispose of Mr. Garg's third argument that the prosecution must prove that the person who sells or keeps for sale any obscene object *knows* that it is obscene, before he can be adjudged guilty. We do not accept this argument. The first sub-section of s. 292 (unlike some others which open with the words "whoever knowingly or negligently etc.") does not make *knowledge* of obscenity an ingredient of the offence. The prosecution need not prove something which the law does not burden it with. If knowledge were made a part of the guilty act (*Actus reus*), and required the prosecution to prove it, it would place an almost impenetrable defence in the hands of offenders. Something much less than actual knowledge must, therefore, suffice. It is argued that the number of books these days is so large and their contents so varied that the question whether there is *mens rea* or not must be based on definite knowledge of the existence of obscenity. We can only interpret the law as we find it and if any exception is to be made it is for Parliament to enact a law. As we have pointed out, the difficulty of obtaining legal evidence of the offender's knowledge of the obscenity of the book etc., has made the liability strict. Under our law absence of such knowledge, may be taken in mitigation but it does not take the case out of the sub-section.

Next to consider is the second part of the guilty act (*Actus reus*), namely, the selling or keeping for sale of an object which is found to be obscene. Here, of course, the ordinary guilty intention (*mens rea*) will be required before the offence can be said to be complete. The offender must have actually sold or kept for sale, the offending article. The circumstances of the case will then determine the criminal intent and it will be a matter of a proper inference from them. The argument that the prosecution must give positive evidence to establish a guilty intention involves a supposition that *mens rea* must always be established by the prosecution through positive evidence. In criminal prosecution *mens rea* must necessarily be proved by circumstantial evidence alone unless the accused confesses. The sub-section makes sale and possession for sale one of the elements of the offence. As sale has taken place and the appellant is a book-seller the necessary inference is readily drawn at least in this case. Difficulties may, however, arise in cases close to the border. To escape liability the appellant can prove his lack of knowledge unless the circumstances are such that he must be held guilty for the acts of another. The Court will presume that he is guilty if the book is sold on his behalf and is later found to be obscene unless he can establish that the sale was without his knowledge or consent. The law against obscenity has always imposed a strict responsibility. When Wilkes printed a dozen copies of his *Essay on Woman* for private circulation, the printer took on certain copy for himself. That copy was purchased from the printer and it brought Wilkes to grief before Lord Mansfield. The gist of the offence was taken to be publication-circulation and Wilkes was

presumed to have circulated it. Of course, Wilkes published numerous other obscene and libellous writings in different ways and when Madame Pompadour asked him: "How far does the liberty of the Press extend in England?" he gave the characteristic answer: "I do not know. I am trying to find out:" (See 52 Har. L. Rev. 40).

The problem of *scienter* (knowingly doing of an act) has caused anxious thought in the United States under the Comstock Law [19 U.S.C. S. 1461 (1958)] which deals with the non-mailability of obscene matter. We were cited *Manual Enterprises v. Day*² but there was so little concurrence in the Court that it has often been said, and perhaps rightly, that the case has little opinion value. The same is perhaps true of the latest case *Nico Jacobellis v. State of Ohio*³ of which a copy of the judgment was produced for our perusal.

It may, however, be pointed out that one may have to consider a plea that the publication was for public good. This bears on the question whether the book etc. can in those circumstances be regarded as obscene. It is necessary to bear in mind that this may raise nice points of the claims of society to suppress obscenity and the claims of society to allow free speech. No such plea has been raised in this case but we mention it to draw attention to the fact that this may lead to different results in different cases. When Savage published his *Progress of a Divine* and was prosecuted for it, his plea was that he had "introduced obscene ideas with a view of exposing them to detestation, and of amending the age by showing the depravity of wickedness" and the plea was accepted (See Dr. Johnson's life of Savage in his *Lives of the Poets*). In *Hicklin's* case Blackburn J. did not accept a similar plea in respect of the pamphlet before him observing that it would "justify the publication of anything however indecent, however obscene, and however mischievous". We are not called upon to decide this issue in this case but we have found it necessary to mention it because ideas having social importance will *prima facie* be protected unless obscenity is so gross and decided that the interest of the public dictates the other way. We shall now consider what is meant by the word 'obscene' in s. 292, Indian Penal Code.

The Indian Penal Code borrowed the word from the English statute. As the word "obscene" has been interpreted by English Courts something may be said of that interpretation first. The Common Law offence of obscenity was established in England three hundred years ago when Sir Charles Sedley exposed his person to the public gaze on the balcony of a tavern. Obscenity in books, however, was punishable only before the spiritual courts because it was so held down to 1708 in which year *Queen v. Read*⁴ was decided. In 1727 in the case against one Curl it was ruled for the first time that it was a Common Law offence (*Dominus Rex v. Curl*⁵). In 1857 Lord Campbell enacted the first legislative measure against obscene books etc. and his successor in the office of Chief Justice interpreted his statute (20 & 21 Viet. C. 83) in *Hicklin's* case. The section of the English Act is long (they were so in those days), but it used the word 'obscene' and provided for search, seizure and destruction of obscene books etc. and made their sale, possession for sale, distribution etc. a misdemeanour. The section may thus be regarded as substantially *in pari materia* with s. 292, Indian Penal Code, in spite of some differences in language. In *Hicklin's* case the Queen's Bench was called upon to consider a pamphlet, the nature of which can be gathered from the title and the colophon which read: "The Confession Unmasked, showing the depravity of Romish priesthood, the iniquity of the confessional, and the questions, put to females in confession." It was bilingual with Latin and English texts on opposite pages and the latter half of the pamphlet according to the report was 'grossly obscene, as relating to impure and filthy acts, words or ideas'. Cockburn C. J. laid down the test of obscenity in these words (p. 371):

"...I think the test of obscenity is this, whether the tendency of the matter charged

2 (1962) 370 U.S. 478, 8 Law ed. 2nd. 639.

3 Decided on June 22, 1964.

4 (1708) 11 Mod. 205, Q.B.

5 (1727) Stra. 788, K.B.

as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall... it is quite certain that it would suggest to the minds of the young of either sex, or even to persons of more advanced years, thoughts of a most impure and libidinous character."

This test has been uniformly applied in India.

The important question is whether this test of obscenity squares with the freedom of speech and expression guaranteed under our Constitution, or it needs to be modified and, if so, in what respects. The first of these questions invites the Court to reach a decision on a constitutional issue of a most far reaching character and we must beware that we may not lean too far away from the guaranteed freedom. The laying down of the true test is not rendered any the easier because art has such varied facets and such individualistic appeals that in the same object the insensitive sees only obscenity because his attention is arrested, not by the general or artistic appeal or message which he cannot comprehend, but by what he can see, and the intellectual sees beauty and art but nothing gross. The Indian Penal Code does not define the word 'obscene' and this delicate task of how to distinguish between that which is artistic and that which is obscene has to be performed by Courts, and in the last resort by us. The test which we evolve must obviously be of a general character but it must admit of a just application from case to case by indicating a line of demarcation not necessarily sharp but sufficiently distinct to distinguish between that which is obscene and that which is not. None has so far attempted a definition of obscenity because the meaning can be laid bare without attempting a definition by describing what must be looked for. It may, however, be said at once that treating with sex and nudity in art and literature cannot be regarded as evidence of obscenity without something more. It is not necessary that the angels and saints of Michaelangelo should be made to wear breeches before they can be viewed. If the rigid test of treating with sex as the minimum ingredient were accepted hardly any writer of fiction to-day would escape the fate Lawrence had in his days. Half the book-shops would close and the other half would deal in nothing but moral and religious books which Lord Campbell boasted was the effect of his Act.

The question is now narrowed to what is obscenity as distinguished from a permissible treating with sex? Mr. Garg relies on some passages from the opinions expressed in the Supreme Court of the United States in *Roth v. United States*⁶ and from the charge to the jury by Stable J. in *Regina v. Martin Secker & Warburg Ltd.*⁷ and invites us to adopt the test of 'hardcore pornography' for the interpretation of the word 'obscene' in the Indian Penal Code. He points out that the latest statute in England now makes exceptions leading to the same result. He has also referred to some books and literary and artistic publications which have not been considered objectionable.

It may be admitted that the world has certainly moved far away from the times when *Pamela*, *Moll Flanders*, *Mrs. Warren's Profession*, and even *Mill on the Floss* were considered immodest. Today all these and authors from Aristophanes to Zola are widely read and in most of them one hardly notices obscenity. If our attitude to art versus obscenity had not undergone a radical change, books like Caldwell's *God's Little Acre* and Andre Gide's *If it Die* [*Si le grain ne meurt*] would not have survived the strict test. The English novel has come out of the drawing room and it is a far cry from the days when Thomas Hardy described the seduction of Tess by speaking of her guardian angels. Thomas Hardy himself put in his last two novels situations which "were strongly disapproved of under the conventions of the age", but they were extremely mild compared with books today. The world is now able to tolerate much more than formerly, having become indurated by literature of different sorts. The attitude is not yet settled. Curiously, varying results are noticeable in respect of the same book and in the United States the same book

is held to be obscene in one State but not in another (*See A Suggested Solution to the Riddle of Obscenity—1964*, 112 Penn. L. Rev. 834).

But even if we agree thus far, the question remains still whether the *Hicklin* test is to be discarded? We do not think that it should be discarded. It makes the Court the judge of obscenity in relation to an impugned book etc. and lays emphasis on the potentiality of the impugned object to deprave and corrupt by immoral influences. It will always remain a question to decide in each case and it does not compel an adverse decision in all cases. Mr. Garg, however, urges that the test must be modified in two respects. He wants us to say that a book is not necessarily obscene because there is a word here or a word there, or a passage here and a passage there which may be offensive to particularly sensitive persons. He says that the overall effect of the book should be the test and, secondly, that the book should only be condemned if it has no redeeming merit at all, for then it is "dirt for dirt's sake", or as Mr. Justice Frankfurter put it in his inimitable way "dirt for money's sake". His contention is that judged of in this light the impugned novel passes the *Hicklin* test if it is reasonably modified.

Mr. Garg is not right in saying that the *Hicklin* case emphasised the importance of a few words or a stray passage. The words of the Chief Justice were that "the matter charged" must have "a tendency to deprave and corrupt". The observation does not suggest that even a stray word or an insignificant passage would suffice. And observation to that effect in the ruling must be read *secundum subjectum materiam*, that is to say, applicable to the pamphlet there considered. Nor is it necessary to compare one book with another to find the extent of permissible action. It is useful to bear in mind the words of Lord Goddard Chief Justice in the *Regina v. Reiter*.⁸

"...The character of other books is a collateral issue, the exploration of which would be endless and futile. If the books produced by the prosecution are indecent or obscene, their quality in that respect cannot be made any better by examining other books..."

The Court must, therefore, apply itself to consider each work at a time. This should not, of course, be done in the spirit of the lady who charged Dr. Johnson with putting improper words in his Dictionary and was rebuked by him: "Madam, you must have been looking for them." To adopt such an attitude towards art and literature would make the Courts a Board of Censors. An overall view of the obscene matter in the setting of the whole work would, of course, be necessary, but the obscene matter must be considered by itself and separately to find out whether it is so gross and its obscenity so decided that it is likely to deprave and corrupt those whose minds are open to influences of this sort and into whose hands the book is likely to fall. In this connection the interests of our contemporary society and particularly the influence of the book etc. on it must not be overlooked. A number of considerations may here enter which it is not necessary to enumerate, but we must draw attention to one fact. Today our national and regional languages are strengthening themselves by new literary standards after a deadening period under the impact of English. Emulation by our writers of an obscene book under the aegis of this Court's determination is likely to pervert our entire literature because obscenity pays and true art finds little popular support. Only an obscurant will deny the need for such caution. This consideration marches with all law and precedent on this subject and so considered we can only say that where obscenity and art are mixed, art must be so preponderating as to throw the obscenity into a shadow or the obscenity so trivial and insignificant that it can have no effect and may be overlooked. In other words, treating with sex in a manner offensive to public decency and morality (and these are the words of our Fundamental Law), judged of by our national standards and considered likely to pander to lascivious, prurient or sexually precocious minds, must determine the result. We need not attempt to bowdlerize all literature and thus rob

speech and expression of freedom. A balance should be maintained between freedom of speech and expression and public decency and morality but when the latter is substantially transgressed the former must give way.

We may now refer to *Roth's* case to which a reference has been made. Mr. Justice Brennan, who delivered the majority opinion in that case, observed that if obscenity is to be judged of by the effect of an isolated passage or two upon particularly susceptible persons, it might well encompass material legitimately treating with sex and might become unduly restrictive and so the offending book must be considered in its entirety. Chief Justice Warren on the other hand made "substantial tendency to corrupt by arousing lustful desires" as the test. Mr. Justice Harlan regarded as the test that it must "tend to sexually impure thoughts". In our opinion, the test to adopt in our country (regard being had to our community *mores*) is that obscenity without a preponderating social purpose or profit cannot have the constitutional protection of free speech and expression and obscenity is treating with sex in a manner appealing to the carnal side of human nature, or having that tendency. Such a treating with sex is offensive to modesty and decency but the extent of such appeal in a particular book etc. are matters, for consideration in each individual case.

It now remains to consider the book *Lady Chatterley's Lover*. The story is simple. A baronet, wounded in the war is paralysed from the waist downwards. He married Constance (*Lady Chatterley*) a little before he joined up and they had a very brief honey-moon. Sensing the sexual frustration of his wife and their failure to have an heir he leaves his wife free to associate with other men. She first experiences with one Michaelis and later with a game-keeper Mellors in charge of the grounds. The first lover was selfish sexually, the other was something of an artist. He explains to Constance the entire mystery of eroticism and they put it into practice. There are over a dozen descriptions of their sexual intimacies. The game-keeper's speech and vocabulary were not genteel. He knew no Latin (which could be used to appease the censors) and the human *puddenda* and other erogenous parts are freely discussed by him and also named by the author in the descriptions. The sexual congress each time is described with great candidness and in prose as tense as it is intense and of which Lawrence was always a consummate master. The rest of the story is a mundane one. There is some criticism of the modern machine civilization and its enervating effects and the production of sexually inefficient men and women and this, according to Lawrence, is the cause of maladjustment of sexes and their unhappiness.

Lawrence had a dual purpose in writing the book. The first was to shock the genteel society of the country of his birth which had hounded him and the second was to portray his ideal of sexual relations which was never absent from any of his books. His life was a long battle with the censor-morans, as he called them. Even before he became an author he was in clash with conventions. He had a very repressive mother who could not reconcile herself to the thought that her son had written the *White Peacock*. His sisters were extremely prim and correct. In his letters he said that he would not like them to read *Lady Chatterley's Lover*. His school teacher would not let him use the word 'stallion' in an essay and his first love Jessie could not read aloud Ibsen as she considered him immodest. This was a bad beginning for a hyper-sensitive man of "wild and untamed masculinity". Then came the publishers and last of all the censors. From 1910 the publishers asked him to prune and to prune his writings and he wrote and rewrote his novels to satisfy them. Aldous Huxley tells us that *Lady Chatterley's Lover* was rewritten three times: *Essays* (Dent). Aldington has seen in it a desire to avoid being pornographic but the fact is that Lawrence hated to be bowdlerized. His first publisher Heinemann refused his *Sons and Lovers* and he went over to Duckworths. They refused *Rainbow* and he went to Secker. They brought out his *Lost Girl* and it won a prize but after the *Rainbow* he was a banned author whose name could not be mentioned

in genteel society. He became bitter and decided to produce a "taboo-shattering bomb". At the same time he started writing in defence of his fight for sexual liberation in English writing. This was Lawrence's first reason for writing the book under our review.

Lawrence viewed sex with indifference and also with passion. He was indifferent to it because he saw in it nothing to hide and he saw it with passion because to him it was the only "motivating power of life" and the culmination of all human strength and happiness. His thesis in his own words was—"I want men and women to be able to think sex fully, completely, honestly and cleanly" and not to make of it "a dirty little secret". The taboo on sex in art and literature which was more strict thirty-five years ago, seemed to him to corrode domestic and social life and his definite view was that a candid discussion of sex through art was the only catharsis for purifying and relieving the congested emotions. This is the view he expounded through his writings and sex is never absent from his novels, his poems and his critical writings. As he was inclined freely to use words which Swift had used before him and many more, he never considered his writings obscene. He used them in this book with profusion and they occur in conversation between Mellors and Constance and in the descriptions of the sexual congresses and the erotic love play. The realism is staggering and outpaces the French Realists. But he says of himself:

"I am abused most of all for using the so called 'obscene words'. Nobody quite knows what the word 'obscene' itself means, or what it is intended to mean: but gradually all the old words that belong to the body below the navel, have come to be judged obscene." (Introduction to *Pansies*).

This was the second motivating factor in the book.

One cannot doubt the sincerity of Lawrence's belief and his missionary zeal. Boccaccio seemed fresh and wholesome to him and Dante was obscene. He prepared a theme which would lend itself to treating with sex on the most erotic plane and one from which the genteel society would get the greatest shock and introduced a game-keeper in whose mouth he could put all the taboo words and then he wrote of sex, of the sex organs and sex actions with brutal candidness. With the magic of words he made the characters live and what might even have passed for allegory and symbolism became extreme realism. He went too far. While trying to edit the book so that it could be published in England he could not excise the prurient parts. He admitted defeat and wrote to Seekers that he "got colour-blind and did not know any more what was supposed to be proper and what not." Perhaps he got colour-blind when he wrote it. He wanted to shock genteel society, a society which had cast him out and banned him. He wrote a book which in his own words was "a revolution—a bit of a bomb". No doubt he wrote a flowering book with pistil and stamens standing but it was to quote his own words again 'a phallic novel' 'a shocking novel'. He admitted it was too good for the public. He was a courageous writer but his zeal was misplaced because it was born of hate and his novel was "too phallic for the gross public."

This is where the law comes in. The law seeks to protect not those who can protect themselves but those whose prurient minds take delight and secret sexual pleasure from erotic writings. No doubt this is treating with sex by an artist and hence there is some poetry even in the ugliness of sex. But as Judge Hand said obscenity is a function of many variables. If by a series of descriptions of sexual encounters described in language which cannot be more candid, some social good might result to us there would be room for considering the book. But there is no other attraction in the book. As J.B. Priestley said, "Very foolishly he tried to philosophize upon instead of merely describing these orgiastic impulses: he is the poet of a world in rut, and lately he has become its prophet, with unfortunate results in his fiction." [The English Novel, p. 142 (Nelson)]. The expurgated copy is available but the people who

would buy the unexpurgated copy do not care for it. Perhaps the reason is as was summed up by Middleton Murray:

"Regarded objectively, it is a wearisome and oppressive book; the work of a weary and hopeless man. It is remarkable, indeed notorious for its deliberate use of unprintable words...."

"The whole book really consists of detailed descriptions of their sexual fulfilment. They are not offensive, sometimes very beautiful, but on the whole strangely wearisome. The sexual atmosphere is suffocating. Beyond this sexual atmosphere there is nothing, nothing." [Son of Woman (Jonathan Cape)].

No doubt Murray says that in a very little while and on repeated readings the mind becomes accustomed to them but he says that the value of the book then diminishes and it leaves no permanent impression. The poetry and music which Lawrence attempted to put into sex apparently cannot sustain it long and without them the book is nothing. The promptings of the unconscious particularly in the region of sex is suggested as the message in the book. But it is not easy for the ordinary reader to find it. The Machine Age and its impact on social life which is its secondary theme does not interest the reader for whose protection, as we said, the law has been framed.

We have dealt with the question at some length because this is the first case before this Court invoking the constitutional guarantee against the operation of the law regarding obscenity and the book is one from an author of repute and the centre of many controversies. The book is probably an unfolding of his philosophy of life and of the urges of the unconscious but these are unfolded in his other books also and have been fully set out in his *Psychoanalysis and the Unconscious* and finally in the *Fantasia of the Unconscious*. There is no loss to society if there was a message in the book. The divagations with sex are not a legitimate embroidery but they are the only attractions to the common man. When everything is said in its favour we find that in treating with sex the impugned portions viewed separately and also in the setting of the whole book pass the permissible limits judged of from our community standards and as there is no social gain to us which can be said to preponderate, we must hold the book to satisfy the test we have indicated above.

In the conclusion we are of the opinion that the High Court was right in dismissing the revision petition. The appeal fails and is dismissed.

Appeal dismissed.

FULL BENCH.

Before the Hon'ble Mr. H. K. Chainani, Chief Justice, Mr. Justice Chandrachud and Mr. Justice Gokhale.

CHAITRAM DAGADU SONAVANE v. THE MALEGAON PANCHAYAT SAMITI.*

Maharashtra Zilla Parishads and Panchayat Samitis Act (Mah. V of 1962), Sec. 72(2) before its amendment by Maharashtra Zilla Parishads and Panchayat Samitis (Second Amendment) Act (Mah. 43 of 1964)—Notice summoning meeting in respect of which requisition received under s. 72(1)—Whether necessary to hold meeting within ten days of receipt of notice of no-confidence motion—Construction of statute—Provision in Act to be so construed as to make it and other provisions workable—Draftsman using word in sense not ordinarily used and whether such user to be permitted to defeat intention of Legislature.

Section 72(2) of the Maharashtra Zilla Parishads and Panchayat Samitis Act, 1961, [as it stood before its amendment by the Maharashtra Zilla Parishads and Panchayat Samitis (Second Amendment) Act, 1964] required that the notice summoning the meeting for consideration of the motion of no-confidence, in respect of which a

*Decided, March 25, 1965. Special Civil Application No. 939 of 1964.

requisition had been received under s. 72(1) of the Act, must be issued within ten days from the date of the receipt of the requisition and it was not necessary to hold the meeting within ten days of the receipt of the notice of no-confidence motion.

The word "convene" in s. 49(2) and sub-ss. (2) and (4) of s. 72 of the Maharashtra Zilla Parishads and Panchayat Samitis Act before their amendment, meant call or summon.

Popat Ragho v. Damu Shankar,¹ overruled.

Bhimrao Narayan Deshmukh v. Chief Executive Officer, Zilla Parishad, Yeotmal,² approved.

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Haribhau v. State,³ referred to.

The Court should, if possible, so construe a provision in an Act as will make it and the other provisions of the Act workable and as will not render any of them ineffective or incapable of being carried out. The intention of the Legislature must not be allowed to be defeated merely because the draftsman has used a word in a sense in which it is not ordinarily used.

THE facts are stated in the judgment.

G. N. Vaidya, for the petitioner.

N. S. Shastri, for opponents Nos. 2 and 5.

R. W. Adik, with *A. V. Savant*, for opponents Nos. 3 and 4.

M. N. Phadke, intervenes and appears with leave of the Court.

CHAIKANI C. J. The petitioner and respondents Nos. 2 to 4 are the members of the Panchayat Samiti of Malegaon. Respondent No. 2 was the Chairman of the Panchayat Samiti. On May 7, 1964, respondents Nos. 3 and 4 and 12 other members of the Panchayat Samiti gave a notice of a motion of no-confidence in respondent No. 2 under sub-s. (1) of s. 72 of the Maharashtra Zilla Parishads and Panchayat Samitis Act. This notice was received by respondent No. 2 on May 7, 1964. On May 16, 1964, he issued a notice calling a meeting of the Samiti for the purpose of considering the motion of no-confidence on June 27, 1964. A meeting was accordingly held on June 27, 1964, in which the motion of no-confidence in respondent No. 2 was carried by a majority of 14 to 9. The petitioner thereafter filed the present special civil application, in which he has contended that the meeting, which was held on June 27, 1964, at which the motion of no-confidence was passed, was illegal, as it was not held within ten days from the date on which the notice of no-confidence motion was received by respondent No. 2. The petitioner has, therefore, prayed for a writ of *mandamus* or any other suitable writ or direction to be issued to the Panchayat Samiti respondent No. 1 not to give effect to the motion of no-confidence passed in the meeting held on June 27, 1964. The Division Bench before which the application came up for hearing decided to refer it to a larger Bench in view of what it regarded to be conflicting decisions in *Haribhau v. State*,¹ and *Popat Ragho v. Damu Shankar*.²

The question, which arises for our consideration, may be formulated as under:

"Whether under sub-section (2) of section 72 of the Maharashtra Zilla Parishads and Panchayat Samitis Act, as this section stood before it was amended by the Maharashtra Zilla Parishads and Panchayat Samitis (Second Amendment) Act, 1964, it was necessary to hold a meeting of the Panchayat Samiti for the consideration of a motion of no-confidence of which notice had been given under sub-section (1), within ten days of the receipt of the notice or whether this sub-section only required that a notice calling a meeting of the Panchayat Samiti should be issued within ten days of the receipt of the notice of no-confidence motion?"

In order to consider this question, it is necessary to refer to the relevant provisions of the Act. Sub-section (1) of s. 72 stated that a motion of no-confidence

1 (1964) 66 Bom. L.R. 729.

2 (1963) Special Civil Application No. 4 of 1963, decided by Abhyankar and Wagle JJ., on September 27, 1963. (Unrep.).

3 (1963) 65 Bom. L.R. 529.

1 (1963) 65 Bom. L.R. 529.

2 (1964) 66 Bom. L.R. 729.

in the Chairman of a Panchayat Samiti should be made by a requisition from not less than one-fourth of the total number of the members after giving a notice thereof in such manner as might be prescribed. Sub-section (2) of this section provided that the Chairman of a Panchayat Samiti shall convene a special meeting of the Panchayat Samiti to consider such motion within ten days of the receipt of the notice. Sub-section (4) provided that if no such meeting was convened by the Chairman of a Panchayat Samiti within the period specified in sub-s. (2), all or any of the members who have given notice of motion of no-confidence, might forward to the Commissioner a copy of the notice and request him to convene a special meeting of the Panchayat Samiti and that the Commissioner shall notwithstanding anything contained in s. 118 read with sub-s. (3) of s. 111 within ten days of the receipt of such communication by him convene the special meeting of the Panchayat Samiti for the consideration of the motion. The words "a special meeting" and "the special meeting" were substituted for the words "a meeting" and "the meeting" in sub-ss. (2) and (4) by Maharashtra Act XXXV of 1963. Sub-section (5) lays down that the meeting convened for the purpose of considering a motion under this section shall not, for any reason, be adjourned. Sub-section (4) of s. 111 provides that fifteen clear days' notice of an ordinary meeting, and ten clear days' notice of a special meeting, specifying the time and place at which such meeting is to be held and the business to be transacted thereat, shall be circulated to the Councillors. Under this sub-section, therefore, fifteen clear days' notice for an ordinary meeting and ten clear days' notice for a special meeting must be given. The provisions of s. 111 apply to Zilla Parishads, but they have been made applicable with some modifications to meetings of a Panchayat Samiti by s. 118. Originally sub-s. (4) of s. 111 applied without any modification to the meetings of a Panchayat Samiti and the period of notice required for calling an ordinary or a special meeting was the same. But by Maharashtra Act XXXV of 1963 the period for an ordinary meeting of a Samiti was reduced from fifteen days to ten days and for a special meeting of a Samiti from ten days to seven days. Section 49 prescribes the procedure to be followed when notice of no-confidence motion in the President of a Zilla Parishad is given. Sub-section (2) of s. 49 provided that the President shall convene a special meeting of the Zilla Parishad to consider the motion within ten days of the receipt of notice.

In *Haribhan v. State*, a Division Bench of this Court held that a meeting of the Panchayat Samiti convened by the Commissioner under sub-s. (4) of s. 72 of the Maharashtra Zilla Parishads and Panchayat Samitis Act is either an ordinary meeting or a special meeting and that notice of such meeting must, therefore, be given in accordance with the provisions of sub-s. (4) of s. 111 of the Act. In that case the Commissioner had convened a meeting of the Samiti after two days' notice. It was held that the notice was bad and that the meeting held in pursuance of it was illegal. This decision led to the amendment of sub-s. (2) of s. 49, sub-ss. (2) and (4) of s. 72 and s. 118 by Maharashtra Act XXXV of 1963, as mentioned above. In the meantime another Division Bench of this Court at Nagpur in *Bhimrao Narayan Deshmukh v. Chief Executive Officer, Zilla Parishad, Yeotmal*³ held that the word "convene" in sub-s. (2) of s. 72 only meant "call", that what was required by sub-s. (2) was that the Chairman shall call a meeting or issue a notice of the meeting for consideration of the no-confidence motion within ten days of the receipt of the requisition and that it did not require that the meeting shall be held within ten days of the receipt of the motion of no-confidence. A contrary view has, however, been taken in *Popat Ragho v. Damu Shankar*, in which it has been held that the expression "convene a special meeting of the Panchayat Samiti" in sub-ss. (2) and (4) of s. 72 of the Act implied that the Chairman of the Panchayat Samiti should have called the body together and held the meeting be-

³ (1963) Special Civil Application No. 4 on September 27, 1963. (Unrep.) of 1963, decided by Abhyankar and Wagle JJ.,

fore the expiry of ten days from the receipt of the notice. Evidently on account of these decisions the Legislature has again amended the above sections by Maharashtra Act XLIII of 1964 and the word "convene" has been replaced by the word "call" in ss. 49 and 72.

We have, however, to construe sub-s. (2) of s. 72 as it stood before the Act was amended in 1964. The word "convene" according to the Oxford English Dictionary means, to come together; to assemble or meet for a common purpose or for united action; to cause to come together; to summon (a person) before a tribunal. As the word has more than one meaning, the question as to what meaning it bears in a particular provision must be decided by reference to the context in which it has been used.

Sub-section (2) of s. 49 was almost in the same terms as sub-s. (2) of s. 72. This required the President to convene a special meeting of the Zilla Parishad to consider the motion of no-confidence within ten days of its receipt. Under sub-s. (4) of s. 111, ten days' notice of a special meeting has to be given. If, therefore, the word "convene" implied that the meeting must be held within ten days, then it would have not been possible to hold any meeting for considering a motion of no-confidence, for if the meeting was to be held within ten days, ten clear days' notice of it could not have been given and if notice of a shorter period was given, the meeting would have been illegal, see *Haribhau v. State*. The above meaning did not, therefore, fit in the context, for it would have made s. 49(2) ineffective and nugatory. On the other hand, if "convene" in this provision meant call or summon, then it was possible to hold the special meeting after giving the requisite notice. The Legislature could not have used this word in a sense in which it would have made the section unworkable. It follows that in s. 49(2) "convene" meant call or summon; and it must bear the same meaning in sub-ss. (2) and (4) of s. 72, because the same word cannot have two different meanings in two provisions of the same Act almost identical in terms and enacted for the same purpose. Moreover, before the Act was amended in 1963, ten clear days' notice was also necessary for a special meeting of a Panchayat Samiti. The word "convene" was, therefore, used in s. 72 in the sense indicated above before the Act was amended in 1963. It cannot change its meaning merely because by the amendment the period of notice for a special meeting was subsequently reduced.

Mr. Adik has pointed out the other provisions of the Act, which indicate that the same words have not always been employed to express the same intention. The proviso to sub-s. (4) of s. 111 refers to a meeting being "called". Sub-section (14) of s. 111 states that a Minister who desires to discuss with the Zilla Parishad any matter relating to the work of the Parishad may request the President to call a meeting of the Zilla Parishad and that the President shall summon the meeting accordingly. Sub-section (1) of s. 113 states that a President may convene a meeting of the Zilla Parishad to enable such dignitaries as the State Government may specify to address the Councillors. The word "convene" in this sub-section, therefore, appears to have been used in the same sense in which the words "call" and "summon" have been used in sub-s. (14) of s. 111. Section 122 provides that when a Minister requests the President of a Zilla Parishad to arrange a meeting with the Standing Committee or any Subjects Committee, the President shall take steps to summon such meeting. The words used in this section are "arrange" and "summon". It will, therefore, be seen that different words have been used in the same sense in different provisions of the Act. Mr. Phadke has urged that as another word "convene" has been employed in sub-ss. (2) and (4) of s. 72 it should be given a different meaning of "call together or assemble together". This word "convene" is also used in other provisions of the Act, such as ss. 76(1)(a), 111(8), 113(1) and 115(1). As stated above, in s. 113(1) it appears to have been used in the sense of call or summon. Sub-section (8) of s. 111 states that except with the permission of the presiding authority, no business shall be transacted and no proposition shall be discussed at any ordinary meeting, unless it

has been entered in the notice convening such meeting. The meaning of the word "convene" in this sub-section obviously is "call" or "summon". It is, therefore, clear that this word has not always been used in the Act in the sense of assembling or bringing together.

It has been contended that the object of the Legislature in specifying a time-limit within which a meeting has to be convened is that a motion of no-confidence should be treated as a matter of urgency and should be disposed of within a short time after notice of it has been given. If it is held that sub-s. (2) of s. 72 only required that a notice calling a meeting should be issued within ten days, the Chairman, who had lost the confidence of the majority of the members of the Samiti, might have complied with the requirements of sub-s. (2) by issuing a notice summoning the meeting within ten days, but might actually have called the meeting at a very much later date, so as to enable him to continue in office for a long period against the desire of the majority of the members. There is some force in this argument. But on the other hand, we must not so interpret the provisions of the Act as to defeat the intention of the Legislature that a person who had lost the confidence of the members should not continue in office. As I have pointed out, unless the word "convene" is held to mean "call or summon", no meeting of the Zilla Parishad could lawfully have been held for consideration of the motion of no-confidence in the President or Vice-President. Ten clear days' notice of such a meeting had to be given and the meeting could not, therefore, have been held within ten days of the receipt of the notice of motion of no confidence. It would, therefore, have been impossible to carry out the provisions of sub-s. (2) of s. 49. Similarly, before the Act was amended in 1963, it would not have been possible to hold any lawful meeting of the Panchayat Samiti for consideration of the no-confidence motion against its Chairman or Deputy Chairman. Since one of the dictionary meanings of the word "convene" is summon, it seems to us that the word "convene" in ss. 49 and 72 must be held to have this meaning, for otherwise sub-s. (2) of s. 49 and sub-ss. (2) and (4) of s. 72 before the Act was amended in 1963 could not have been given effect to and would have become unworkable.

Mr Phadke has relied on the decision in *Popat Ragho v. Damu Shankar*. The judgment shows that the learned Judges were aware of the difficulties which have been pointed out above. At p. 733 it has been observed:

"...It may be that when making the provisions of sub-s. (2) of s. 49 the legislative draftsman overlooked the difficulty that would arise, but for the reason that difficulties would arise in the implementation of the other provisions of the Act, we cannot give to the expression used in s. 72 'convene a special meeting' any meaning other than what the plain English requires and merely to obviate difficulties."

With respect, it seems to us that the Court should, if possible, so construe a provision in an Act as will make it and the other provisions of the Act workable and as will not render any of them ineffective or incapable of being carried out. The intention of the Legislature should not be allowed to be defeated merely because the draftsman has used a word in a sense in which it is not ordinarily used. With respect, we do not, therefore, agree with the view taken in *Popat Ragho v. Damu Shankar*. We agree with the view taken in Special Civil Application No. 4 of 1963. In our opinion, all that sub-s. (2) of s. 72 required was that the notice summoning the meeting for consideration of the motion of no confidence, in respect of which a requisition had been received under sub-s. (1), should be issued within ten days from the date of the receipt of the requisition and that it was not necessary to hold the meeting within ten days of the receipt of the notice. The reply to the first part of the question formulated for our consideration is, therefore, in the negative and to the second part in the affirmative.

In this view the present application must fail.

Rule discharged. No order as to costs.

Rule discharged.

Before the Hon'ble Mr. H. K. Chainani, Chief Justice, Mr. Justice Chandrachud and Mr. Justice Gokhale.

DATTATRAYA SADASHIV DHOND v. GANPATI RAGHU GAOLI.*

Hyderabad Abolition of Inams and Cash Grants Act (Hyd. VIII of 1955), Secs. 1, 2, 3, 5, 6, 33—Hyderabad Tenancy and Agricultural Lands Act (Hyd. XXI of 1950), Secs. 44, 32, 19, 28—Hyderabad Tenancy and Agricultural Lands Rules, 1958. Rule 28—Inam abolished from July 20, 1955 under Act in respect of land leased to tenant before that date—Subsistence of relationship of landlord and tenant after such date—Tenancy under Hyderabad Tenancy Act when terminates—Conditions under which Inamdar or other person entitled to rights of occupant under s. 5 or 6 of Hyderabad Abolition of Inams and Cash Grants Act.

In cases in which the inam was abolished with effect from July 20, 1955, under the Hyderabad Abolition of Inams and Cash Grants Act, 1954, and in which the inam land had been leased to a tenant before that date, the relationship of landlord and tenant continued to subsist between July 20, 1955 and July 1, 1960, and the provisions of the Hyderabad Tenancy and Agricultural Lands Act, 1950 applied thereto.

Fruit & Vegetable Merchants Union v. Delhi Improvement Trust,¹ *Ramjivan Birdichand v. Pandu*,² *Deolal Bulakhi v. Kadu Tolaram*³ and *Nama Handrale v. Shambhaji Rao*,⁴ referred to.

Under the provisions of the Hyderabad Tenancy and Agricultural Lands Act, 1950, the tenancy of a land terminates on the date on which the landholder makes an application for possession of the land to the Tehsildar as provided in s. 44(2) of the Act.

*Ganpati Appa v. Maruti Bala*⁵ and *Ramchandra Anant v. Janardan*,⁶ referred to.

In order to be entitled to the rights of an occupant under s. 5 or 6 of the Hyderabad Abolition of Inams and Cash Grants Act, 1954, as the case may be, the inamdar or other person should have been in lawful possession of the land on July 1, 1960.

The inamdar is entitled to the rights of an occupant under s. 5 or 6 of the Hyderabad Abolition of Inams and Cash Grants Act, 1954, as the case may be, if in the application for possession made by him under the Hyderabad Tenancy and Agricultural Lands Act, 1950, a final order for possession had been made in his favour before July 1, 1960. He would also be so entitled if an order for possession was made before July 1, 1960 and if such order is not set aside in appeal or revision or other proceeding by a superior Court. Where, however, no order for restoration of the possession to the landholder had been made before July 1, 1960, or if the order for possession was subsequently set aside, the tenant would become the occupant with effect from July 1, 1960.

THE facts are stated in the judgment.

Special C. A. No. 1174 of 1963:

H. C. Vaishnav, for the petitioner.

B. N. Deshmukh, (*amicus curiae*), for opponent No. 1.

R. B. Kotwal, Government Pleader, as per notice.

Special C. A. No. 1435 of 1963:

R. G. Bhadekar, for the petitioner.

K. H. Kulkarni, for opponent No. 1.

*Decided, March 29, 1965. Special Civil Application No. 1174 of 1963 (with Special Civil Applications Nos. 1435 of 1963 and 697 of 1964).

1 [1957] S.C.R. 1.

2 (1961) Special Civil Application No. 1131 of 1960, decided by Chainani C.J. and Gokhale J., on March 1, 1961 (Unrep.).

3 (1956) 58 Bom L.R. 941.

4 (1961) Special Civil Application Nos. 845 and 896 to 900 of 1960, decided by Chainani C.J. and Tambe J., on January 24, 1961 (Unrep.).

5 (1960) 62 Bom L.R. 802, F.B.

6 (1962) 64 Bom L.R. 635, F.B.

Special C. A. No 697 of 1964:

R. G. Bhadekar, for the petitioner.

R. W. Adik, with *B. N. Deshmukh*, assisted by *A. V. Sawant*, for opponent No. 1.

R. B. Kotwal, Government Pleader, for opponent No. 2.

CHAINANI C.J. These three applications raise questions relating to the interpretation of the provisions of the Hyderabad Abolition of Inams and Cash Grants Act, 1954, hereinafter referred to as the Act. The petitioner in Special Civil Application No. 1174 of 1963 was the holder of two Madad Mash Inam (Personal Inam) lands. Opponent No. 1 was the tenant of the lands. As the lands were not service inam lands, the Hyderabad Tenancy and Agricultural Lands Act, 1950 (hereinafter referred to as the Tenancy Act) applied to them. On July 20, 1955, the Inam was abolished by the Inams Abolition Act. All the provisions of the Act did not however come into force on that date. On December 16, 1958, the petitioner gave a notice to opponent No. 1 terminating his tenancy under sub-s. (1) of s. 44 on the ground that he required the lands bona fide for cultivating them personally. On March 31, 1959, he made an application to the Tehsildar for obtaining possession of the lands. On July 1, 1960, all the remaining provisions of the Act came into force. On December 15, 1960, the Tehsildar made an order allowing the petitioner to resume the lands. This order was confirmed in appeal by the Deputy Collector. It was set aside in revision by a Full Bench of the Maharashtra Revenue Tribunal. The Tribunal took the view that after the abolition of the Inam with effect from July 20, 1955, the petitioner had no rights left in the lands and that consequently the application made by him under s. 44 of the Tenancy Act was not maintainable. Against the order made by the Revenue Tribunal the petitioner has filed the present special civil application.

In Special Civil Application No. 1435 of 1963 the petitioners are the holders of a land, which is said to be Deshmukh Inam. Such inams were abolished with effect from July 1, 1960, under sub-s. (2A) of s. 1 read with sub-s. (1) of s. 3 of the Act. On March 26, 1959, the petitioners made an application for possession of the land under s. 32 read with s. 44 of the Act. This application has been rejected by the Revenue Tribunal on the ground that after the abolition of the inam, the petitioners had no rights left in the land and that consequently they could not resume the land under s. 44.

The petitioner in Special Civil Application No. 697 of 1964 was the holder of three inam lands. The inam was abolished with effect from July 20, 1955. In 1956 the tenant opponent No. 1 surrendered all his tenancy rights and in pursuance of the order made by the Tehsildar the possession of the lands was delivered to the petitioner. The petitioner was, therefore, in possession of the lands on July 1, 1960. After ss. 5 and 6 of the Act came into force, the Tehsildar held that as the tenant was in possession of the lands on July 20, 1955, the occupancy rights should be granted to him. This order was confirmed in appeal by Government and is being challenged in this application.

As the questions involved in these applications arise in many other cases, they have been referred to a Full Bench.

The questions, which arise for consideration by the Full Bench, may be formulated as under:

(1) Whether in cases, in which the inam was abolished with effect from July 20, 1955, under the Hyderabad Abolition of Inams and Cash Grants Act, 1954, and in which the inam land had been leased to a tenant before that date, the relationship of landlord and tenant continued to subsist between July 20, 1955, and July 1, 1960, and whether the provisions of the Hyderabad Tenancy and Agricultural Lands Act applied thereto?

(2) Whether under the provisions of the Hyderabad Tenancy and Agricultural Lands Act, the tenancy of a land terminates on the date on which the

land holder makes an application for possession of the land to the Tehsildar, as provided in sub-s. (2) of s. 44 of the Act or on the date on which the Tehsildar makes an order for possession of the land being restored to the landlord?

(3) Whether in order to be entitled to the rights of an occupant under ss. 5 or 6 of the Hyderabad Abolition of Inams and Cash Grants Act, as the case may be, the inamdar or other person should have been in possession of the land on July 20, 1955, or July 1, 1960?

(4) Whether the inamdar is entitled to the rights of an occupant under ss. 5 or 6 of the Hyderabad Abolition of Inams and Cash Grants Act, 1954, as the case may be, if in the application for possession made by him under the Hyderabad Tenancy and Agricultural Lands Act—

(a) a final order for possession had been made in his favour before July 1, 1960,

(b) an order for possession had been made before July 1, 1960, but against which an appeal or revision or other proceeding in a superior Court was pending on that date, or

(c) no order for possession was made in favour of the inamdar before July 1, 1960?

In order to answer these questions, it is necessary to refer to the relevant provisions of the Act. The Act was published on July 20, 1955. It was amended with retrospective effect by the Hyderabad Abolition of Inams (Amendment) Act, 1956. Sub-section (2) of s. 1 of the amending Act states that it shall be deemed to have come into force on July 20, 1955, that is, on the same date on which the parent Act had been published in the Official Gazette. The Act was further amended in 1959 by the Hyderabad Abolition of Inams (Amendment) Act, 1959. Sub-section (2) of s. 1 of the Act states that it shall be applicable to all inams except—

(i) inams held by or for the benefit of charitable and religious institutions;

(ii) inams held for rendering village service useful to the Government or to the village community including sethsendhi, neeradi and balutha inams.

Sub-section (2A) provides that on the coming into force of the Hyderabad Abolition of Inams (Amendment) Act, 1959, this Act shall apply also to cash grants and inams of the nature of community service inams and watans. Sub-section (3) of s. 1 is in the following terms:

“(3) (a) This section, section 2, section 3 except clauses (d), (g), (h) and (i) of sub-section (2), sections 30 to 34 (both inclusive), section 35 to the extent to which it enables rules to be made for the purposes of the aforesaid sections, section 36 and section 37, shall come into force on the date of publication of this Act in the *Official Gazette*;

(b) the rest of this Act shall come into force on such date as the Government may by notification in the *Official Gazette*, appoint in this behalf.”

The Act was published on July 20, 1955. The date appointed by the State Government under cl. (b) is July 1, 1960. Consequently the provisions referred to in cl. (a) of sub-s. (3) came into force on July 20, 1955, while the remaining provisions came into force on July 1, 1960.

Clause (b) in sub-s. (1) of s. 2 defines the expression “date of vesting” as meaning when used—

(i) in sub-section (1), sub-section (2) with reference to clauses (a), (b), (c), (e) and (f), and sub-section (3) of section 3 and section 34, means,—

(A) in the case of inams other than those specified in clauses (i) and (ii) of sub-section (2A) of section 1, the date of the publication of this Act in the *Official Gazette*, and

(B) in the case of inams and cash grants to which this Act shall apply under sub-section (2A) of section 1, the date of the coming into force of the Hyderabad Abolition of Inams (Amendment) Act, 1959;

(ii) elsewhere in this Act the date appointed by the Government under clause (b) of sub-section (3) of section 1;

There are no clauses (i) and (ii) in sub-s. (2A) of s. 1. The reference to sub-s. (2A) of s. 1 in sub-cl. (A) of cl. (i) in the definition is, therefore, a mistake. The reference obviously is to sub-s. (2) of s. 1. The State Government has issued

a notification under cl. (ii) appointing July 1, 1960 as the relevant date. It will be seen that the date of vesting is not the same in the case of all inams. In respect of inams abolished by the amending Act of 1959, to which sub-s. (2A) of s. 1 applies, the date of vesting is July 1, 1960. In respect of the other inams the date of vesting is July 20, 1955, with reference to the provisions referred to in cl. (i) of the definition of "date of vesting" and July 1, 1960 with reference to the remaining provisions of the Act. Section 2A states that if any question arises whether any land is an inam, whether any inam is held with or without conditions of service, whether any person is a kabiz-e-kadim, permanent tenant or tenant, or in regard to other matters mentioned in this section, the State Government or the officer authorised by that Government shall decide the question. Sub-section (2) of this section provides for an appeal to the State Government where any question is decided by an officer authorised by the State Government.

Sub-section (1) of s. 3 is in the following terms:

"(1) Notwithstanding anything to the contrary contained in any usage, settlement, contract, grant, sanad, order or other instrument, Act, regulation, rules or order having the force of law and notwithstanding any judgment, decree or order of a Civil, Revenue or Atiyat Court, and with effect from the date of vesting, all inams to which this Act is made applicable under sub-section (2) or sub-section (2A) of section 1 of this Act shall be deemed to have been abolished and shall vest in the State."

Sub-section (2) of this section provides:

"Save as expressly provided by or under the provisions of this Act and with effect from the date of vesting, the following consequences shall ensue, namely:—

(a) the provisions of the Land Revenue Act, 1317 Fasli relating to inams, and the provisions of the Hyderabad Atiyat Enquiries Act, 1952 and other enactments, rules, regulations and circulars in force in respect of Atiyat grants shall, to the extent they are repugnant to the provisions of this Act, not apply and the provisions of the Land Revenue Act, 1317 Fasli, relating to unalienated lands for purposes of land revenue, shall apply to the said inams;

(b) all rights, title and interest vesting in the inamdar, Kabiz-e-Kadim, permanent tenant and tenant in respect of the inam land, other than the interests expressly saved by or under provisions of this Act and including those in all communal lands, cultivated and uncultivated lands (whether assessed or not), waste lands, pasture lands, forests, mines and minerals, quarries, rivers and streams, tanks and irrigation works, fisheries and ferries, shall cease and be vested absolutely in the State free from all encumbrances;

(c) all such inam lands shall be liable to payment of land revenue;

Explanation.—In the case of an inam land in respect of which the settlement of assessment has not been made under the Land Revenue Act, 1317 Fasli, the amount of land revenue thereon shall be assessed under section 52 of that Act with effect from the date of vesting under this section.

(d) all rents and land revenue including cesses and royalties, accruing in respect of such inam lands, on or after the date of vesting, shall be payable to the State and not to the inamdar, and any payment made in contravention of this clause shall not be valid;...

(h) the relationship with regard to inam land as between the inamdar and Kabiz-e-kadim, permanent tenant or tenant shall be extinguished;

(i) the Inamdar, Kabiz-e-kadim, permanent tenant and a tenant of inam lands and any person holding under them and holder of an inam, shall, as against the Government be entitled only to such rights and privileges and be subject to such conditions as are provided for under this Act and any other rights and privileges which may have accrued to any of them in the inam before the date of vesting against the inamdar shall cease and shall not be enforceable against the Government or the inamdar...."

Out of these, cls. (a), (b) and (c) came into force on July 20, 1955, while the remaining clauses did not come into force until July 1, 1960. Sections 5 and 6 provide for the grant of occupancy rights to the persons in possession. Sub-

section (1) of s. 5 is as under:

"(1) In the case of an occupied land comprised in an inam including a community service inam or watan, which under the terms of the grant or commutation settlement was to continue in perpetuity and was alienable without the permission of any competent authority—

(i) if it is in the possession of a Kabiz-e-kadim, or of a permanent tenant or tenant holding from the inamdar, such Kabiz-e-kadim, permanent tenant or tenant, and

(ii) in other cases, the inamdar shall be primarily liable to the State Government for the payment of land revenue due in respect of the land held by him and shall, subject to the provisions of sub-sections (2), (3), (4) and (5), be entitled to all the rights and be liable to all the obligations in respect of such land as an occupant under the Land Revenue Act, 1317 Fasli, and the rules made thereunder."

Sub-section (1) of s. 6 similarly provides for the grant of occupancy rights to the person in possession of an occupied land comprised in an inam other than land to which the provisions of s. 5 apply. Section 33 provides for the continuing application of the Tenancy Act. This section runs as under:

"Nothing in this Act shall in any way be deemed to affect the application of the provisions of the Hyderabad Tenancy and Agricultural Lands Act, 1950, to any inam or the mutual rights and obligations of an inamdar and his tenants, save in so far as the said provisions are in any way inconsistent with the express provisions of this Act."

I may here also refer to s. 4 of the amending Act of 1956, which provides that with effect from the date of the publication of the principal Act in the Official Gazette, that is, July 20, 1955, and till the commencement of the provisions mentioned in cl. (b) of sub-s. (3) of s. 1, that is, July 1, 1960, the full land revenue payable in respect of every inam abolished and vesting in the State shall be recovered from the inamdar of such inam as if he were the occupant of such land.

Before we deal with the questions, which arise for our determination, we consider it necessary to observe that this Act and the subsequent amendments made to it have not been drafted with that care which may reasonably be expected having regard to the fact that the Act affects the vested rights in property of inamdars and several other persons. The Act contains conflicting provisions with the result that it is difficult to find out what exactly the Legislature intended. There are also grammatical and spelling mistakes. If, therefore, we have given to some of the provisions of the Act a meaning which the language used may not strictly justify, it is due to the fact that that is the only way in which we can resolve the conflict between the different provisions of the Act and find a solution for the Chinese puzzle which they have posed.

Mr. Adik has contended, and the same argument has been adopted by Mr. Deshmukh, that the vesting of an inam in the State under sub-s. (1) of s. 3 with effect from July 20, 1955, that is, the date from which the inam was abolished, was absolute and unqualified, that all rights, title and interest vesting in the inamdar and other persons in the inam land ceased and that, therefore, the relationship previously existing between the inamdar and his tenant came to an end on the same date. It has been urged that sub-s. (2) mentions only some consequences of abolition of inams. The language used in sub-s. (1) supports this argument, because under this sub-section the whole grant was cancelled and whatever was granted or held in inam was to vest in the State. If, therefore, the grant was of the land, the land was to vest in the State. If, however, this was to be the result of the vesting; then it is not easy to understand why cl. (b) in sub-s. (2) refers to interests expressly saved by or under the provisions of the Act. Also in that case it would not have been necessary to include s. 33 in the Act. If all the rights of the inamdar and his tenant vested in the State on July 20, 1955, the relationship of landlord and tenant also ceased on that date and the Tenancy Act could no longer govern that relationship. Section 33 must have been enacted with some purpose and must, therefore, be given some meaning. Section 4 of the amending Act of 1956 imposes a liabi-

lity on the inamdar to pay land revenue of the inam land for the period from July 20, 1955 to July 1, 1960. This liability would not have been imposed upon him if he had been deprived of all his rights in the inam land. The word "vest" does not have a fixed connotation, meaning in all cases that the property is owned by the person or authority in whom it vests. It may vest in title, or it may vest in possession or it may vest in a limited sense, see *Fruit & Vegetable Merchants Union v. Delhi Improvement Trust*.¹ Having regard to the provisions, to which I have just referred, it seems to us that sub-s. (2) of s. 3 explains what vesting under sub-s. (1) means and specifies the rights, title and interest, which vest in the State by reason of the abolition of the inam.

Clause (b) in sub-s. (2) of s. 3 provides that all rights, title and interest vesting in the inamdar, permanent tenant and tenant in respect of inam land, other than the interests expressly saved by or under the provisions of this Act, shall cease and be vested absolutely in the State free from all encumbrances, with effect from the date of vesting, July 20, 1955. This clause, therefore, saves from vesting in the State the interests expressly saved by or under the provisions of the Act. The only provisions of the Act, which save any interest, are those contained in s. 33. This section provides for two things:

(1) The continued application of the Tenancy Act and

(2) it saves the mutual rights and obligations of an inamdar and his tenant. In the context "mutual rights and obligations" can only mean the mutual rights and obligations under the Tenancy Act. It may be noted that s. 33 itself contains a saving clause that the provisions of the Tenancy Act shall apply, save in so far as they are inconsistent with the express provisions of the Act. Section 33 read with cl. (b), therefore, saved from vesting in the State the mutual rights and obligations of an inamdar and his tenant, which were not inconsistent with the express provisions of the Act. These rights and obligations were the right of the inamdar to receive rent and recover possession of the inam land subject to the restrictions contained in the Tenancy Act and the right of the tenant to continue in possession of the land and to enjoy its income subject to his liability to pay rent and to restore possession to the inamdar in accordance with the provisions of the Tenancy Act. Clauses (d), (h) and (i) also show that the mutual rights and obligations of an inamdar and his tenant were intended to be saved and did not vest in the State on July 20, 1955. It is true that these clauses did not come into force till July 1, 1960. But they were part of the Act even on July 20, 1955 and can, therefore, be looked at for the purpose of ascertaining the true intention of the Legislature. Under cl. (d) all rents became payable to the State after July 1, 1960, which was the date of vesting for the purpose of this clause. The necessary inference, therefore, is that till that date the rent was payable by the tenant to the inamdar. Clause (h) states that on the date of vesting, that is, July 1, 1960, the relationship with regard to inam land as between the inamdar and his tenant shall be extinguished. The relationship, therefore, continued till that date. Clause (i) provides that with effect from the date of vesting, which for the purposes of this clause was July 1, 1960, any rights and privileges which may have accrued to any person in the inam before the date of vesting against the inamdar shall cease and shall not be enforceable against the Government or the inamdar. The rights in respect of the inam land, therefore, became unenforceable against the inamdar from July 1, 1960.

It is clear from these provisions that the Legislature intended to save mutual rights and obligations of an inamdar and his tenant and to continue the mutual relationship between them during the period from July 20, 1955 to July 1, 1960. This is also suggested by s. 4 of the amending Act of 1956. As the inamdar was made liable to pay land revenue to Government, he was also given a right to recover rent from his tenant. There has been some argument before us in regard to the words "as if he were the occupant of such land" in s. 4 of the

amending Act of 1956. These words were used because ss. 5 and 6 relating to the grant of occupancy rights did not come into force till July 1, 1960. The intention, therefore, appears to have been that till that date the inamdar's right to the possession of the inam land and his liability to pay land revenue should continue as if he was an occupant.

This view also appears to be in accordance with the object and scheme of the Act. The object of the Act as stated in the preamble was to provide for the abolition of inams and cash grants. The various provisions of the Act show that it was not intended to disturb the possession of the person, who was actually in possession, or to take possession from him. The Act has, therefore, provided for the grant of occupancy rights to the person in possession of the inam land. These occupancy rights could not be granted before July 1, 1960, when ss. 5 and 6 came into force. Till then the relationship between the inamdar and his tenant was allowed to continue and they could enforce mutual rights and obligations. The land holder could, therefore, make an application for possession to the Tehsildar and the tenant was competent to surrender his tenancy rights.

The mutual rights and obligations were governed by the Tenancy Act before July 20, 1955. There is no dispute that this Act applied to inam lands other than service inam lands. Section 102 of the Tenancy Act, as it stood on July 20, 1955, provided that nothing in the preceding sections of the Act shall apply to lands leased by Government. It is not disputed before us that even after the inam was abolished, the inam land cannot be said to have been leased by Government to the inamdar's tenant, who was allowed to continue in possession. The Tenancy Act, therefore, continued to apply. With effect from June 8, 1958, s. 102 was replaced by s. 102A and some other sections. Clause (a) in s. 102A provides that nothing in the preceding provisions of the Act shall apply to lands leased or held by Government. The corresponding words in s. 88 of the Bombay Tenancy Act are "lands belonging to or leased by Government." The word "hold" is not defined in the Tenancy Act. Clause (z) in sub-s. (1) of s. 2 of the Tenancy Act states that words and expressions used in this Act but not defined therein shall have the meaning assigned to them in the Hyderabad Land Revenue Act. The expression "to hold" is defined in s. 2(vi) of the Land Revenue Act to mean to be lawfully in possession of land, whether such possession is actual or not. In many cases this Court has, therefore, taken the view that the word "held" implied possession of the person concerned, see *Ramjivan Birdichand v. Pandu*² and *Deolal Bulakhi v. Kadu Tolaram*.³ It has been contended by the learned Government Pleader that after the inam was abolished, the title to the inam land vested in Government and that consequently Government was in constructive possession of it with effect from July 20, 1955. The mutual rights and obligations of an inamdar and his tenant, which were saved by cl. (b) in sub-s. (2) of s. 3 read with s. 33, included a right to possession. After the abolition of the inam, the tenant, therefore, continued in possession not by reason of any authority or permission granted by Government, but because this right and the inamdar's right to recover possession in accordance with law did not vest in Government until July 1, 1960. The tenant was also liable to pay rent to the inamdar and not to Government, which was only entitled to receive land revenue. The scheme of the Act also shows that while the Act abolishes the inams, it does not provide for resumption of possession of the inam land. There is no provision in the Act empowering Government to resume possession or to evict the person in possession (except when occupancy price is not paid). Government cannot, therefore, be said to have been even in constructive possession of the inam land after July 20, 1955, when the inam was abolished. The land cannot, therefore, be said to have been held by Government within the meaning of cl. (a) in s. 102A of the Tenancy Act. The operation of this Act was, therefore, not

2 (1961) Special Civil Application No Gokhale J., on March 1, 1961 (Unrep.).
1131 of 1960, decided by Chainani C.J. and 3 (1956) 58 Bom L.R. 941.

excluded with effect from June 8, 1958. The Act continued to apply till July 1, 1960, when under cl. (h) in sub-s. (2) of s. 3 the relationship between the inamdar and his tenant was extinguished. The provisions of the Tenancy Act, under which a tenancy cannot be terminated except as provided in this Act, became inconsistent with the express provisions contained in cl. (h) of the Act, which extinguished the relationship between the inamdar and his tenant. The mutual rights and obligations of the inamdar and his tenant were no longer saved by cl. (b) in sub-s. (2) of s. 3 read with s. 33 of the Act and all rights, title and interest of both the inamdar and his tenant in the inam land thereafter vested in Government. From the same date the person in possession of the land became entitled to all the rights of an occupant under the Land Revenue Act.

The position, therefore, is that on July 20, 1955, all rights, title and interest in the inam land vesting in the inamdar and his tenant ceased and became vested in Government free from all encumbrances, except the mutual rights and obligations of the inamdar and his tenant under the Tenancy Act, which were saved for a limited period upto July 1, 1960. The inam land lost its inam character and ceased to be governed by the special laws relating to inam lands previously applicable to it. The Land Revenue Act became applicable and the land became liable to payment of land revenue. The State acquired title to and proprietary rights in the land, but possession of the land was to continue with the tenant subject to his liability to pay rent to the inamdar and to the right of the inamdar to recover possession from him in accordance with law. This relationship between the inamdar and his tenant came to an end on July 1, 1960, when the person in possession became entitled to the rights of an occupant under the Land Revenue Act.

Mr. Deshmukh has relied on the decision of a Division Bench of this Court in *Nama Handrale v. Shambhajirao*.⁴ In these applications it was held that after an inam was abolished, the ownership of the inam land did not stand transferred to and vest in the tenant under s. 38E of the Tenancy Act. That decision is correct, because s. 38E provides for the transfer of the ownership rights of the landholder to the protected tenant. As after July 20, 1955, the title to the land vested in the State, the landholder had no ownership rights left which the tenant could purchase under s. 38 and which could be transferred to him under s. 38E. The judgment contains observations that the rights of the tenant had come to an end with effect from July 20, 1955. For the reasons, which we have given, those observations do not appear to be quite correct.

In regard to the second question, sub-s. (1) of s. 44 of the Tenancy Act provides that a landholder may after giving notice to the tenant and making an application for possession as provided in sub-s. (2), terminate the tenancy of any land, if the landholder bona fide requires the land for cultivating it personally. Sub-section (2) states that the notice required to be given under sub-s. (1) shall be in writing and shall state the purpose for which the land holder requires the land and that an application for possession under s. 32 shall be made to the Tehsildar. Two things are, therefore, necessary for terminating a tenancy under sub-s. (1) :

(1) A notice must be given to the tenant stating that the landholder requires the land for cultivating it personally, and

(2) the landholder must make an application for possession to the Tehsildar under s. 32 of the Act.

If these requirements are complied with, the tenancy stands terminated. Sub-section (2) of s. 32 provides that no landholder shall obtain possession of any land or dwelling house held by a tenant, except under an order of the Tehsildar, for which he shall apply in the prescribed form. A tenant is, therefore, en-

⁴ (1961) Special Civil Applications Nos. Chainani C.J. and Tambe J., on January 845 and 896 to 900 of 1960, decided by 24, 1961 (Unrep.).

titled to continue in possession of the land until the Tehsildar has made an order for possession being restored to the landholder. It has, therefore, been urged that he continues to be a tenant until the Tehsildar has made his order. The manner in which a tenancy is to be terminated is, however, laid down in s. 44. Under this section the tenancy terminates when after giving the requisite notice the landholder makes an application for possession to the Tehsildar. Thereafter the tenant's possession is not unlawful, but it is not held by him as a tenant. He has an estate in possession, which he will lose if the Tehsildar makes an order in favour of the landholder. If, however, the Tehsildar rejects the application of the landholder, the termination of tenancy by the landholder will become ineffective. The tenancy will revive and the tenant will continue in possession as if his tenancy had not been terminated. In this connection reference may be made to ss. 19 and 28. Section 19 provides for termination of a tenancy on other grounds, one of which is failure to pay rent within the prescribed time. The first proviso in sub-s. (2) states that no tenancy of any land held by a tenant shall be terminated on any of the grounds mentioned in this sub-section, unless the landholder gives six months' notice in writing intimating his intention to terminate the tenancy and the grounds for such termination. Six months' notice as provided in this sub-section is, therefore, required for terminating a tenancy. Sub-section (1) of s. 28 is in the following terms:

"(1) Where a tenancy of any land held by a tenant is terminated for non-payment of rent and the landholder files any proceeding to eject the tenant, the Tehsildar shall call upon the tenant to tender to the landholder the rent in arrears together with the cost of proceeding within ninety days from the date of the order, and, if the tenant complies with such order, the Tehsildar shall, in lieu of making an order of ejectment, pass an order directing that the tenancy has not been terminated, and thereupon the tenant shall hold the land as if the tenancy had not been terminated."

The opening words of this sub-section make it clear that a proceeding to eject a tenant can be instituted after the tenancy has been terminated, that is to say, an application for possession can be made to the Tehsildar under s. 32 only after the tenancy has been terminated. A tenancy is, therefore, terminated by the notice given under sub-s. (2) of s. 19 and an order of the Tehsildar is not required for this purpose. In fact until the tenancy is terminated, the landholder does not get a right to possession of the land. The words "as if the tenancy had not been terminated" at the end of the sub-section also imply that the tenancy had previously been terminated. Section 28, therefore, also shows that a tenancy is terminated by giving a notice to the tenant and that it does not continue until the Tehsildar has made an order for possession of the land.

Sub-section (10) of s. 44 states that the State Government shall provide by rules for—

(iv) the time when the termination of tenancy will take effect.

Rule 28 of the Hyderabad Tenancy and Agricultural Lands Rules prescribes the manner of conducting inquiries into applications for possession of lands made under s. 44. Sub-rule (5) of this rule states that if the Tehsildar grants the application, the termination of the tenancy of the land, in respect of which the application is granted, shall take effect from the commencement of the year following the year in which the application is granted. It has been contended by Mr. Deshmukh that as under these provisions the termination of the tenancy does not take effect until the commencement of the revenue year following that in which the application is granted, the tenancy continues upto that time. These provisions must, however, be read along with sub-s. (1) of s. 44, which lays down the manner in which a landholder may terminate a tenancy. Under this sub-section a tenancy is terminated when after giving the prescribed notice the landholder makes an application for possession. The words used in sub-s. (10) (iv) are not "when the tenancy will be deemed to

have been terminated", but "when the termination of tenancy will take effect." These words imply that the tenancy had terminated earlier and that the rules may provide for the time when effect is to be given to the termination of the tenancy, i.e. when the consequences of the termination of the tenancy will issue. It seems to us, therefore, that sub-r. (5) of r. 28 only provides for the time when the consequences, which arise from the termination of the tenancy, will take effect, that is, when the landholder will be entitled to obtain actual possession of the land.

The view, which we are taking, is in accordance with that taken by a Full Bench of this Court in *Ganpati Appa v. Maruti Bala*.⁵ That decision was given under corresponding provisions of the Bombay Tenancy Act. It was held that a tenancy terminates on the expiry of the period of notice given by the landlord to his tenant terminating his tenancy. A distinction was drawn between the right to terminate a tenancy and the right to obtain possession and it was held that the right to possession accrues on the termination of the tenancy, that is, on the expiry of the period of notice given by the landlord to the tenant. Similar view was taken in *Ramchandra Anant v. Janardan*,⁶ where at p. 641 it was observed:

"...Under the ordinary law, if a tenant continues in possession after his tenancy has been determined, his possession is protected by law and he cannot be ousted except in due course of law, but he has no right to possession after the termination of tenancy. Under the Tenancy Act, however, even after his tenancy has been determined by a notice given by his landlord, the tenant has a legal right to continue in possession, until the Mamlatdar has made an order for possession being restored to the landlord. During the intervening period, the tenant has an estate in possession, of which he can only be deprived by an order of the Mamlatdar."

In our opinion, therefore, the tenancy terminates when the landholder makes an application for possession of the land to the Tehsildar as provided in sub-s. (2) of s. 44.

The next question which arises for consideration is about the date, possession on which would entitle the inamdar, Kabiz-e-kadim, permanent tenant or tenant holding from the inamdar to the rights of an occupant under s. 5 or 6, as the case may be. These sections provide for grant of occupancy rights in occupied land, which is defined in cl. (g) of s. 2 to mean inam land, which is not uncultivated land, waste land, pasture land or forest land or not comprising a mine, quarry, tank, irrigation works, stream or river and which is in the actual or constructive possession of an inamdar. These sections came into force on July 1, 1960. The position as on this date should, therefore, be considered. Consequently possession, which would entitle a person to claim the rights of an occupant, would be possession on July 1, 1960. The date of vesting has no bearing on this question. This is also clear from the fact that for the period from July 20, 1955, to July 1, 1960, the inamdar was made liable for payment of land revenue. He would not have been made so liable, if it was intended that the tenant in possession on the date of vesting July 20, 1955, should become the occupant. Possession as on July 1, 1960, should, therefore, be considered for deciding the question who was entitled to become an occupant under ss. 5 and 6.

The possession which would entitle a person to be recognised as an occupant must also be lawful possession. If, therefore, a person had unlawfully taken possession of a land, he could not claim occupancy rights unless the right to recover possession from him had become barred by limitation before July 1, 1960. In cases in which the land had been leased to a tenant, the sections specifically provide for occupancy rights being granted to the tenant, even though the constructive possession was with the inamdar. The possession, which will determine the question of occupancy rights as between an inamdar and his tenant must, therefore, be actual possession. If, therefore, the inam-

dar had obtained the actual possession of the land before July 1, 1960, or if a final order for possession had been made in his favour before this date, which entitled him to actual possession on or before July 1, 1960, then the inamdar would be entitled to the rights of an occupant.

The next question to be considered is about proceedings for possession which were pending on July 1, 1960. There is no provision in the Act, which saves pending proceedings. The answer to the question will, therefore, depend upon who was entitled to actual possession on July 1, 1960. It has been urged that as in such cases the tenancy had been terminated before July 1, 1960, the person against whom the application had been made was no longer a tenant and that consequently he could not be recognised as an occupant. The word "inamdar" in ss. 5 and 6 includes a person who had ceased to be an inamdar by reason of the inam having been abolished on July 20, 1955. The word "tenant" in these sections must, therefore, also be held to include a person whose tenancy had been terminated and against whom an application for possession was pending. An inamdar like any other landholder acquires a right to apply for possession when the tenancy is terminated. Under s. 32 he cannot, however, take actual possession of the land except under an order of the Tehsildar. Until, therefore, an order for possession is made in favour of a landholder, he has no right to and cannot take actual possession of the land. He cannot be deemed to be in possession because he has terminated the tenancy or made an application for possession. Where, therefore, no order for possession had been made before July 1, 1960, then as the landholder was not entitled to actual possession on July 1, 1960, the tenant and not the landholder would become the occupant. Where, however, an order for possession had been made in favour of the landholder before July 1, 1960, but that order was the subject-matter of appeal or revision or other proceeding in a superior Court, then the final order made in that proceeding would determine the question of occupancy rights. If the order for possession made in favour of the landholder before July 1, 1960, is finally upheld, then he would be entitled to the rights of an occupant. If, on the other hand, the final order is in favour of the tenant, then he would become an occupant under the above provisions.

Our reply to the first question is, therefore, in the affirmative. The reply to the second question is that the tenancy terminates on the date on which the landholder makes an application for possession of the land to the Tehsildar as provided in sub-s. (2) of s. 44 of the Act. The reply to the third question is that possession as on July 1, 1960, should be considered for deciding who is entitled to the rights of an occupant. The reply to the fourth question is that the inamdar would be entitled to the rights of an occupant if a final order for possession had been made in his favour before July 1, 1960. He would also be so entitled if an order for possession was made before July 1, 1960, and if such order is not set aside in appeal or revision or other proceeding by a superior Court. Where, however, no order for restoration of the possession to the landholder had been made before July 1, 1960, or if the order for possession was subsequently set aside, the tenant would become the occupant with effect from July 1, 1960.

Answers accordingly.

APPELLATE CIVIL.

Before the Hon'ble Mr. H. K. Chainani, Chief Justice, and Mr. Justice Kotval.

ABDUS SHUKOOR SHAIKH DAWOOD v. A. M. CHATTERJEA.*

Foreign Exchange Regulation Act (VII of 1947), Secs. 2(d), 4(1), 5(1)(b), 23, 5(1)(f) & (e)—Defence of India Rules. Rule 91(1)—Cheque drawn in Indian currency payable in Indian as well as foreign currency—Whether such cheque foreign exchange within s. 2(d)—Construction of statute—Two views reasonably possible of provisions of penal statute—Court should prefer which.

A cheque or a bill of exchange expressed or drawn in Indian currency, which is payable in Indian as well as in foreign currency, is not foreign exchange within the meaning of the Foreign Exchange Regulation Act, 1947.

Where two views are reasonably possible about the provisions of a penal statute, the Court must prefer the one which imposes a lesser restriction and a lesser obligation on a citizen and which does not make a citizen liable to a penalty in a doubtful case.

L. N. E. R. v. Berriman,¹ referred to.

THE facts appear in the judgment.

Sharad Manohar, with *H. J. Aranka*, for the petitioner.

V. H. Gumaste, Additional Government Pleader, with *A. A. Choudhury*, for the respondent.

CHAINANI C. J. The petitioner was formerly employed in Arabian American Oil Company at Dhahran in Saudi Arabia. Some time about September 1959 his services came to an end. The petitioner was then given two cheques, one of which he encashed in Saudi Arabia. The second cheque, which has given rise to the present proceeding, was drawn by the American Oil Company in Indian currency on September 29, 1959. It was drawn on the "Netherlands Trading Society, Al Khobar through the Netherlands Trading Society, Bombay". Al Khobar is in Saudi Arabia. The cheque bore the endorsement "Pay to the order of Abdus Shukoor (the petitioner) Rs. 16504.31". The petitioner brought this cheque to India and gave it to one Badshah & Co., Bombay, who according to the petitioner, paid him the amount due on it. It appears that Badshah & Co. then sent this cheque by post to Bhatkal Provision Stores, Al Khobar. The cheque was intercepted in transmission and was sent to the Enforcement Directorate. An enquiry was started. Notice was issued to the petitioner and he was asked to show cause why adjudication proceedings as contemplated by s. 23D of the Foreign Exchange Regulation Act, 1947, should not be held against him for his having contravened the provisions of s. 4(1) of the Act. In reply the petitioner stated that he did not know that the cheque was foreign exchange or that the Act applied to it. He admitted that he had encashed the same with Badshah & Co., Bombay, but he stated that he had done so in ignorance of law. Respondent No. 1 held that the petitioner was guilty of contravening the provisions of s. 4(1) of the Act and imposed upon him a penalty of Rs. 2,000. That order is being challenged in the present petition.

Sub-section (1) of s. 4 of the Foreign Exchange Regulation Act states that except with the previous general or special permission of the Reserve Bank, no person other than an authorised dealer shall buy, sell or exchange with, any person not being an authorised dealer, any foreign exchange. It is not in dispute that Badshah & Co. were not authorised dealers. Consequently, if the cheque which the petitioner had given to Badshah & Co. was foreign exchange, then the petitioner will be held to have contravened the provisions of this

*Decided, April 5, 1965. Special Civil Application No. 2095 of 1963. 1 [1946] 1 All E.R. 255.

section. The main question to be decided in this application, therefore, is whether this cheque was foreign exchange within the meaning of the Act.

“Foreign exchange” is defined in cl. (d) of s. 2 as under:

“‘foreign exchange’ means foreign currency, and includes all deposits, credits and balances payable in any foreign currency, and any drafts, traveller’s cheques, letters of credit and bills of exchange, expressed or drawn in Indian currency but payable in any foreign currency.”

At our instance enquiries on certain points were made by the Reserve Bank from the branches of the Netherlands Trading Society (now called Algemene Bank Nederland N. V.) at Al Khobar and Bombay and the replies which have been received have been filed along with the affidavits of the Superintendent of the Enforcement Directorate. The cheque was drawn on the Al Khobar branch of the Bank, evidently because the American Oil Company had an account with that branch. If the cheque had been presented at this branch, the amount would have been paid in Saudi Arabian Riyals, as Indian Rupees are not legal tender in Saudi Arabia, though Saudi Arabian Riyals so obtained could thereafter have been exchanged for Indian Rupees. The information now made available also shows that under an agreement between the Bank and the Oil Company, cheques marked “Through Netherlands Trading Society, Bombay”, if presented at the Bombay branch of the Bank, are paid by that branch without reference to its Al Khobar office. The petitioner could, therefore, have presented the cheque for payment at the Netherlands Trading Society, Bombay, and received from it the amount payable on the cheque. Although, therefore, the cheque was expressed and drawn in Indian currency, it could have been paid both in Indian currency if it was presented for payment in Bombay and in foreign currency (Saudi Arabian Riyals) if it had been presented at Al Khobar.

The learned Additional Government Pleader has urged that the word “payable” necessarily implies that it must be payable according to law. He has, however, conceded that the arrangement arrived at between the American Oil Company and the two branches of the Netherlands Trading Society was a lawful arrangement. Consequently the cheque could lawfully have been paid in India.

The learned Additional Government Pleader has urged that as the cheque was also payable in foreign currency (Saudi Arabian Riyals), it was foreign exchange as defined in the Act. Mr. Sharad Manohar has, on the other hand, contended that the word “but” implies that in order to be foreign exchange, the cheque must be payable only in foreign currency. According to the dictionary the word “but” is used in more than one sense. It is frequently used in the sense of “only”, as for instance, in the sentence, “He is but a child”. It also means “nevertheless; however; yet”. As to in what sense it is used in a particular provision must, therefore, be decided by reference to the context.

Our attention has been invited to sub-rule (1) of Rule 91 of the Defence of India Rules made under the Defence of India Act, 1939, in which the expression “foreign exchange” was defined to mean any bill or promissory note, payable otherwise than in rupees and any credit or balance otherwise than in rupees. For the words “payable otherwise than in rupees” the words “payable in foreign currency” have been used in the present definition. The difference in the language does not, however, seem to be material, because if the bill of exchange was payable otherwise than in rupees, then it was necessarily payable in foreign currency.

One of the objects of the Act is to regulate and control dealings in foreign exchange. The provisions of the Act, therefore, require that such dealings should take place through authorised dealers. It has been urged that if we were to accept the argument, which has been advanced on behalf of the petitioner, a person will be able to acquire foreign exchange otherwise than through an authorised dealer. For instance, if in the present case the cheque

had not been intercepted in transmission, Badshah & Co. would have been able to acquire foreign exchange against this cheque through the person to whom they had despatched it. They could, however, not have done so lawfully. Sub-section (1)(b) of s. 5 read with s. 23 makes it an offence to negotiate any bill of exchange, so that a right to receive a payment is created in favour of any person outside India. Similarly, s. 5(1)(f) read with cl. (e) makes it punishable to negotiate any bill of exchange, so that a right to receive a payment is created in favour of any person as consideration for the acquisition by any person of property outside India. No foreign exchange could, therefore, have been lawfully acquired against the above cheque.

As the cheque in the present case was payable both in rupees and in foreign currency, in order to hold it to be foreign exchange, we will have to add the word "also" before the words "in any foreign currency". In any case, as two views are reasonably possible, we must prefer the one which imposes a lesser restriction and a lesser obligation on a citizen and which does not make a citizen liable to a penalty in a doubtful case. As was observed by Lord Simonds in *L. N. E. R. v. Berriman*¹ "a man is not to be put in peril upon an ambiguity".

We are, therefore, of the opinion that a cheque or a bill of exchange expressed or drawn in Indian currency, which is payable in Indian as well as in foreign currency, is not foreign exchange within the meaning of the Act. We, therefore, set aside the order made by the Director of Enforcement on November 22, 1963, imposing upon the petitioner a penalty of Rs. 2,000. As the point on which the petitioner has succeeded does not appear to have been raised previously, we make no order as to costs.

Order set aside.

CRIMINAL APPELLATE.

Before Mr. Justice Gokhale.

THE POONA ELECTRIC SUPPLY CO., LTD.

v.

THE STATE OF MAHARASHTRA.*

Indian Electricity Act (X of 1910), Secs. 33, 36A, 37—Indian Electricity (Amendment) Act (XXXII of 1959), Sec. 24—General Clauses Act (X of 1897), Sec. 24—Constitution of India, Art. 20—Notification issued under s. 33 prior to its amendment whether actually and factually in force at date of its amendment—Notice required to be given under notification whether must be in writing—Meaning of expression "unless it is otherwise expressly provided" in s. 24, General Clauses Act.

The notification issued by the Government of Bombay on February 9, 1953, under s. 33 of the Indian Electricity Act, 1910, before its amendment, was actually and factually in force on the date on which s. 33 as amended by the Indian Electricity (Amendment) Act, 1959, came into force.

M/s. W.R.E.D. Co. Ltd. v. State of Madras,¹ explained.

*In re Lingareddi*² and *Chief Inspector of Mines v. K. C. Thapar*,³ referred to.

The notification to the extent that it requires notice to be given regarding the particulars mentioned therein must be considered to be an absolute requirement which must be complied with. But to the extent to which it says that it must be in writing, it must be treated to be directory and not absolute. Substantial compliance with the requirement of notice, if proved, must be treated as sufficient compliance for the purpose of s. 33 of the Indian Electricity Act, 1910.

The expression "unless it is otherwise expressly provided" in s. 24 of the General Clauses Act, 1897, means that the notifications, rules, etc. under the repealed Act

¹ [1946] 1 All E.R. 255.

*Decided, December 2/3, 1964. Criminal Revision Application No. 257 of 1964.

² [1962] A.I.R. S.C. 1753.

³ [1956] A.I.R. Andhra 24.

³ [1961] A.I.R. S.C. 838.

shall continue in force provided they are not inconsistent with the re-enacted provision, unless there is an express provision in the re-enacted legislation to the effect that they shall not so continue in force.

THE facts appear in the judgment.

F. S. Nariman, instructed by *Payne & Co.*, for the petitioners.

V. T. Gambhirwala, Assistant Government Pleader, for the State.

GOKHALE J. Some interesting questions of law arise for decision in this revision application which is filed by two of the three accused, who were convicted by the learned Judicial Magistrate, First Class, Court No. 5, Poona, in a prosecution for having committed certain offences under the Indian Electricity Act, 1910. Petitioner No. 1 is a company registered under the Indian Companies Act and owns the electric supply lines in the city of Poona and its surroundings. Petitioner No. 2 is the general manager and was responsible for the conduct of the business of the company at the material time. Accused No. 3, who was the Superintendent of the Ganeshkhind Receiving Station and as such was in charge of that station, having been acquitted, is not a party to this revision application.

There was a major accident in the Ganeshkhind Receiving Station of the Poona Electric Supply Company on May 15, 1961, at about 3 p.m. The prosecution case was that the oil circuit breaker of one of the two incoming feeders burst and affected the supply of electricity, resulting in the cutting of the supply to the city of Poona and its surroundings. As a result of the burst, nine persons, including original accused No. 3, received injuries and two of them succumbed to their injuries. The complaint was filed by one Yeshwant Gajanan Penkar, who was the Electrical Inspector for the city of Poona, on June 12, 1962, alleging, firstly that the company was bound to inform him about the accident within 24 hours of its occurrence and that not having been done, the company and accused No. 2, who was its General Manager, had committed an offence under s. 33 of the Indian Electricity Act, 1910. The other allegation was that in the inquiry which was made after the accident relating to the causes of the accident it had transpired that the accident was due to the fact that the apparatus of receiving electric supply was not maintained in accordance with the standards of Indian Standards Institution. It was also alleged that the company had not changed the oil since September 3, 1958, and had thus acted in contravention of the Code of practice for maintenance of insulating oil set down by the Indian Standards Institution. On these and other allegations it was stated that accused Nos. 2 and 3 who were in charge of the works of the company were required to maintain the apparatus of receiving electric supply in accordance with the standards of the Indian Standards Institution as required by Rule 29 of the Indian Electricity Rules, 1956, and they having failed to do so had committed an offence under r. 29 read with r. 141 of the Indian Electricity Rules. The learned Magistrate acquitted accused No. 3 on all the counts. He acquitted accused Nos. 1 and 2 of the offence under r. 29 read with r. 141 of the Indian Electricity Rules. He, however, convicted them for having committed the offence under s. 33 read with s. 47 of the Indian Electricity Act and sentenced both the accused to pay a fine of Rs. 170 each and directed that in the event of accused No. 2 not paying the fine he should suffer S.I. for one month. As regards accused No. 1, i.e. the Company, he directed that the fine should be recovered from the property of the company. There was an appeal against this order of the learned Magistrate to the learned Sessions Judge and the learned Additional Sessions Judge, Poona, who heard the appeal, confirmed the convictions and the sentences imposed on the accused and dismissed the appeal. That is why the present revision application has been filed by the two accused against the order of the learned Additional Sessions Judge.

It was not disputed that a written notice relating to the accident, as required by the Electricity Act, was not given on May 15, 1961. The defence of the accused was that although a written notice was not given within 24 hours of the accident, they had not committed any offence under s. 33 of the Indian Electricity Act read with the relevant rules made thereunder, inasmuch as intimation of all the particulars required to be communicated in a written notice had already been communicated to the Electrical Inspector within 24 hours of the accident and that was enough compliance with the requirements of s. 33 of the Indian Electricity Act.

Before discussing the evidence on the question whether intimation relating to all particulars was given or not, it would be convenient to refer to the relevant provisions of the Act and the rules so that the contentions made before me by the learned counsel on behalf of the petitioners can be properly appreciated. The Indian Electricity Act first came on the statute book in March 1910, but it has undergone many changes since then and one of the changes with which we are concerned in this application was the amendment effected by the amending Act No. XXXII of 1959, called the Indian Electricity (Amendment) Act, 1959. By s. 24 of this Act s. 33 was substituted. Before the substitution, sub-s. (1) of s. 33, to the extent relevant, was as follows:—

“33. (1) If any accident occurs in connection with the generation, transmission, supply or use of energy... and the accident results or is likely to have resulted in loss of life or personal injury, such persons shall give notice of the occurrence and of any loss of life or personal injury, actually occurred by the accident, in such form and within such time and to such authority as the State Government may by general or special order direct.”

Under this section, prior to the amendment, a notice of the accident had to be given to such authority as the State Government may by general or special order direct. This notice had to be given in such form and within such time and to such authority as the State Government may by general or special order direct. Therefore, the time within which the notice was to be given, the form in which it was to be given and the authority to which it was to be given were to be determined by the State Government. Before the substitution of this section by Act No. XXXII of 1959, a notification had been issued by the Government of Bombay on February 9, 1953, prescribing the requirements of the notice contemplated by s. 33 and the authority to which the notice was required to be given. Under this notification the notice had to be given within 24 hours of the occurrence of the accident and it had to be addressed to the Electric Inspector, in writing. It was also required to be given to the District Magistrate if the accident occurred outside the limits of Greater Bombay, or to the Commissioner of Police, if the accident occurred within Greater Bombay. The particulars required to be communicated by such notice to these authorities were also indicated in this notification and it would be necessary to reproduce that part of the notification. It is as follows:

“...every such notice shall contain full particulars of the time, place and nature of the accident and of any loss of life or personal injury actually occasioned by the accident and information as regards the cause or the probable cause of such accident.”

The Schedule mentions the Electric Inspector, Poona, as the authority to whom the notice is required to be addressed for accidents occurring within the areas comprising the district of Poona. In this context, it would now be convenient to refer to the amended s. 33(1) which was substituted by Act No. XXXII of 1959. Sub-section (1) of s. 33 is as follows:

“33. (1) If any accident occurs in connection with the generation, transmission, supply or use of energy in or in connection with, any part of the electric supply-lines or other works of any person and the accident results or is likely to have resulted in loss of human or animal life or in any injury to a human being or an animal, such person shall give notice of the occurrence and of any such loss or injury actually caused by the accident, in such form and within such time as may be prescribed, to the Elec-

trical Inspector and to such other authorities as the appropriate Government may by general or special order direct."

It is evident that after the substitution of the said section the notice of the occurrence of any such loss or injury actually caused by the accident is required to be given in such form and within such time as may be prescribed. Under s. 2(j) of the Act "prescribed" means prescribed by rules made under the Act. The notice, therefore, would have to be given in such form and within such time as may be prescribed under the rules framed under the Act. Under the section as it stood prior to the amendment, the notice had to be in such form and within such time and to such authority as directed by the State Government by a general or special order. Similarly, under the amended section it is provided that the notice in the form and within the time prescribed under the rules must be given to the Electrical Inspector and in addition to such other authorities as the appropriate Government may by general or special order direct. Section 36A of the Act constitutes a Board called the Central Electricity Board to exercise the powers conferred by s. 37. Section 37 provides for the power of the Board to make rules, and one of the items in respect of which the Board can make rules is, under cl. (1) of s. 37, "to provide for any matter which is to be or may be prescribed". After the amendment, therefore, the form in which and the time within which the notice has to be given would have to be provided in the rules framed by the Board under s. 37 of the Act.

Now, it is common ground that the rules which have been framed by the Board do not provide for the form in which and the time within which the notice required to be given under s. 33(1) has to be given. The prosecution, therefore, relied on the notification issued by the Government of Bombay on February 9, 1953, under the section as it stood prior to the amendment of the Act by Act No. XXXII of 1959. The contention was that the notification issued under the section before its substitution in 1959 continued in force and it was obligatory on the company and the General Manager to have given notice in writing to the Electrical Inspector, Poona, within 24 hours of the occurrence, and since admittedly no written notice was given till May 22, 1961, the accused had committed an offence under s. 33 read with s. 47 of the Act.

It was the defence of the accused that the notification was no longer in force and the rules framed by the Board under s. 37 of the Act not having provided for the form in which and the time within which the notice under s. 33(1) was required to be given, there was no obligation to give any such notice. In the alternative, it was contended that even if a notice was required to be given within 24 hours there was substantial compliance of that requirement inasmuch as such material particulars as were required to be communicated to the Electrical Inspector under the notification had in fact been communicated and the accused had, therefore, committed no offence.

The learned Magistrate took the view that by virtue of s. 24 of the General Clauses Act the notification has continued in force and it shall be deemed to have been made or issued under the provision re-enacted, i.e., in this case, the section which was substituted by Act No. XXXII of 1959. He also negatived the argument that the notification, after the re-enactment of the section, was not law in force at the time of the commission of the act charged as an offence. Before dealing with the alternative argument as to substantial compliance of the notification, it would be convenient to refer to the two contentions raised on behalf of the defence which, if accepted, will go to the root of the matter and will render the consideration of the other question unnecessary.

The first contention of Mr. Nariman, the learned counsel appearing for the petitioners, was that the notification which was issued under s. 33(1) prior to its substitution by Act No. XXXII of 1959 was not the law actually and factually in existence at the relevant time and, therefore, the accused could not be convicted for the offence charged against them. Reliance was placed on art. 20 of the Constitution in support of this argument. Article 20, to the extent it

is relevant, is as follows:

"No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence..."

Mr. Nariman says that even assuming that s. 24 of the General Clauses Act attracted the notification issued under s. 33, before its re-enactment, it cannot be said to be law actually and factually in force. It would be necessary to refer to s. 24 of the General Clauses Act to appreciate this argument. Section 24, to the extent it is relevant for this petition, is as follows:

"24. Where any Central Act or Regulation is, after the commencement of this Act, repealed and re-enacted with or without modification, then, unless it is otherwise expressly provided, any appointment, notification, order, scheme, rule, form or bye-law, made or issued under the repealed Act or Regulation shall, so far as it is not inconsistent with the provisions re-enacted, continue in force, and be deemed to have been made or issued under the provisions so re-enacted, unless and until it is superseded by any appointment, notification, order..."

Under this section, where any Central Act is repealed and re-enacted, a notification issued under the repealed Act (1) shall continue in force and (2) shall be deemed to have been made or issued under the provisions so re-enacted. This would be so unless the re-enacted law expressly provides otherwise and the notification so continued or deemed to have been issued under the re-enacted law is not inconsistent with the provisions re-enacted. Mr. Nariman says that this section creates a fiction. It is a deeming provision under which a notification made or issued under the repealed provision is deemed to have been made or issued under the provision re-enacted. Such a notification, according to his contention, may be law by a fiction, but it was not law actually and factually in existence on the date of the re-enactment. He points out that the accident occurred on May 15, 1961, on which date the law in force was s. 33(I), as substituted by the Amendment Act No. XXXII of 1959 and this was the only section which could be said to be in force factually. The notification, according to his contention, may be in force by a legal fiction, namely, the deeming provision contained in s. 24 of the General Clauses Act, but that notification cannot be said to be the law in fact in force on the date on which the accident occurred. In his submission, art. 20 of the Constitution contemplates that no person shall be convicted except for violation of a law in force and the law in force must be law actually and factually in force. The contention put that way is no doubt attractive, but if the provisions of s. 24 of the General Clauses Act are considered, it is difficult to accept it and hold that the notification issued under the provision prior to its re-enactment was not law in fact in force on the material date. Of course, this assumes that s. 24 is applicable and there is no express contrary provision showing that the notification is superseded or that it is not inconsistent with the provisions re-enacted. Section 24 itself continues in force a notification which is not inconsistent. The only fiction is that the notification which is so continued in force shall also be deemed to have been made or issued under the provisions re-enacted.

Reference was made to the decision of the Supreme Court in *M/s. W. R. E. D. Co. Ltd. v. State of Madras*.¹ By an earlier decision the Madras Electricity Supply Undertakings (Acquisition) Act (XLIII of 1949) was declared *ultra vires* by the Supreme Court on the ground that the Act was beyond the legislative competence of the Madras Legislature. Thereafter the Madras Electricity Supply Undertakings Acquisition Act (XXIX of 1954) was passed. Some of its provisions had retrospective operation and in particular s. 24 of the Act validated orders made, decisions or directions given, notifications issued, proceedings taken and acts or things done under the former Act. It was contended that these notifications which were issued under the earlier Act contravened art. 31(I) of the Constitution which provided that "no person shall be de-

prived of his property save by authority of law". The expression "law", it was contended, postulates the existence of an antecedent law before a citizen is deprived of his property and since the notification was issued on the assumption that there was an antecedent law, viz., the earlier Act of 1949, it was not valid under art. 31 of the Constitution. In the context of this argument, the Supreme Court construed art. 20(1) of the Constitution. Emphasis was placed on the expression "law in force" used in art. 20(1). It is necessary to bear in mind that s. 24 of the validating Act was retrospective in the sense that it validated actions taken under the provisions of the earlier Act. In this context the Supreme Court held that it must be assumed that before the notification is issued the relevant provisions of the Act were in existence and so art. 31(1) must be held to have been complied with in that sense. That is why reference was made to the difference in the expressions "law" and "law in force". It was observed (p. 1760):

"...By using the expression 'law in force' in both the parts of Art. 20(1), the Constitution has clearly indicated that even if a criminal law was enacted by any legislature retrospectively, its retrospective operation would be controlled by Art. 20(1). A law in force at the time postulates actual factual existence of the law at the relevant time and that excludes the retrospective application of any subsequent law. Art. 31(1), on the other hand, does not use the expression 'law in force at the time'; it merely says 'by authority of law' and so, if a subsequent law passed by the legislature is retrospective in its operation, it would satisfy the requirement of Art. 31(1) and would validate the impugned notification in the present case."

The reference, therefore, was to legislation which validated *ex post facto* certain notifications etc. by making the validating Act retrospective in its operation. In that sense the Supreme Court referred to actual, factual existence of the law at the relevant time. The actual existence of the law by a fiction because of the retrospective validation by a validating statute would not make the law, which was otherwise invalid, factually in existence at the time when the alleged offence was committed. That is why the observations relate to validating legislation which has retrospective effect and which validates *ex post facto* certain notifications issued under the former Act. In this case the notifications issued under s. 33, as it was prior to its re-enactment, were not validated retrospectively by a subsequent validating legislation. On the contrary, s. 24 of the General Clauses Act provides that such notifications etc. shall continue in force and shall be deemed to have been made or issued under the provisions re-enacted. Therefore, simultaneously with the re-enactment of s. 33 the notifications issued under the repealed provision continued in force. They would be so continued if it were shown that there was no express provision otherwise or that they were not inconsistent with the provisions re-enacted.

Mr. Nariman then invited my attention to the decision of a Division Bench of the Andhra Pradesh High Court in *In re Lingareddi*.² Mr. Justice Bhimasankaram considered the meaning of the expression "law in force" in art. 20 of the Constitution. A similar argument in which reliance was placed on s. 24 of the General Clauses Act was advanced and it was contended that although the rules, etc. framed under the repealed Act may continue in force under the new Act for other purposes, still no punishment as provided under the new Act can be made for violation of the rules made under the earlier Act, because they are not rules really in force, but they are rules which are, under the General Clauses Act, only deemed to be in force. Dealing with this argument the learned Judge concluded as follows (p. 25):

"...The rules and regulations made under the old Act, it is true, continue in force, but, for the purpose of a criminal prosecution, they cannot be properly described as being 'laws in force' because they are not rules made under the new Act, but are only to be deemed to be made thereunder."

It is true that on this view taken by the Division Bench of the Andhra Pradesh High Court, laws which are deemed to be in force because of the application of s. 24 of the General Clauses Act cannot be held to be laws in force for the purpose of a conviction in a criminal prosecution for violation of rules or notifications under the old Act. But in view of what the Supreme Court has observed in *M/s. W. R. E. D. Co. Ltd. v. State of Madras*, to which I have just referred, it is clear that they were only referring to *ex post facto* legislation which validates retrospectively certain notifications or rules issued under an earlier Act.

The question which arose for decision by the Supreme Court in *Chief Inspector of Mines v. K. C. Thapar*³ was an identical question as to whether rules, notifications etc. which continue in force because of s. 24 of the General Clauses Act were laws in force, so that any violation of those rules or notifications could result in a conviction. It was held as follows (p. 845):

"Equally untenable is Mr. Pathak's next contention that the contravention of the Indian Coal Mines Regulations, 1926, which were at the date of contravention 'deemed' to be regulations under the 1952 Act, was not a violation of a law in force on such date, so that Art. 20(1) is a bar to the conviction of his clients. The relevant portion of Art. 20(1) lays down that no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence. The result of this is that if at the date of the commission of an act, such commission was not prohibited by a law then in force, no future legislation prohibiting that act with retrospective effect will justify a conviction for such commission. In other words, if an act is not an offence at the date of commission, no future law can make it an offence. But how, on the facts of this case the accused can claim benefit of this principle embodied in Art. 20(1) it is difficult to see. They are being charged under s. 73 and s. 74 of the Mines Act, 1952, for the contravention of some regulations. Were these regulations in force on the alleged date of contravention? Certainly, they were, in consequence of the provisions of s. 24 of the General Clauses Act. The fact that these regulations were deemed to be regulations made under the 1952 Act does not in any way affect the position that they were laws in force on the alleged date of contravention. The argument that as they were 'regulations' under the 1952 Act in consequence of a deeming provision, they were not laws in force on the alleged date of contravention is entirely misconceived."

The Supreme Court has thus made a distinction between laws which are continued in force and laws deemed to be in force by a future legislation, which prohibited certain acts with retrospective effect. The moment s. 33(1) was re-enacted, all notifications issued under the earlier s. 33 were continued in force by virtue of s. 24 of the General Clauses Act and there is no question of any legislation in future making them effective from an antecedent date, so as to give them retrospective effect. The notification must, therefore, be said to be actually and factually in force on the date on which the re-enacted provision came into force. It is true that the decision in *Chief Inspector of Mines v. K. C. Thapar* was not referred to in the later decision, viz., *M/s. W. R. E. D. Co. Ltd. v. State of Madras*. But that must be presumably because the question which arose in the later case was only regarding a validating legislation which retrospectively validated certain notifications issued under the earlier Act. In this view of the matter, it is not possible to agree with the contention that the notifications, for the breach of which the petitioners have been convicted, were not actually and factually in force on the date of the offence.

The next argument of Mr. Nariman is that s. 24 of the General Clauses Act will not protect the notifications in question, firstly, because the re-enacted s. 33(1) of the Act makes express provisions for laying down the form in which and the time within which the notice of the occurrence is required to be given. He also says that under the re-enacted provision notice has to be given to the Electrical Inspector and to such other authorities as the appropriate Government may by general or special order direct. Under the repealed s. 33(1) the

notice had to be given to such authority as the State Government may by general or special order direct. In his submission the re-enacted s. 33(1) expressly provides that the notice must be given to the Electrical Inspector, and, only in addition, to such other authorities as the appropriate Government may by general or special order direct. Similarly, under the repealed s. 33(1) the form in which and the time within which the notice was to be given was to be determined by the State Government. But under the re-enacted s. 33(1) the form in which and the time within which the notice is to be given is as may be prescribed, i.e. as prescribed in the rules framed by the Central Electricity Board. This, according to Mr. Nariman, is an express provision and since there is an express provision the old notification issued under the repealed s. 33(1) cannot be said to have continued in force. Now, it is not possible to accept this argument because, in my view, it does not correctly appreciate the expression "unless it is otherwise expressly provided" in s. 24 of the General Clauses Act. All that the expression in that section means is that the notifications, rules, etc. under the repealed Act shall continue in force provided they are not inconsistent with the re-enacted provision, unless there is an express provision in the re-enacted legislation to the effect that they shall not so continue in force. There is no doubt that after the amendment of the Act by Act No. XXXII of 1959 there is no express provision to the effect that the notifications, rules, etc. under the repealed provisions shall not continue in force. The result is that such rules and notifications shall continue in force unless, of course, it is shown that they are inconsistent with the provisions of the re-enacted section. Mr. Nariman, therefore, also contends that the notifications are inconsistent with the re-enacted provision. According to him, the very fact that the power of making rules for prescribing the form in which and the time within which the notice is to be given is now of the Board, instead of the Government, the provision must be deemed to be inconsistent with the repealed provision. I do not think that this contention has any force. All that the re-enacted provision has done is that it has indicated a different manner prescribing the conditions of giving notice, but in substance it is a provision which is consistent with the earlier provision because it deals substantially with the requirement to give notice of the occurrence in a form prescribed and within the time prescribed. If any authority were needed, one may refer to *Chumilal v. State*,⁴ in which a similar contention was raised and negatived. The argument of Mr. Nariman, therefore, that s. 24 of the General Clauses Act will not protect notifications issued under the repealed s. 33(1) must fail.

The next argument is that even if the notification was in force and there was an obligation to give a notice of the occurrence, on the facts of this case it must be held that the requirement had been substantially complied with and the accused, therefore, cannot be held to be guilty of any offence. Mr. Nariman says that what is mandatory under the section and the notification is that a notice shall be given intimating to the Electrical Inspector full particulars of the time, place and nature of the accident and of any loss of life or personal injury actually occasioned by the accident and information as regards the cause or the probable cause of such accident. He contends that even though the notification of February 9, 1953, requires a notice in writing to be given within 24 hours, if, in fact, within that period, a notice intimating all the particulars required to be intimated under the notification has been given to the Electrical Inspector it must be held that such notice was in substantial compliance with the requirements of the notification and the provision that it must be in writing must be deemed to be a directory provision. In his submission, the enactment, namely, s. 33(1), imposed a duty on conditions, but these, not being conditions precedent to the exercise of jurisdiction, are subject to the maxim '*lex non cogit ad impossibilia aut inutilia*'. He argued that if all the particulars are shown to have been intimated to the Electrical Inspector, the insistence of a written

notice would not be justified because the performance of the condition that it should be a notice in writing would be idle and superfluous. He points out that there was clear evidence to show that the accused had within 24 hours of the occurrence given intimation of all the particulars referred to in the notification of February 9, 1953, to the extent to which it was possible to be done, and the mere fact that the notice was given on May 22, 1961, instead of within 24 hours, would not make any difference since the provision has been substantially complied with. It is a very interesting argument, but in order to appreciate it it would be convenient to refer to certain facts which have been brought out in the evidence. The accident occurred on May 15, 1961. A complaint had been filed by one Penkar, who was at the relevant time the Electrical Inspector. He has given evidence. One Deshpande, who was at the relevant time Assistant Electrical Inspector, has also given evidence. Penkar has stated that he first got the information of the accident at about 4.15 p.m. on that day from his sectional officer, one Kulkarni, on a telephone. Kulkarni's office is in the compound of Rajbhavan at Poona, which is near the Ganeshkhind Receiving Station where the accident occurred. When he got this information he called Deshpande and both went to the Ganeshkhind Receiving Station to find out what had happened. He saw there some ordinary persons and one Coyajee, who was a supervisor at that station. He found at that time that the circuit breaker of the incoming feeder No. 2 had burst and his conclusion was that oil had spread out. He, therefore, left Deshpande to make necessary inquiries and left for Rajbhavan to see that the supply of electricity there was not cut off. He admits that he himself did not make any investigation at the Ganeshkhind Receiving Station, because he left the matter of investigation to Deshpande. He also admits that he had ascertained the time of the accident from Coyajee and the probable cause of the accident had been ascertained by his assistant Deshpande. He also admits that further enquiries as to the cause of the accident could not be made since he could not obtain the statements of the injured who were in the hospital and Deshpande could not take those statements because of their condition. Then the following statements made by Penkar are material:

"I know that the persons who would be in a position to give more detailed information were lying in the hospital then. Up to 23-5-1961 none of the persons working in the switch room were able to give any statement. The first statement which we were able to get from any of the injured was on 31st May 1961. I know that the officers of the company were making efforts and were engaged in restoration of electricity supply to Poona on 15-5-1961."

From the evidence of Penkar it would be clear that even though he did not make any detailed enquiries he had obtained such information as he could, such as the time when the accident occurred, and he could not make any further enquiries because the persons who were injured in the accident were lying in the hospital and their statements could not have been obtained till May 31, 1961, till which time they remained in the hospital. It is also clear that detailed enquiries were left to be made by his assistant Deshpande who remained at the Ganeshkhind Receiving Station after Penkar left. It would, therefore, appear that Penkar in effect deputed Deshpande to continue the enquiry on that day. Deshpande also admits that he was left at the Receiving Station for further inquiry and Penkar left for Rajbhavan. He had in fact visited the injured persons within 2 to 4 days in the hospital and had attempted to obtain information from them, but their condition was such that they could not make any statement. He also admits that he was told by Shah, accused No. 2, that information could not be given because his staff members were engrossed with the work of restoring supply and that he would be in a position to give information after a few days. It is very material to refer to the following statements made by Deshpande in his cross-examination:

"On the date of accident when I had been to the spot of accident I was informed that number of employees were injured. So also I was shown the damaged O.C.B. of incoming feeder No. 2. I was told as to what had happened and how the serious fire

had squirted out. I had not got full details or the causes of accident but approximately I find that the cause of accident might be due to O.C.B. not functioning properly under fault conditions. I was there on spot from 4.30 to 5 p.m. I also looked to the various connections made to the switch-board panel. I found that those persons who could give more detailed information were already in hospital for treatment. When I have mentioned in examination-in-chief that I tried to get additional information it only means that the more detailed information regarding the accident. No further information was necessary apart from the details referred to above."

On this evidence there could be no doubt that excepting the exact cause of the accident, there was no information which Deshpande had not received during his visit to the Ganeshkhind Receiving Station on the date of the accident. The admission of Deshpande shows that he had notice of the time, the place and the nature of the accident. He had notice as to whether there was any loss of life or personal injury occasioned by the accident. He had information about the probable cause of the accident, although he had no information relating to the actual cause of the accident. He has admitted that such information could not be had because the employees who were injured were in the hospital and it was not possible to obtain their statements. He has fairly admitted that all the information which he wanted had become available to him on that day and no further information was necessary.

If this is the position, Mr. Nariman contends—and in my view rightly—that the requirements of the notification issued under the repealed s. 33 which was in force at that time had been substantially complied with. It is well-known that when a condition is impossible of performance, the condition must be treated as dispensed with and it is in such cases that the maxim '*lex non cogit ad impossibilia aut inutilia*' applies. In English the maxim means, "The law does not compel the impossible". To the same effect are two other maxims: "*Impotentia excusat legem*", which means "Inability is an excuse in law" and "*Argumentum ab impossibili plurimum valet in lege*" which means "An argument deduced from an impossibility greatly avails in law". On Mr. Deshpande's admission it was impossible to give the exact cause of the accident because the persons from whom that information could be obtained had been injured and were incapable of making a statement for a number of days after the accident. Therefore, the requirement of the notification that the cause of the accident must be intimated was impossible of performance within 24 hours of the accident. So far as the probable cause was concerned, Deshpande himself admits that it had been known to him. The other particulars required to be intimated had also been admittedly known to Deshpande on the day of the accident. Mr. Nariman, therefore, relies on this maxim and on the observation in Maxwell on Interpretation of Statutes, Eleventh edn., at p. 373, which are as follows:

"Enactments which impose duties on conditions are, when these are not conditions precedent to the exercise of a jurisdiction, subject to the maxim *lex non cogit ad impossibilia aut inutilia*. They are understood as dispensing with the performance of what is prescribed when performance of it is idle or impossible".

If the non-compliance had arisen out of an excusable mistake, the Courts will sometimes exercise a discretion in extending the time when it does not affect the question of jurisdiction. The notification, to the extent that it requires notice to be given regarding the particulars mentioned therein, must be considered to be an absolute requirement which must be complied with. But to the extent to which it says that it must be in writing, it must be treated to be directory and not absolute. Substantial compliance with the requirement of notice, if proved, must be treated as sufficient compliance for the purposes of s. 33 of the Act. It is well settled that an absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directive enactment is obeyed or fulfilled substantially. It is clear on the facts of this case that insistence on a written notice, when in fact a full notice of all the particulars had been given, was insistence on an idle performance of a directory requirement. So far as

the particulars relating to the cause of the accident are concerned, it is clear from Deshpande's evidence that that condition was impossible of performance. Mr. Gambhirwala, who appeared for the State, contended that although all the particulars had been known to Deshpande on the date of the accident, the requirement of the notification that the notice must be in writing must be treated to be a mandatory provision since the notification is under a provision of a statute which provides for safety of the public and the workmen employed in an electrical undertaking and strict interpretation of that notification is necessary with a view to seeing that the very object and purpose of the notification is not defeated. There is no doubt that the object and purpose of requiring that notice of all these particulars must be given would be defeated if there is no compliance with the requirement of notice. But, if in fact there is substantial compliance with the notice and if all the particulars are found in fact to have been communicated to the Electrical Inspector, it is a case in which there is only a technical non-compliance which cannot defeat the object and purpose of the notification. I am satisfied on the evidence led on behalf of the prosecution itself in this case that the requirement of notice had been substantially complied with, although it was a technical non-compliance in the sense that the notice was not in writing. I would, therefore, accept the contention of Mr. Nariman that the accused in this case had not committed an offence for breach of the notification issued under the repealed s. 33(1) of the Act. I may mention that the maxim that 'law condones the impossible' has been applied by this Court in *Emperor v. Ganpat*⁵ in a criminal case. The Division Bench in its judgment observed as follows:

"In construing the provisions of a statute, regard must be had to the express terms of any limitation contained therein. If in the interpretation of a statute the Court finds a duty enjoined by it either impossible of performance and beyond the normal capacity of a reasonable or prudent man, or when performance in the strictest language of the enactment is either idle or impossible, then the enactment must be understood as dispensing with the strict performance of that duty."

I would, therefore, set aside the conviction and sentence imposed on the accused by the learned Magistrate and confirmed by the learned Additional Sessions Judge for the offence under s. 33 read with s. 47 of the Indian Electricity Act, 1910, and acquit them. Fine, if paid, be refunded.

Conviction and sentence set aside.

ORIGINAL CIVIL.

Before Mr. Justice Tarkunde.

CHOITHRAM VERHOMAL JETHWANI v. A. G. KAZI.*

Indian Passport Act (XXXIV of 1920)—Indian Passport Rules, 1950. Rule 3—Constitution of India. Arts. 14, 21, 19(1)(d) & (e), 73, 12; Seventh Schedule, List I, Item 19—Whether Government of India has absolute and unfettered discretion to grant or refuse passport to Indian citizen—Citizen of India whether has no right to get passport from Government of India—Right to go abroad whether part of "personal liberty" guaranteed to Indian citizen.

In the absence of any legislative provision to guide the exercise of the discretion in the matter of issuing passports, the Government of India must issue passports to all Indian citizens who apply for them.

Article 14 of the Constitution of India is expressly directed to the "State" (which includes the Government of India) and its effect is that, in the absence of any regulations in regard to the issue of passports, the Government of India must issue passports to all Indian citizens who ask for them, or to none at all.

Moreover, art. 21 of the Constitution recognises and protects the right of every person to "personal liberty" of which he cannot be deprived, "except according to procedure established by law." An Indian citizen has, therefore, the right, in the absence of any law to the contrary, to obtain a passport which is necessary for the exercise of his right to go abroad, which right is clearly a part of the "personal liberty" guaranteed to him.

V. G. Row v. State of Madras,¹ dissented from.

Abdul Rahim v. State of Bombay,² Bidi Supply Co. v. Union of India,³ Basheshar Nath v. I.-T. Commr.,⁴ The State of West Bengal v. Anwar Ali Sarkar,⁵ State of Orissa v. Dhirendranath Das,⁶ A. K. Gopalan v. The State,⁷ Kharak Singh v. The State of U. P.,⁸ Kent v. Dulles,⁹ Ebrahim Vazir Mavat v. The State of Bombay,¹⁰ L. C. Bhatia v. K. S. Dilipsinghji, Asst. Collector of Customs, Bombay¹¹ and Ismail Karmalli Pirbhoy v. R. C. Chawan,¹² referred to.

THE facts are stated in the judgment.

S. J. Sorabjee, with Rana, for the petitioner.

S. Baptista, for the respondents.

TARKUNDE J. This writ petition raises a question of considerable importance. The question can be given two alternative formulations: Do the Government of India have an absolute and unfettered discretion to grant or refuse a passport to a citizen of India? Alternatively, does a citizen of India have no right to get a passport from the Government of India?

It is common ground that the petitioner is a citizen of India. He says that he is a partner of a firm in Bombay which carries on the business of Bankers, Exporters and Importers, and also of a firm in Dubai, in the Persian Gulf, which carries on the business of Indent Agents and Importers. I am told that Dubai is part of a British Protectorate. The petitioner claims, and this is not disputed, that passports were granted to him during the period from October 1952 and October 1962 to enable him to make trips to Dubai and certain ports in the Persian Gulf. The last passport issued in favour of the petitioner expired on October 28, 1962. On January 10, 1963, the petitioner applied to the Regional Passport Officer, who is respondent No. 2 to this petition, for the grant of a new passport for a period of three years. That application was rejected by respondent No. 2 on May 24, 1963. The petitioner made some further efforts, but was informed by the Assistant Passport Officer, who is respondent No. 1 to this petition, by a letter dated June 27, 1963, that his office had nothing to add to the previous letter of May 24, 1963, and that the petitioner may appeal for a re-consideration of his case to the Chief Passport Officer, New Delhi. No reasons were communicated to the petitioner for the rejection of his application for a fresh passport. On these facts the petitioner filed this petition under art. 226 of the Constitution for an appropriate writ or direction to quash the order refusing to grant him a passport, and for a direction against the respondents requiring them to grant and issue to him a passport as applied for.

The petition is supported on three main grounds. It is alleged, firstly, that it is absolutely necessary for the petitioner to go abroad and to return to India for the purpose of his business, and that the refusal of the passport by the respondents amounts to a contravention of his fundamental right guaranteed by art. 21 of the Constitution. In this connection the petitioner says that it

1 [1954] A.I.R. Mad. 240.

2 [1959] A.I.R. S.C. 1315, s.c. 61 Bom. L.R. 1547.

3 [1956] A.I.R. S.C. 479.

4 [1959] A.I.R. S.C. 149.

5 [1952] S.C.R. 284.

6 [1961] A.I.R. S.C. 1715.

7 [1950] S.C.R. 88.

8 [1964] 1 S.C.R. 332.

9 (1958) 357 U.S. 116, 2 Law ed. 2nd series 1204.

10 [1954] S.C.R. 933.

11 (1959) O.C.J. Miscellaneous Petition No. 167 of 1959, decided by Shelat J., on June 16, 1959 (Unrep.).

12 (1960) O. C. J. Miscellaneous Application No. 299 of 1959, decided by K.K. Desai J., on July 8, 1960 (Unrep.).

is not possible for him to leave India without a passport, because the Government of India have issued instructions to the shipping and air companies not to take on board passengers leaving India without a valid passport, and also because, even if the petitioner were to go abroad without a passport, the entry into India without a passport is forbidden by law and involves penal consequences. The second ground of the petition is that the respondents' refusal to grant a passport to the petitioner amounts to an infringement of his right to enter India and to reside, settle and move freely in any part of India, and is, therefore, violative of the fundamental rights declared under art. 19(1) (d) and (e) of the Constitution. The petitioner claims, thirdly, that the refusal of a passport without assigning any reasons and without giving the petitioner any opportunity of being heard or of showing cause is arbitrary, that a number of passports have been given to various persons who are similarly situated as the petitioner, and that the refusal of a passport to the petitioner is a contravention of art. 14 of the Constitution, as it amounts to a discrimination against the petitioner.

An affidavit in reply to the petition was filed by respondent No. 2. He submits that by reason of the proclamation of Emergency, the petitioner is precluded by art. 358 of the Constitution from approaching the Court for an alleged breach of art. 19. He further says that the petitioner's application for a fresh passport was rejected because he (respondent No. 2) received a communication from the Government of India, Ministry of External Affairs, dated May 1, 1963, whereby he was directed to refuse passport facilities to the petitioner and to black-list his name for two years. He further says that the grant of a passport is within the absolute discretion of the Union of India, that there is no right in the petitioner to have a passport issued to him, and that there is no statutory obligation on the Union of India to issue a passport to the petitioner.

In view of the contents of this affidavit, the Union of India were added as respondents No. 3 to the petition. On behalf of respondents No. 3 an affidavit in reply to the petition has been filed by the Under Secretary to the Government of India in the Ministry of External Affairs. The affidavit says that there is no legal prohibition which prevents a citizen of India from going out of India without a passport, and that

"the instructions of the Government of India to the Carriers and Travel Agencies which have been issued from time to time that they should not take on board passengers leaving India without valid passports, do not constitute any legal bar to a Citizen leaving India without a passport".

The affidavit further says that the grant of a passport is within the absolute discretion of the Central Government, that there is no right in the petitioner to have a passport issued to him, and that

"the refusal to grant the passport to the Petitioner is a non-statutory administrative action"

which is not subject to judicial review. The affidavit further says that as the refusal to grant a passport was an administrative act, no show-cause notice was required to be issued to the petitioner.

It is not disputed on behalf of the petitioner that the order rejecting his application for a passport was made when the Proclamation of Emergency by the President was in operation, and that the provisions of art. 358 of the Constitution preclude him from having recourse to art. 19 for the purpose of impugning that order. Mr. Sorabjee, who appeared on behalf of the petitioner, confined his arguments to the alleged contravention of art. 21 and art. 14.

A passport is an official document issued in the name of the head of a State to a traveller for his safe passage to and protection in a foreign country, and is intended to be presented to a foreign Government for this purpose. (*Rex v. Brailsford*).¹ It is clear that a passport is issued to a traveller by the Gov-

ernment of his own country. In India, a passport is now issued in the following form:

"These are to request and require in the name of the President of the Republic of India all those whom it may concern to allow the bearer to pass freely without let or hindrance, and to afford him or her every assistance and protection of which he or she may stand in need".

(Basu's Commentary on the Constitution of India, 4th edn., Vol. 5, p. 371).

It is crucial to notice that the issue of a passport by the Government of India to a citizen of India is not regulated by any statute. However, the subject of passports and visas is included in Item 19 of List I (Union List) of the Seventh Schedule of the Constitution. Item 19 of List I reads:—

"Admission into, and emigration and expulsion from, India; passports and visas."

Article 73 of the Constitution defines the extent of the executive power of the Indian Union and provides, *inter alia*, that the executive power of the Union shall extend "to the matters with respect to which Parliament has power to make laws". It follows that, although the issue of passports by the Union Government is not regulated by any statute, the function of issuing passports is vested in the Indian Union.

A reference may next be made to the Indian Passport Act, 1920, and the Indian Passport Rules, 1950, issued thereunder. It is evident from the preamble of the Act that its purpose was to provide a statutory requirement that persons desiring to enter India shall be in possession of valid passports. Section 3 of the Act empowers the Central Government to make rules requiring that persons entering India shall be in possession of passports, and for all matters ancillary or incidental to that purpose. Section 5 of the Act empowers the Central Government to direct the removal of any person from India who, in contravention of any rule made under s. 3 prohibiting entry into India without passport, has entered therein. Rule 3 of the Indian Passport Rules, 1950, lays down that save as provided in r. 4, no person proceeding from any place outside India shall enter, or attempt to enter, India by water, land or air unless he is in possession of a valid passport conforming to the conditions prescribed in r. 5. Rule 4 provides for classes of persons who are exempted from the necessity of having a passport. We are not concerned with those exemptions in the present case. In *Abdul Rahim v. State of Bombay*,² the Supreme Court held that s. 3 of the Indian Passport Act, 1920, and rr. 3 and 4 of the Indian Passport Rules, 1950, applied to all persons including Indian citizens. The result is that an Indian citizen cannot enter India from abroad unless he is in possession of a valid passport.

With the background of this legal position, I will first consider the petitioner's contention that the claim made on behalf of the Government of India of absolute discretion to grant or refuse passports to Indian citizens is inconsistent with the fundamental right guaranteed by art. 14 of the Constitution. Article 14 lays down that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. This and the subsequent four articles have been placed in the Constitution under the heading "Right to Equality". The word "State" as defined by art. 12 includes the Government and Parliament of India, the Government and the Legislature of each of the States, and all local or other authorities within the territory of India or under the control of the Government of India. It follows that the right to equality which is guaranteed by art. 14 is designed to protect all persons against discriminatory treatment, irrespective of whether it results from legislative or from executive action. The claim of absolute and unfettered discretion to grant or to refuse passports is *ex facie* discriminatory, and, therefore, violative of art. 14 of the Constitution.

On behalf of the Government of India Mr. Baptista argued that the grant or the refusal of a passport was a purely administrative act, and that such an

act does not fall within the ambit of art. 14. The argument implies that a purely administrative act has greater validity than a legislative act, a view which is clearly untenable. In *Bidi Supply Co. v. Union of India*,³ the Supreme Court considered the validity of an order by which the assessment records of the petitioner in that case, which was a registered firm, were transferred from Calcutta where the head office of the firm was situated to the office of the Income-Tax Officer, Special Circle, Ranchi, with whom the petitioner was required to correspond in future regarding its assessment proceedings. The Supreme Court held that the order was not contemplated or sanctioned by the particular provision of the Income-tax Act under which it purported to have been made. Treating the order as a purely executive order, the Supreme Court observed (p. 484):—

"In the circumstances this substantial discrimination has been inflicted on the petitioner by an executive fiat which is not founded on any law and no question of reasonable classification for purposes of legislation can arise. Here 'the State' which includes its Income-tax department has by an illegal order denied to the petitioner, as compared with other Bidi merchants who are similarly situate, equality before the law or the equal protection of the laws and the petitioner can legitimately complain of an infraction of his fundamental right under Art. 14 of the Constitution."

It is thus clear that the protection given by art. 14 extends to all discriminatory action, whether executive or legislative. If any doubt existed on this question, it was removed by the judgment of S. R. Das C. J. in *Basheshar Nath v. I.-T. Commr.*⁴ His Lordship observed (p. 157):—

"...The underlying object of this Article is undoubtedly to secure to all persons, citizens or non-citizens, the equality of status and of opportunity referred to in the glorious preamble of our Constitution. It combines the English doctrine of the rule of law and the equal protection clause of the 14th Amendment to the American Federal Constitution which enjoins that no State shall 'deny to any person within its jurisdiction the equal protection of the laws'. There can, therefore, be no doubt or dispute that this Article is founded on a sound public policy recognised and valued in all civilised States".

After referring to the definition of "the State" in art. 12, his Lordship said (p. 158):—

"...Article 14, therefore, is an injunction to both the legislative as well as the executive organs of the State and the other subordinate authorities... It is not necessary, for the purpose of this appeal to consider whether an executive order is a 'law' within the meaning of Art. 13, for even without the aid of Art. 13, our right to the equal protection of the law is protected against the vagaries, if any, of the executive Government also... Thus Art. 14 protects us from both legislative and executive tyranny by way of discrimination".

In view of these observations of the Supreme Court, it is not necessary to refer to the American decisions which were cited by Mr. Sorabjee to show that the equal protection clause of the 14th Amendment to the American Constitution gave protection against legislative as well as executive discrimination.

As stated above, the function of issuing passports vests with the Government of India by virtue of art. 73 read with List I, Item 19 of the Seventh Schedule of the Constitution. Article 14 requires that that function shall be discharged by the Government of India without discrimination. The Legislature has not provided any guidance for the discharge of that function. I asked Mr. Baptista whether the Government of India have framed any administrative rules for the regulation of its function of issuing passports, and Mr. Baptista told me that no such rules have been framed. Under these circumstances, it must logically follow from the fundamental right to equality guaranteed by art. 14 of the Constitution that the Government of India can adopt either of two courses: they can refuse passports to all Indian citizens or grant passports to all Indian citizens. To grant passports to some and not

to others involves the exercise of arbitrary and unregulated discretion which is repugnant to art. 14. Out of these two alternatives, one is clearly excluded, for it is obvious that the Government of India cannot dispense with issuing passports altogether. It is true that the right to equality guaranteed by art. 14 is available to all persons, whether Indian citizens or not; but no persons other than Indian citizens require a passport from the Government of India. The petitioner has given in exh. D to the petition the names of six other Indians to whom passport facilities for going to Dubai were granted by the Government of India. It was not denied on behalf of the Government of India that passport facilities were granted to these persons. Since the Government of India have granted passports to some persons and since they must continue to grant passports to others, it must follow that, in the absence of any regulations which would justify a classification between those who are and those who are not entitled to passport facilities, the Government of India must grant passports to all Indian citizens who apply for them.

The Government of India's claim to an absolute and unfettered discretion of granting or refusing passport facilities appears to be founded on the fact that the Legislature has not made any law or regulation for the grant of those facilities. What is guaranteed by art. 14, however, is the rule of law and not equal subjection to lawless rule. Supposing the Legislature had passed a law bestowing upon the executive an absolute and unfettered discretion in issuing passports, the law would have been invalid by virtue of art. 14 of the Constitution (*The State of West Bengal v. Anwar Ali Sarkar*,⁵ *State of Orissa v. Dhirendranath Das*⁶). The fact that no such discriminatory law has been passed by the Legislature cannot possibly enable the executive to claim an absolute and unfettered discretion in the matter of issuing passports.

A different view was expressed by a Division Bench of the Madras High Court in *V. G. Row v. State of Madras*.⁷ The petitioner in that case had applied for the issue of a passport for travelling to various countries, including the Soviet Union. A passport was issued to the petitioner, but his request to have it endorsed for certain countries including the Soviet Union was refused. He applied for appropriate writ or direction requiring the respondents to endorse his passport for the remaining countries including the Soviet Union. His petition was rejected by the Madras High Court. The decision of the Madras High Court is for the most part based on the view that there was no statutory provision which prevented a person from leaving India without a passport or which prevented an Indian citizen from entering India without a passport. The subsequent decision of the Supreme Court in *Abdul Rahim v. State of Bombay*, which I have already referred to, shows that the view that there was no provision preventing an Indian citizen from entering India without a passport was incorrect. After stating that an Indian citizen was not precluded by any legal provision from leaving India or entering India without a passport, the Madras High Court observed (p. 244):—

"In this view, we do not see much substance in the contentions of the petitioner's learned counsel. Article 14 guarantees equality before the law and equal protection of the laws. Equal protection of the laws has been construed to mean the protection of equal laws. It is this Article which prohibits discriminatory legislation and arbitrary classification. But this Article can have no application to a matter like the issue of passports which consists in the exercise of a purely political function".

With great respect, I do not find it easy to understand what is meant by the exercise of "a purely political function" in this context, and why action taken in the exercise of a political function should be outside the ambit of art. 14 of the Constitution. Even supposing that a passport was unnecessary to an Indian citizen for either going abroad or for entering India, the fact remains that certain facilities in respect of foreign travel are available to persons who

⁵ [1952] S.C.R. 284.

⁶ [1961] A.I.R. S.C. 1715.

⁷ [1954] A.I.R. Mad. 240.

are in possession of passports. The Government cannot grant these facilities to some persons and deny them to others at their sweet will without violating art. 14 of the Constitution.

I must, accordingly, uphold the contention of the petitioner that the order refusing his application for a passport was made in contravention of art. 14 of the Constitution.

The other contention of the petitioner is that the rejection of his application for a passport amounts to a contravention of art. 21 of the Constitution. That article lays down that no person shall be deprived of his life or personal liberty except according to procedure established by law.

The first question which arises in this connection is whether the expression "personal liberty" in art. 21 includes the freedom to go abroad. The meaning of that expression was considered by the Supreme Court in *A. K. Gopalan v. The State*.⁸ There was some difference in that case between Fazl Ali J. and the other learned Judges on whether the right to freedom from arrest and detention was or was not guaranteed by art. 19(1)(d), but there was no difference between them on the scope of the expression "personal liberty" as used in art. 21. They all agreed that the expression "personal liberty" in art. 21 was not confined to the mere freedom from arrest and detention. Mr. Dās J. observed in his judgment that besides the rights mentioned in the several sub-clauses of art. 19(1), there are many other personal liberties which a free man may exercise, and these personal liberties are included in the expression "personal liberty" used in art. 21. He quoted with approval a passage from a Full Bench decision of the Calcutta High Court (*Kshitindra v. Chief Secretary of West Bengal*)⁹ in which it was stated (p. 296):—

"...For example, a free man can eat what he likes subject to rationing laws, work as much as he likes or idle as much as he likes. He can drink anything he likes subject to the licensing laws and smoke and do a hundred and one things which are not included in Art. 19. If freedom of person was the result of Art. 19, then a free man would only have the seven rights mentioned in that article; but obviously the free man in India has far greater rights".

His Lordship added (p. 296):—

"...Indeed, I regard it as a merit of our Constitution that it does not attempt to enumerate exhaustively all the personal rights but uses the compendious expression 'personal liberty' in Art. 21, and protects all of them".

His Lordship observed that the expression "personal liberty" did not mean only liberty of the person, but meant liberty or the rights attached to the person, i.e., *jus personarum*, and went on to say (p. 299):—

"...In my judgment, Art. 19 protects some of the important attributes of personal liberty as independent rights and the expression 'personal liberty' has been used in Art. 21 as a compendious term including within its meaning all the varieties of rights which go to make up the personal liberties of men".

The scope of the expression "personal liberty" in art. 21 was again considered by the Supreme Court in *Kharak Singh v. The State of U. P.*¹⁰ The petitioner in that case had challenged the constitutional validity of a certain police regulation in Uttar Pradesh which provided for five kinds of surveillance by the police over persons suspected of offences. The Supreme Court found that the impugned police regulation did not have any statutory basis and consisted of executive or departmental instructions framed for the guidance of police officers. One mode of surveillance provided by the impugned police regulation was to pay domiciliary visits on the suspect, and this involved the knocking at his door at night and the consequent disturbance to his sleep and rest. The majority of the Judges held that the part of the police regulation which allowed domiciliary visits was violative of art. 21, while the minority was of

⁸ [1950] S.C.R. 88.

(Unrep. Cal.)

⁹ Miscellaneous Case No. 166 of 1950

¹⁰ [1964] 1 S.C.R. 332.

the view that the whole regulation inclusive of all the five kinds of surveillance violated that article. In the course of his judgment for the majority, Ayyangar J. observed (p. 347):—

“We shall now proceed with the examination of the width, scope and content of the expression ‘personal liberty’ in Art. 21. Having regard to the terms of Art. 19(1)(d), we must take it that [the] expression is used as not to include the right to move about or rather of locomotion. The right to move about being excluded its narrowest interpretation would be that it comprehends nothing more than freedom from physical restraint or freedom from confinement within the bounds of a prison; in other words, freedom from arrest and detention, from false imprisonment or wrongful confinement. We feel unable to hold that the term was intended to bear only this narrow interpretation but on the other hand consider that ‘personal liberty’ is used in the Article as a compendious term to include within itself all the varieties of rights which go to make up the ‘personal liberties’ of man other than those dealt with in the several clauses of Art. 19(1). In other words, while Art. 19(1) deals with particular species or attributes of that freedom, ‘personal liberty’ in Art. 21 takes in and comprises the residue”.

His Lordship further said (pp. 347-348):—

“...Is then the word ‘personal liberty’ to be construed as excluding from its purview an invasion on the part of the police of the sanctity of a man’s home and an intrusion into his personal security and his right to sleep which is the normal comfort and a dire necessity for human existence even as an animal? It might not be inappropriate to refer here to the words of the preamble to the Constitution that it is designed to ‘assure the dignity of the individual’ and therefore of those cherished human value[s] as the means of ensuring his full development and evolution. We are referring to these objectives of the framers merely to draw attention to the concepts underlying the constitution which would point to such vital words as ‘personal liberty’ having to be construed in a reasonable manner and to be attributed that sense which would promote and achieve those objectives and by no means to stretch the meaning of the phrase to square with any preconceived notions or doctrinaire constitutional theories”.

The minority view in that case did not attach to the expression “‘personal liberty’” a less comprehensive connotation. They were of the view, however, that the expression “‘personal liberty’” in art. 21 did not exclude those aspects of personal liberty which have received a separate treatment in art. 19. Subba Rao, J., who delivered the judgment of the minority, said (pp. 356-357):—

“At this stage it will be convenient to ascertain the scope of the said two provisions and their relation *inter se* in the context of the question raised. Both of them are distinct fundamental rights. No doubt the expression ‘personal liberty’ is a comprehensive one and the right to move freely is an attribute of personal liberty. It is said that the freedom to move freely is carved out of personal liberty and, therefore, the expression ‘personal liberty’ in Art. 21 excludes that attribute. In our view, this is not a correct approach. Both are independent fundamental rights, though there is overlapping. There is no question of one being carved out of another. The fundamental right of life and personal liberty have many attributes and some of them are found in Art. 19. If a person’s fundamental right under Art. 21 is infringed, the State can rely upon a law to sustain the action; but that cannot be a complete answer unless the said law satisfies the test laid down in Art. 19(2) so far as the attributes covered by Art. 19(1) are concerned. In other words, the State must satisfy that both the fundamental rights are not infringed by showing that there is a law and that it does amount to a reasonable restriction within the meaning of Art. 19(2) of the Constitution”.

It must follow that the compendious expression “‘personal liberty’” used in art. 21 includes in its ambit the right to go abroad, and that a person cannot be deprived of this right “except according to procedure established by law” as laid down in art. 21. Mr. Baptista, however, argued that it can be gathered from the majority judgment in the above case that the right to go abroad was excluded from the expression “‘personal liberty’” used in art. 21. For this argument Mr. Baptista relied on the following sentence which occurs in a part

of the majority judgment of Ayyangar J. quoted above (p. 347):—

“...Having regard to the terms of Art. 19(1)(d), we must take it that [the] expression is used as not to include the right to move about or rather of locomotion”.

According to Mr. Baptista, this sentence implies that the right to go abroad is not part of the “personal liberty” guaranteed in art. 21. The argument is clearly untenable, because what the majority judgment has done is to exclude from the ambit of “personal liberty”, as the expression occurs in art. 21, the right which is specified in art. 19(1)(d), namely, the right “to move freely throughout the territory of India”. The right to go abroad, being not covered by art. 19(1)(d), is not excluded from art. 21.

It was then urged by Mr. Baptista that the Constitution can be deemed to have protected only such rights as can be exercised within the territory of India, that the right to go abroad is not such a right, and that, therefore, it cannot be deemed to have been included in the “personal liberty” protected by art. 21. This argument also has no substance, because the right to go abroad as claimed by the petitioner consists of his right to cross the Indian border, and it is the petitioner’s case that, although this right is protected by art. 21, the respondents have deprived him of this right without resort to any procedure established by law.

The right to go abroad has always been regarded as an important aspect of “personal liberty”. The right was recognised as early as the Magna Carta. Article 42 of the Magna Carta says:—

“It shall be lawful to any person, for the future, to go out of our kingdom, and to return, safely and securely, by land or by water, saving his allegiance to us, unless it be in time of war, for some short space, for the common good of the kingdom: excepting prisoners and outlaws, according to the laws of the land, and of the people of the nation at war against us, and Merchants who shall be treated as it is said above”.

In recent times, the right was recognised and included in the Declaration of Human Rights adopted by the United Nations. Article 13, para. 2 of the Declaration runs thus:—

“Everyone has the right to leave any country, including his own, and to return to his country”.

There is no reason why this important right of personal freedom should be held to have been excluded from the expression “personal liberty” in art. 21 of the Constitution.

Considerable support for this view can be derived from a recent decision of the Federal Supreme Court of the United States in *Kent v. Dulles*.¹¹ A federal statute of the United States of 1952 provides that it is

“unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport”.

The petitioners in the above case had applied for passports, but they were called upon to file affidavits concerning their membership in the communist party, and on their failure to file such affidavits, passport facilities were denied to them. The Supreme Court held by a majority vote that the petitioners were entitled to passports, and that the pertinent statutes did not authorise the Secretary of State to withhold passports for the reasons stated above. In delivering the opinion of the Court, Douglas J. observed (p. 1207):—

“A passport not only is of great value—indeed necessary—abroad; it is also an aid in establishing citizenship for purposes of re-entry into the United States”.

With reference to the Fifth Amendment to the American Federal Constitution which provides, in so far as it is relevant for the present purpose, that no person shall “be deprived of... liberty... without due process of law”, the learned Judge observed (p. 1210):

“The right to travel is a part of the ‘liberty’ of which the citizen cannot be deprived without due process of law under the Fifth Amendment. So much is conceded by the

Solicitor General... Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. Travel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values”.

It must be added that the minority in that case did not take a different view from the majority with regard to the scope of the “liberty” guaranteed by the Fifth Amendment.

If the petitioner’s right to go abroad, being part of his personal liberty, is protected by art. 21, it follows that he is entitled, as of right, to a passport provided, firstly, that a passport is necessary for going abroad, and secondly, he is not deprived of that right by some procedure established by law. It is the case of the respondents that there is no legal prohibition which prevents the petitioner from going out of India without a passport. The respondents admit that the Government of India have issued instructions to Carriers and Travel Agencies that they should not take on board passengers leaving India without valid passports, but the respondents claim that these instructions do not constitute a legal bar to a citizen leaving the country without a passport. Even supposing, however, that the petitioner can leave India without a passport, it is clear that he has no right to re-enter India without a passport. That is the result of r. 3 of the Indian Passport Rules, 1950, made under the Indian Passport Act, 1920. Now, it is obvious that an Indian citizen, unless he intends to give up his nationality, can exercise the right of going abroad only if he does not lose thereby the right to return to his country. It is clear, therefore, that the restriction on the right to re-enter which has been imposed by r. 3 of the Indian Passport Rules operates at the same time as a restriction on the right to go abroad. It must follow that, in the absence of any law to the contrary, the right to go abroad which is protected by art. 21 carries with it the right to receive a passport which is essential for the enjoyment of that right.

It is the case of the respondents that the Government of India are not subject to any lawful obligation to issue a passport to an Indian citizen. This contention implies, in the last analysis, that the Government of India’s right to issue passports is not coupled with any responsibility—a view which I find very difficult to accept. The better view is that the right is coupled with an obligation, and the obligation is to issue passports to those who have a right to receive them. As shown above, in the absence of a law to the contrary, all Indian citizens have that right.

Whether such a right and such an obligation do or do not exist can be tested by raising the question whether an Indian citizen, who happens to be abroad without a passport, is not entitled to get a passport from the Government of India in order to enter the country. Can the Government of India in such a case claim an absolute discretion to grant or refuse a passport to the Indian citizen? Article 19(1)(e) guarantees to all Indian citizens the right “to reside and settle in any part of the territory of India”, and this right necessarily carries with it the right to receive a passport in order that an Indian citizen, who happens to be abroad without a passport, may be able to enter the country and reside and settle in its territory. Such a question did in fact arise in two cases decided by the Supreme Court, and both the cases were decided on the assumption that an Indian citizen in such circumstances was entitled as of right to get a permit or a passport to enter India.

In *Ebrahim Vazir Mavani v. The State of Bombay*¹² the Supreme Court dealt with the case of several persons who were assumed to be Indian citizens and who had entered India in contravention of s. 3 of the Influx from Pakistan (Control) Act, being Act XXIII of 1949. Section 3 of that Act provided, in so far as it is relevant, that no person shall enter India from any place in

Pakistan, whether directly or indirectly, unless he was in possession of a permit or a valid passport. Section 4 of the Act empowered the Central Government to make rules in regard to the manner in which permits may be applied for and obtained. Section 5 provided, *inter alia*, that whoever entered India in contravention of the provisions of s. 3 shall be punishable with imprisonment for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both. Section 7 of the Act was material to the case before the Supreme Court, and it empowered the Central Government to direct the removal from India of any person who had committed, or against whom a reasonable suspicion existed that he had committed, an offence under the Act. The question before the Supreme Court was whether s. 7 of the Act, in so far as it authorised the removal from India of Indian citizens who had committed an offence under the Act or were reasonably suspected of having committed such an offence, was in the nature of a reasonable restriction on the citizens' right to reside and settle in any part of the territory of India guaranteed by art. 19 (1) (e) of the Constitution. The Supreme Court held by majority that s. 7 of that Act contravened the said fundamental right, and not being a reasonable restriction thereof, was void. In coming to that conclusion, Ghulam Hasan J., who delivered the majority judgment, observed, in the first place, that the provision in s. 3 of the Act requiring an Indian citizen to have a permit or a passport to be able to enter India from Pakistan could be regarded as a reasonable restriction upon his right to enter the country. His Lordship observed (p. 937) :—

"...That an Indian citizen visiting Pakistan for any purpose whatsoever and returning to India may be required to produce a permit or passport as the case may be before he can be allowed to enter the country, may well be regarded as a proper restriction upon entry but to say that if he enters the country without a permit or on an invalid permit or commits a breach of any of the conditions of the permit he may, on conviction for such offence, be ordered to be removed from the country is tantamount to taking away his fundamental right guaranteed under Art. 19(1)(e), 'to reside and settle in any part of the territory of India'."

In a later part of the judgment, his Lordship observed with reference to s. 7 of the Act (p. 938) :—

"...A law which subjects a citizen to the extreme penalty of a virtual forfeiture of his citizenship upon conviction for a mere breach of the permit Regulations or upon a reasonable suspicion of having committed such a breach can hardly be justified upon the ground that it imposes a reasonable restriction upon the fundamental right to reside and settle in the country in the interest of the public."

It is clear from these observations that, according to the Supreme Court, it was permissible to prevent an Indian citizen from entering the country unless he produced a permit or passport, but that it was not permissible, if he did enter the country without such a permit or passport, to remove him from the country for the breach committed by him. In this connection the Supreme Court considered what the duty would be of the sentry on guard at the check-post on the frontier, in case an Indian citizen tried to enter the country without having secured a permit or passport. On this point, Ghulam Hasan J. said in his judgment (p. 939) :—

"...If any person claims to have the right to enter, the sentry's duty would be to hand him over to the Commander of the Guard and normally it would be the duty of that Commander to hand him over to the proper authority empowered to determine the right which he claims".

It is obvious from these remarks that, according to the Supreme Court, an Indian citizen had a "right" to get a permit to enter India, that his failure to get such a permit was "a mere breach of the permit Regulations", and that, therefore, although such a citizen could be prevented from entering the country unless he had secured a permit, he could not be lawfully expelled from the country if he effected an entry in breach of the permit regulations.

It must be observed that normally an Indian citizen wanting to enter India from Pakistan would have required a permit issued under s. 4 of the Influx from Pakistan (Control) Act and not a passport, and that, therefore, the above case related rather to the right of an Indian citizen to get a permit under s. 4 of that Act than to his right to get a passport from the Government of India. The latter question, however, was more clearly involved in the subsequent decision of the Supreme Court in *Abdul Rahim v. State of Bombay*, which I have already referred to in another connection. The appellant in that case was an Indian citizen and he had admittedly entered India without a passport, and thereby committed a breach of r. 3 of the Indian Passport Rules, 1950. For that breach, he was convicted under r. 6(a) and was sentenced to a nominal fine. He challenged the order of conviction and sentence, and one of the grounds of the challenge was that r. 3 of the Indian Passport Rules and s. 3 of the Indian Passport Act were *ultra vires* of the Constitution in so far as they purported to affect the right of an Indian citizen to enter India without a passport. After observing that the fundamental right "to reside and settle in any part of the territory of India" was subject to reasonable restrictions under cl. (5) of art. 19, Imam J., who delivered the judgment of the Court, said (p. 1316):—

"...In the case of *Ebrahim Vazir Mavani v. The State of Bombay*, referred to above, the majority judgment of this Court held that an Indian citizen visiting Pakistan for any purpose whatsoever and returning to India may be required to produce a permit or a passport as the case may be before he can be allowed to enter India, and this requirement may well be regarded as a proper restriction upon entry. This Court, however, held that it was quite a different matter to say that if he enters India without a permit he may on conviction for such offence be ordered to be removed from India. It was the order directing his removal from India which was held by this Court to be tantamount to taking away his fundamental right guaranteed under Art. 19(1)(e), 'to reside and settle in any part of the territory of India.' It is clear, therefore, that so far as this Court is concerned it has already decided that to require an Indian citizen to produce a passport before he can be allowed to enter India may be regarded as a proper restriction upon entering India. This decision is binding on us and we must follow the decision of this Court in the case referred to".

The Supreme Court have thus held that the provision which requires an Indian citizen to produce a passport before he can be allowed to enter India is reasonable restriction on his right to enter India. No such view could possibly have been taken if an Indian citizen wanting to enter India from abroad had no right to obtain a passport and if his application for a passport could be rejected at the absolute discretion of the Government of India. The above decision necessarily implies that an Indian citizen, having his right to enter India guaranteed in the Constitution, has also the right to receive from his Government a passport which is necessary for the exercise of that right. On what is essentially the same ground, I hold that the petitioner, having the right to go abroad as provided by art. 21 of the Constitution, which includes the right to return to his country, has also the right to receive from his Government the passport necessary for the exercise of his right to go abroad.

Mr. Baptista argued that the above decision of the Supreme Court, (*Abdul Rahim v. The State of Bombay*), is not inconsistent with the absolute discretion claimed by the Government of India in the matter of issuing passports to Indian citizens. According to Mr. Baptista, the above decision means that, if an Indian citizen succeeds in entering India without a passport, he can be lawfully punished under r. 6(a) of the Indian Passport Rules but cannot be deported as provided in s. 5 of the Indian Passport Act. In my view, Mr. Baptista's argument amounts to putting a premium on the ability of an Indian citizen to hoodwink the sentries whose duty is to prevent any person from entering India without a passport. Under r. 3 of the Indian Passport Rules, an Indian citizen can be lawfully prevented from entering India, if he is unable to produce a passport, and the constitutional validity of that provi-

sion is based on the assumption that an Indian citizen wishing to enter India is entitled to a passport. The further conclusion that he cannot be deported if he enters India without a passport, which receives support from the earlier decision of the Supreme Court in *Ebrahim Vazir Mavani v. The State of Bombay*, goes to re-inforce the view that the Government of India do not have an absolute and unfettered discretion to refuse a passport to an Indian citizen.

I have already referred to a decision of the Madras High Court in *V. G. Row v. The State of Madras*. It was there held that no contravention of the right under art. 19(1)(d) occurs when passport facilities are denied to an Indian citizen. That conclusion was based on the view, which was subsequently held to be incorrect by the Supreme Court in the case of *Abdul Rahim*, that the refusal of a passport does not amount to a restriction of an Indian citizen's right to leave and re-enter India.

My conclusion that an Indian citizen is entitled to a passport, in the absence of any statutory provision which disables him from obtaining it, finds support in certain observations of Mr. Justice Shelat in his judgment in *L. C. Bhatia v. K. S. Dilipsinghji, Asst. Collector of Customs, Bombay*.¹³ A passport of the petitioner in that case was taken charge of by the Customs Authorities. The Customs Authorities handed over the passport to the Regional Passport Officer on demand made by the Police, and the Regional Passport Officer detained the passport pending orders from the Government of India. Mr. Justice Shelat held that the Regional Passport Officer was not entitled to detain the passport, and directed that the passport be returned to the petitioner. After observing that the term "personal liberty" in art. 21 includes freedom of movement, the learned Judge said:—

"That being so, prima facie a citizen of this country is entitled to a passport unless there is some statutory provision disabling him to obtain it... Now, assuming that there is no law debarring exit without a passport, as I have already pointed out, there are rules made under the Passport Act which debar a person from making his re-entry into this country unless he is equipped with a passport. Even if he were to be able to go abroad without a passport, there can be no doubt that it would be depriving him of his freedom of movement if he is not allowed to come back to his own country".

The learned Judge, however, went on to say that it was not necessary for the purpose of the case before him to go into the question whether the Government have the right to refuse a passport on the ground of its absolute discretion. It is clear that the learned Judge himself treated the observations quoted above as *obiter dicta*.

A contrary view is found expressed by Mr. Justice K. K. Desai in his judgment in *Ismail Karmali Pirbhoy v. R. C. Chawan*.¹⁴ The petitioner in that case had a passport which was valid up to May 15, 1959. He applied for the extension of the validity of the passport for a further period of one year (i.e. till May 15, 1960). But the Regional Passport Officer rejected his application and returned his passport after cancelling the same. The petitioner applied to this Court under art. 226 of the Constitution, and prayed that the cancellation of his passport should be quashed, and further that the respondent should be directed to replace the old passport wrongfully cancelled by a fresh one, or, in the alternative, to issue a new passport. In dismissing this application, the learned Judge pointed out that, by the time of his judgment, the period for which the petitioner had asked for the extension of his passport had already expired. The learned Judge said:—

"The complaint is that the respondent has not acceded to his (Petitioner's) application for renewal of passport for one year which period of course has expired on May 16, 1960. Having regard to the fact that the period of the application for renewal is now not outstanding and cannot be ordered to be considered once again, the cancellation of

¹³ (1959) O.C.J. Miscellaneous Petition No. 167 of 1959, decided by Shelat J., on June 16, 1959 (Unrep.).

¹⁴ (1960) O.C.J. Miscellaneous Application No. 299 of 1959, decided by K. K. Desai J., on July 8, 1960 (Unrep.).

his exhausted passport cannot create any rights in the petitioner to issue of a new passport”.

It was thus held by the learned Judge that in view of the expiry of one year's period mentioned in the petitioner's application, it was not possible to grant him any relief, irrespective of the merits of the case, and that the petition under art. 226 of the Constitution had become infructuous. The learned Judge, however, went on to deal with the various arguments which were advanced before him during the hearing of the petition. It was urged before him that in view of the fundamental rights guaranteed by art. 21 as well as by art. 19(1)(d) and (e) of the Constitution, there was an obligation on the President (the Government of India) to issue a passport to the petitioner. With reference to that article, the learned Judge said:—

“To me it is obvious that the Arts. 21 and 19(1)(d) and (e) have no relation to statutory obligation making it incumbent on the President to issue a passport. The argument appears to me to be *prima facie* not sustainable.”

Towards the end of the judgment, the learned Judge quoted some passages from the judgment in *V. G. Row v. The State of Madras*, including a passage where it was stated that no person had any legal right to obtain a passport to any particular country, and after these quotations, the learned Judge said:—

“I find it unnecessary in this case to discuss the above observations”.

Having carefully gone through the judgment of the learned Judge, I have come to the conclusion that his observations on arts. 21 and 19(1)(d) and (e) of the Constitution and his statement that there is no statutory obligation making it incumbent on the President to issue a passport are in the nature of *obiter dicta*. Before he made these observations, the learned Judge had already held that the petition had become infructuous on the expiry of the one year's period mentioned by the petitioner in his application for renewal of his passport. Moreover, the learned Judge himself has described his view as being “*prima facie*”. Mr. Baptista pointed out that at one place in the judgment the learned Judge has stated that he had “already held” that it did not appear to him that there was any statutory obligation cast on the President to issue a passport in favour of the petitioner. This is, however, followed by the observations quoted from the Madras case and the final statement of the learned Judge that he found it unnecessary to discuss those observations. One of the observations which he found it unnecessary to discuss was that “no person has any legal right to obtain a passport to any particular country”. It appears to me that the learned Judge dismissed the application as it had become infructuous, and since he was the Court of first instance, he also dealt with the arguments which were addressed to him on the merits.

Treating the views of the learned Judge as *obiter dicta*, I must further observe, with great respect, that I cannot accept his view that the Government of India have no obligation to issue a passport in favour of an Indian citizen. In the first place, art. 14 of the Constitution is expressly directed to the “State” (which includes the Government of India) and its effect is that, in the absence of any regulations in regard to the issue of passports, the Government of India must issue passports to all Indian citizens who ask for them, or to none at all. Secondly, art. 21 recognises and protects the right of every person to “personal liberty” of which he cannot be deprived, “except according to procedure established by law”. An Indian citizen has, therefore, the right, in the absence of any law to the contrary, to obtain a passport which is necessary for the exercise of his right to go abroad, which right is clearly a part of the “personal liberty” guaranteed to him.

Mr. Baptista drew my attention to the following statement which is contained in the affidavit in reply, which was filed by the Under Secretary, Ministry of External Affairs, on behalf of the Government of India:—

“I say that on the basis of the communications received in official confidence and for which reasons, it is considered, should not be disclosed in the public interest, the

Government of India decided that in the interest of the State and the Public, the Petitioner should not be granted further passport facilities".

This statement does not even touch the contention of the petitioner that by virtue of art. 21, he is entitled to a passport, in the absence of any legal provision to the contrary. The statement does not also affect the petitioner's contention under art. 14 of the Constitution. So long as no rules have been formulated for guiding the exercise of discretion in the matter of issuing passports, any refusal of a passport to an Indian citizen, when passports are granted to other Indian citizens, must be held to be discriminatory.

The conclusion to which I have reached does not imply that every Indian citizen must have an absolute and unrestricted right to receive a passport. It implies that, in the absence of any legislative provision to guide the exercise of the discretion in the matter of issuing passports, the Government of India have no alternative but to issue passports to all Indian citizens who apply for them.

Accordingly, the order of respondent No. 1 dated May 24, 1963, refusing passport facilities to the petitioner is set aside, and the respondents are directed to grant and issue to the petitioner a passport as applied for by him by his application dated January 10, 1963. The passport to be issued within two weeks from to-day. The respondents will pay the petitioner the costs of this petition as taxed.

Order accordingly.

APPELLATE CIVIL.

Before the Hon'ble Mr. H. K. Chainani, Chief Justice, and Mr. Justice Gokhale.

ISHWARA BHAU SAWANT

v.

PANDURANG VASUDEO KARMARKAR.*

Bombay Tenancy Act (Bom. XXIX of 1939), Secs. 2A, 3A, 7, 34, 5(2)—Bombay Tenancy and Agricultural Lands Act (Bom. LXVII of 1948), Secs. 4, 4A, 3, 31, 14—Transfer of Property Act (IV of 1882), Secs. 60, 76—Bombay Agricultural Debtor's Relief Act (Bom. XXVIII of 1939), Secs. 45, 54(2)(i)—Bombay Agricultural Debtors Relief Act (Bom. XXVIII of 1947), Secs. 24, 32(2)(v)—Mortgagee in possession whether a deemed tenant under s. 2A of Tenancy Act of 1939—Construction of statute—General words and phrases in statute how to be construed.

A mortgagee in possession cannot be deemed to be a tenant under s. 2A of the Bombay Tenancy Act, 1939.

Salman Raje v. Madhavsang,¹ dissented from.

Jaswantrai Tricumlal v. Bai Jwoti,² explained.

Laxman Bandu Patil v. Dhavaji Yesu Babar,³ *Laxman Bandu Patil v. Dhavaji Yesu Babar*,⁴ *Nookes & Co., Limited v. Rice*,⁵ *Dahya Lala v. Rasu*⁶ and *Laxmipat Singhania v. Larsen & Toubro*,⁷ referred to.

One of the presumptions in law is that the Legislature does not intend to make any substantial alteration in the law beyond what it explicitly declares, either in express terms or by clear implication, or, in other words, beyond the immediate scope and object of the statute. In all general matters outside those limits the law remains undisturbed. General words and phrases, therefore, however wide and comprehensive they may be in their literal sense, must usually be construed as being limited to the actual objects of the Act.

The facts are stated in the judgment.

*Decided, March 19, 1965. Special Civil Application No. 1199 of 1964 (with Special Civil Application No. 1449 of 1964 and Civil Application No. 3162 of 1964).

¹ (1963) 4 Guj. L.R. 817.

² (1956) 59 Bom L.R. 168, F.B.

³ (1960) A.O. No. 155 of 1958, decided

by Naik J., on July 15/18, 1960 (Unrep.).

⁴ (1962) Letters Patent Appeal No. 1 of 1961, decided by Patel and K. K. Desai, JJ., on November 30, 1962 (Unrep.).

⁵ [1902] A.C. 24.

⁶ (1962) 65 Bom. L.R. 328, S.C.

⁷ (1949) 52 Bom. L.R. 688.

Sp. C. A. No. 1199 of 1964:

M. V. Paranjpe, for the petitioner.

K. J. Abhyankar, for opponent No. 1's heirs and opponent No. 2

Sp. C. A. No. 1449 of 1964:

N. D. Hombalkar, for the petitioner.

S. C. Pratap, for opponent No. 1.

CHAINANI C. J. These two applications have been heard together as they raise a common question of law. The first application No. 1199 of 1964 relates to two lands, which originally belonged to one Pandurang and his two brothers Waman and Vinayak. In 1931 they mortgaged these lands by an ostensible sale-deed to Maruti Sawant *alias* Rede. The petitioners are the heirs and successors of Maruti. In 1951 Pandurang filed a suit for a declaration that the transaction of 1931 was really a mortgage and for taking accounts under the Deccan Agriculturists Relief Act. A declaration was made in that suit in 1951 that the transaction was a mortgage and that the amount due on the mortgage was Rs. 2,800. This decision was confirmed in appeal by the District Judge. In 1956 Pandurang filed a suit for redemption of the mortgage and for obtaining possession of the lands. The petitioners contended in that suit that as they were lawfully cultivating the lands, under s. 2A of the Bombay Tenancy Act of 1939 they were deemed to be tenants, that they had become protected tenants under s. 3A of that Act, that they continued to be protected tenants under old s. 31 and present s. 4A of the Bombay Tenancy Act of 1948 and that with effect from April 1, 1957, they had become the owners of the lands under s. 32 of the Tenancy Act. The learned trial Judge, therefore, referred to the Mamlatdar for his decision the question whether the petitioners as mortgagees-in-possession are protected tenants and whether they had become the owners of the lands since April 1, 1957. The Mamlatdar answered this question in the negative. In appeal the Deputy Collector took a somewhat different view. According to him the petitioners had acquired the rights of tenants and protected tenants, but these rights were in abeyance during the subsistence of the mortgage and that these would revive when the mortgage was redeemed or when it was extinguished. Against the order made by him both the parties, the petitioners and opponents Nos. 1 to 3, applied in revision to the Bombay Revenue Tribunal.

The facts of application No. 1449 of 1964 are that the three lands in dispute originally belonged to the husband of opponent No. 1. These lands were mortgaged with possession in 1928 to the petitioner. In 1959 opponent No. 1 filed a suit for redemption of the mortgage. The petitioner contended in that suit that he was a protected tenant of the lands. The Civil Court, therefore, made a reference to the Mamlatdar for deciding the issue whether the petitioner proved that as a mortgagee he had become the tenant of the lands and as such become the owner thereof. The Tenancy Aval Karkun held that the petitioner had acquired the rights of a tenant. This finding was confirmed in appeal by the Deputy Collector. Opponent No. 1 then applied in revision to the Bombay Revenue Tribunal. The matter came up for hearing before a single member of the Revenue Tribunal. As the questions involved were of considerable importance, he referred the matter to a larger Bench.

These two applications along with some other applications were then heard by a Full Bench of the Bombay Revenue Tribunal. The Full Bench has in a well considered and able judgment held that a mortgagee-in-possession could not be deemed to be a tenant under s. 2A of the Bombay Tenancy Act of 1939. In the first application the Revenue Tribunal accordingly held that the petitioners had not acquired the rights of tenants, which could revive or survive after the redemption of the mortgage. In the second application the petitioner was held not to have acquired the rights of a tenant. The orders made by the Tenancy Aval Karkun and the Deputy Collector were set aside. The

correctness of the view taken by the Full Bench of the Revenue Tribunal is being challenged before us in these two applications.

The Bombay Tenancy Act of 1939 as originally enacted gave protection to persons who were tenants under the ordinary law, that is, those who had acquired their tenancy rights under an agreement or contract with their landlords. In fact the Act contained no definition of the word "tenant". In 1946 the Act was amended in order to extend its protection to certain classes of persons, who were cultivating the lands lawfully, but who were not tenants under the ordinary law. New ss. 2A and 3A were inserted in the Act. Section 2A was in the following terms:

"(1) A person lawfully cultivating any land belonging to another person shall be deemed to be a tenant if such land is not cultivated personally by the owner and if such person is not—

(a) a member of the owner's family, or

(b) a servant on wages payable in cash or kind but not in crop share or a hired labourer cultivating the land under the personal supervision of the owner or any member of the owner's family,

unless the owner has within one year of the coming into force of the Bombay Tenancy (Amendment) Act, 1946, made an application to the Mamlatdar within whose jurisdiction the land is situated for a declaration that the person is not a tenant.

(2) Where an application under sub-section (1) has been made and the Mamlatdar refuses to make such declaration and the Mamlatdar's decision is not set aside by the Collector in appeal under sub-section (3) of section 13 or by the Provincial Government under section 28, the person shall be deemed to be a tenant for the purposes of this Act."

Sub-section (1) of s. 3A provided:

"(1) Every tenant shall, on the expiry of one year from the date of the coming into force of the Bombay Tenancy (Amendment) Act, 1946, be deemed to be a protected tenant for the purposes of this Act and his rights as such protected tenant shall be recorded in the Records of Rights, unless his landlord has within the said period made an application to the Mamlatdar within whose jurisdiction the land is situated for a declaration that the tenant is not a protected tenant.

Sub-section (2) of s. 3A was on the same lines as sub-s. (2) of s. 2A.

These sections came into force on November 8, 1946. Section 2A, therefore, created a class of statutory or deemed tenants. It made every person lawfully cultivating another person's land a tenant, unless he fell in one of the two excepted categories mentioned in cls. (a) and (b). This section gave one year's time to the landlord to obtain a declaration that such person was not a tenant. If no application was made by the landlord, then such person became a tenant under s. 2A and a protected tenant under s. 3A.

The Tenancy Act of 1939, except ss. 3, 3A and 4 as modified, was repealed by the Bombay Tenancy Act of 1948, which came into force on December 28, 1948. Section 31 of this Act, as it originally stood, stated that for the purposes of this Act a person shall be recognised to be a protected tenant if such person had been deemed to be a protected tenant under ss. 3, 3A and 4 of the Bombay Tenancy Act, 1939. The corresponding section now is s. 4A. Section 4 of this Act is in the following terms:

"A person lawfully cultivating any land belonging to another person shall be deemed to be a tenant if such land is not cultivated personally by the owner and if such person is not—

(a) a member of the owner's family, or

(b) a servant on wages payable in cash or kind but not in crop share or a hired labourer cultivating the land under the personal supervision of the owner or any member of the owner's family, or

(c) a mortgagee in possession."

This section specifically excludes a mortgagee in possession from the category of deemed tenants.

In both the applications before us the lands had been mortgaged before November 8, 1946, when s. 2A of the 1939 Act came into force. The mortgagees were, therefore, lawfully in possession of the lands. They were also cultivating these lands. No application had also been made by the mortgagors to the Mamlatdar for a declaration that the petitioners, who were in possession of the lands as mortgagees, were not tenants. It has, therefore, been contended that as s. 2A did not exclude a mortgagee in possession, the petitioners became tenants under s. 2A and protected tenants under s. 3A and that they continued to be protected tenants under s. 31 of the Act of 1948 as it originally stood and under s. 4A of this Act as it now stands. It has been urged that the inclusion of cl. (c) in s. 4 of the Act of 1948 shows that the intention was to exclude persons who otherwise would have been within the scope of the section. On behalf of the mortgagees on the other hand it has been contended that s. 2A did not apply to any person whose position was incompatible with that of a tenant, that a mortgagee in possession possesses many rights of ownership, that the land in his possession cannot, therefore, be said not to belong to him, that he cannot, therefore, be said to be a person cultivating the land belonging to another person and that consequently he could not be deemed to be a tenant under s. 2A of the Act.

Before we deal with the arguments, which have been advanced before us, it may be mentioned that apart from the decision of a single Judge in *Laxman Bandu Patil v. Dhavaji Yesu Babar*,¹ that a mortgagee in possession could under the Tenancy Act of 1939 acquire the rights of a tenant, there does not appear to be any other decision on this point. There are casual observations in some cases, but the question does not appear to have been decided in any other case. The decision of the single Judge in *Laxman Patil's* case was set aside on some other ground in *Laxman Bandu Patil v. Dhavaji Yesu Babar*.² The learned Judges who decided this appeal did not consider it necessary to decide whether a mortgagee in possession can be deemed to be a tenant. In their judgment they observed:

"There has been no case where a mortgagee even under the old Act has been held to be a tenant as a person lawfully in cultivation of the same... We do not find in this case that this is absolutely necessary to decide as to whether or not a mortgagee must be held to be a tenant under the Tenancy Act of 1939. There are difficulties in the way of such a conclusion... It is argued and there is substance in the argument that a mortgagee who has got an interest in the property or owns a subordinate interest as such when in possession cannot also be held to be a tenant inasmuch as the words 'lawfully in cultivation' have obvious limitations."

Section 3 of the Tenancy Act of 1948 provides that the provisions of Chap. V of the Transfer of Property Act shall, in so far as they are not inconsistent with the provisions of this Act, apply to the tenancies and leases of land to which this Act applies. There was no similar provision in the Act of 1939. Section 2A of the Act of 1939 does not also begin with a non-obstante clause or words such as "notwithstanding any law, agreement, etc." There are many other sections in this Act which contain this clause. For instance, s. 14 begins with the words "Notwithstanding any agreement, usage or law." The opening words in sub-s. (2) of s. 5 are: "Notwithstanding any agreement, usage, decree or order of a Court of law." It is, therefore, reasonable to assume that the Legislature did not intend to override the provisions of the Transfer of Property Act in regard to mortgages. The words used in s. 2A are undoubtedly wide. One of the presumptions in law is that the Legislature does not intend to make any substantial alteration in the law beyond what it explicitly declares, either in express terms or by clear implication, or, in other words, beyond the immediate scope and object of the statute. In all general matters outside these limits the law remains undisturbed. General words and phrases,

1 (1960) A. O. No. 155 of 1958, decided by Naik J., on July 15/18, 1960 (Unrep.).

2 (1962) Letters Patent Appeal No. 1 of

1961, decided by Patel and K. K. Desai JJ., on November 30, 1962 (Unrep.).

therefore, however wide and comprehensive they may be in their literal sense, must usually be construed as being limited to the actual objects of the Act; See Maxwell on Interpretation of Statutes, 1962 edn., pp. 78-79. If, therefore, it is possible, we must so construe s. 2A as to avoid repugnancy and as not to make ineffective the general provisions of law in regard to mortgages.

It has been contended that the position in law of a mortgagee in possession is inconsistent with his being a tenant of the same property. A tenancy of an agricultural land is created when the owner is unable or does not wish to cultivate the land himself. The purpose and object of a mortgage, on the other hand, is to secure a debt and the mortgagee is not entitled to retain possession of the land after his debt has been satisfied. A mortgagor has a right to redeem the land and after redemption to hold and enjoy it as he was entitled to hold and enjoy it before it was mortgaged. This right is recognised in s. 60 of the Transfer of Property Act, which provides that at any time after the principal money has become due, the mortgagor has a right, on tender of the mortgage-money, to require the mortgagee, where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor and either to retransfer the mortgaged property to him or to such third person as he may direct. This is a statutory right which, in the words of Lord Macnaghten in *Noakes & Co., Limited v. Rice*,³ is of "the very nature and essence of a mortgage and inherent to the thing itself". This right cannot be fettered or restricted by any condition, which impedes, hampers or prevents redemption and any such condition would be void. This statutory right of a mortgagor would be materially affected if a mortgagee is held to be a tenant, for in that case he cannot get back possession of the land except on the very limited grounds specified in the Tenancy Act. It seems to us very doubtful whether this was intended by the Legislature.

That this was not so intended is also suggested by the provisions of the Bombay Agricultural Debtors Relief Act. The first Agricultural Debtors Relief Act was enacted in 1939 about the same time when the Tenancy Act of 1939 was placed on the statute book. Section 45 of this Act provided that notwithstanding anything contained in any law, custom or contract, the Board shall declare any transaction purporting to be a sale of land belonging to a debtor to be in the nature of a mortgage, if the Board was satisfied that the circumstances connected with the sale-deed showed it to be in the nature of a mortgage. Clause (4) in sub-s. (2) of s. 54 provided that the award shall be in the prescribed form and shall include the conditions subject to which the immoveable property, if any, in the possession of the creditor shall be delivered to the debtor. This Act was repealed by the Bombay Agricultural Debtors Relief Act, 1947. This new Act came into force on May 27, 1947, about six months after ss. 2A and 3A of the Tenancy Act of 1939 had been inserted in that Act. The provisions of s. 24 of the Agricultural Debtors Relief Act of 1947 are similar to those of s. 45 of the old Act. Clause (v) in sub-s. (2) of s. 32 provides that the Court may pass an order for the delivery of possession of any property notwithstanding any law or contract to the contrary. These provisions express a clear intention on the part of the Legislature that possession of agricultural land, which had been mortgaged, should be restored to the mortgagor-debtor. It is, therefore, improbable that s. 2A was intended to apply to mortgagees.

In *Jaswantrai Tricumlal v. Bai Jiwi*,⁴ a Full Bench of this Court held that a sub-tenant of a tenant, who had been let into possession of the land at the time when sub-letting was not invalid, became, on the termination of the contractual tenancy, a tenant under s. 2A of the Act of 1939 and that he could, therefore, be said to be lawfully cultivating the land within the meaning of s. 4 of the Act of 1948. In the same case it was observed that under the old Act a tenant of a mortgagee in possession became, on the redemption of the

3 [1902] A.C. 24.

4 (1956) 59 Bom. L.R. 168, F.B.

mortgage, a statutory tenant. If, therefore, a mortgagee has introduced a tenant on the land, the mortgagor would not be entitled to obtain possession of the land from him. It has, therefore, been urged that if a tenant of a mortgagee can be deemed to be a tenant under s. 2A of the Act of 1939, there is no reason why a mortgagee should not also be so held. There is, however, a clear distinction between the position of a mortgagee and that of a tenant brought on the land by the mortgagee. This has been pointed out by the Supreme Court in *Dahya Lala v. Rasul*,⁵ where it has been observed (p. 330):

"...Nor has the contention that the expression 'mortgagee in possession' (in clause (c) of section 4 of the Act of 1948) includes a tenant from such a mortgagee any force. A mortgagee in possession is excluded from the class of deemed tenants on grounds of public policy: to confer that status upon a mortgagee in possession would be to invest him with rights inconsistent with his fiduciary character. A transferee of the totality of the rights of a mortgagee in possession may also be deemed to be a mortgagee in possession. But a tenant of the mortgagee, in possession is inducted on the land in the ordinary course of management under authority derived from the mortgagor and so long as the mortgage subsists, even under the ordinary law he is not liable to be evicted by the mortgagor."

A mortgagee, therefore, occupies a fiduciary character and even though he is not a trustee for the mortgagor, his duties are akin to those of a trustee: see p. 480, Mulla's Transfer of Property Act, 1956 edn.

There are other difficulties in holding a mortgagee to be a tenant. A tenant is liable to pay only rent. A mortgagee, on the other hand, is subject to several liabilities specified in s. 76 of the Transfer of Property Act. He must manage the property as a person of ordinary prudence would manage it, if it were his own. He must use his best endeavours to collect the rents and profits thereof. He must keep full and accurate accounts of all sums received and spent by him as mortgagee and give the mortgagor at his request true copies of such accounts. He must debit the receipts from the mortgaged property in reduction of the amounts due to him on account of interest and so far as such receipts exceed any interest due, in reduction or discharge of the mortgage-money. If, therefore, a mortgagee is held to be a tenant, a heavier burden would be imposed on the mortgagor making redemption more difficult, for the mortgagee would then be liable to appropriate towards the amount due to him only the rent payable under the Tenancy Act, which has been reduced from time to time and is now equal to only five times the assessment. Moreover, under s. 7 of the Tenancy Act of 1939 and under old s. 34 and under present s. 31 of the Act of 1948, a landlord can terminate the tenancy and apply for possession of the land on the ground that he requires it *bona fide* for personal cultivation. Can a mortgagor obtain possession on this ground even during the pendency of the mortgage? Under sub-s. (2) of s. 5 of the Tenancy Act of 1939 and under s. 14 of the Act of 1948 a tenancy can be terminated on the ground of sub-letting. If, therefore, a mortgagee after cultivating the land personally, introduces a tenant on the land, can the mortgagor evict him on the ground that he has sub-let the land? It is difficult to imagine that the Legislature by merely inserting s. 2A in the Tenancy Act of 1939 intended to so radically alter the legal relationship between a mortgagor and a mortgagee.

The object of the Tenancy Act of 1939, was, as stated in its preamble, to provide for the protection of tenants of agricultural lands. The provisions of the Act show that this object was sought to be achieved in two ways, firstly, by giving to the tenants security of tenancy by providing that they shall not be evicted except on the grounds specified in the Act and in the manner provided therein. Provision was also made for determination of reasonable rent and also for fixation of maximum rent. A mortgagee in possession enters upon possession of the land not for the purpose of personally cultivating it, but with the object and purpose of paying himself wholly or partially out of the

income from the land. He is entitled to retain possession of the land until he has recovered the full amount due to him. He is also not liable to pay any rent. He does not, therefore, stand in need of protection of the Act either in respect of his right to possession or liability to pay rent. Consequently, it was not necessary to confer the status of a tenant upon him. This evidently is the reason why he has been specifically excluded by cl. (c) in s. 4 of the Tenancy Act of 1948. As pointed out by the Supreme Court in *Dahya Lala v. Rasul*, at p. 330, a mortgagee in possession has been excluded from the class of deemed tenants on grounds of public policy. Public policy must have been the same two years previously when s. 2A was inserted in the Tenancy Act of 1939. It does not, therefore, appear that the Legislature intended to include a mortgagee in possession in the class of deemed tenants under s. 2A of the Act. A tenant of a mortgagee, however, stands on a different footing. He is introduced on the land in the ordinary course of management by the mortgagee in exercise of authority derived from the mortgagor. He needs as much protection as any other tenant.

Section 2A gave an opportunity to a landlord to apply to the Mamlatdar and obtain a declaration that the person lawfully cultivating his land was not his tenant. It has, therefore, been urged that full effect must be given to the wide words used in s. 2A. The opportunity given to landlords by s. 2A was, however, a limited one and could only be exercised in respect of persons who were on the land on November 8, 1947, or earlier. This provision does not, therefore, by itself suggest that a mortgagee in possession was intended to be covered by s. 2A.

On behalf of the petitioners reliance has been placed on the observation of Chagla C.J. in *Jaswantrai Tricumlal v. Bai Jiwi*, at p. 175, that under the old Act all persons lawfully on the land were intended to be protected. Reliance was also placed on the following observations of the Supreme Court in *Dahya Lala v. Rasul* (p. 329) :

"...A person who is deemed a tenant by s. 4 is manifestly in a class apart from the tenant who holds lands on lease from the owner. Such a person would be invested with the status of a tenant if three conditions are fulfilled—(a) that he is cultivating land lawfully, (b) that the land belongs to another person, and (c) that he is not within the excepted categories."

These observations must be read in their context. In the first case the question which arose for consideration was whether a sub-tenant could be deemed to be a tenant. In the case before the Supreme Court the dispute was about a tenant brought on the land by the mortgagee. Moreover, as pointed out above, the Supreme Court has itself made a distinction between a mortgagee and a mortgagee's tenant.

Reliance has also been placed on the following observations in the judgment of the Full Bench in *Jaswantrai Tricumlal v. Bai Jiwi* (p. 175) :

"...It may be pointed out that the Legislature in the Act of 1948 in cl. (c) of s. 4 has taken mortgagees in possession out of the categories of statutory tenants. Therefore, whatever lacuna there was in the old Act has now been made good. The learned Judge (Bavdekar J.) relies on this fact for strengthening his view that mortgagees in possession were never intended to be treated as statutory tenants, and if the tenants of mortgagees in possession were not intended to be treated as statutory tenants, then on a parity of reason sub-tenants could not also be considered as statutory tenants. In our opinion, the amendment effected by s. 4(c) of the Tenancy Act strongly supports the view which we are inclined to take that under the old Act all persons lawfully on the land were intended to be protected, but the Legislature realising the difficult position in which the mortgagor would find himself if the *tenancy created by the mortgagee* in possession were to be protected and on redemption the mortgagor was prevented from getting possession of the land, made the necessary amendment by enacting s. 4(c)."

Stress has been laid on the fact that in the opinion of the Full Bench the amendment had not been made to clarify the law. Apart from the fact that

these observations must be read in the context of the case, which arose for consideration before the Full Bench, the last sentence shows that according to the learned Judges the amendment in s. 4 had been made so that there may be no difficulty in the way of a mortgagor's obtaining possession of the land not because of the mortgagee's claiming to be a tenant, but because of the tenancy created by the mortgagee. It is, therefore, obvious that the Full Bench was not considering the question of a mortgagee in possession being deemed to be a tenant. In fact there is no discussion in the judgment on this point.

In *Salman Raje v. Madhavsang*,⁶ the Gujarat High Court has held that a tenant of a mortgagee can be deemed to be a tenant under s. 2A of the Tenancy Act of 1939. The judgment shows that the learned Judges were aware of the difficulties, which would consequently result. At p. 826 it has been observed:

"...We may observe that these very difficulties were urged in support of the limited construction of sec. 2A before the Full Bench in *Jaswantrai Tricumlal v. Bai Jiwi*. At page 174 of the Report the learned Chief Justice, though he was there dealing with the case of a sub-tenant, refuted this very argument by observing that questions of statutory protection can only arise when the contractual relations come to an end, that is, in the case of a sub-tenant which he was dealing when the contractual tenancy of a tenant would be determined. Similar would be the position in the case of a mortgagee in possession when his mortgage gets extinguished. A further answer to Mr. Chhatrapati would be that the same difficulties must also arise in the case of a mortgagee's tenant and yet such a tenant was held to be entitled to the status of a protected tenant in *Jaswantrai Tricumlal v. Bai Jiwi*. The question whether a mortgagee has to pay fair rent to his statutory landlord, the mortgagor, would be best answered by stating, as was done in *Jaswantrai Tricumlal v. Bai Jiwi*, that no such question would arise so long as the mortgage subsists."

With respect, it may be pointed out that if s. 2A is held to include a mortgagee in possession, he would be a deemed tenant not only after the redemption of the mortgage but also during the subsistence of the mortgage. The learned Judges appear to have relied on the following observations of Chagla C. J. (p. 175):

"...Therefore, with very great respect, we must hold that the view taken by the learned Judge with regard to the position of the tenants of the mortgagees in possession under the old Act of 1939 is not the correct position, and that as far as the old Act is concerned the position of the tenants of the mortgagees in possession and the position of sub-tenants was identical; they both became statutory tenants, one on the redemption of the mortgage and the other on the termination of the contractual tenancy."

If we may say with respect, these observations are correct, because a tenant of a mortgagee can only be deemed to be a tenant of the mortgagor after the redemption of the mortgage. A sub-tenant would also be deemed to be a tenant of the landlord after the contractual tenancy has been terminated. A mortgagee, on the other hand, will become a tenant as soon as he enters upon the possession of the land. With respect, therefore, we are unable to agree with the view taken by the Gujarat High Court.

It has been urged on behalf of the mortgagors that the consequence of a mortgage with possession is that the ownership rights are split up, that all the rights except the right to redeem vest in the mortgagee, that the mortgagee acquires a heritable and transferable interest in the property and that, consequently, it cannot be said that the mortgaged land does not belong to him or that he is cultivating the land which belongs to another person. In support of this argument reliance is placed on the decision of Tendolkar J. in *Laxmipat Singhania v. Larsen & Toubro Ltd.*,⁷ in which it was held that the words "belonging to" in s. 4(I) of the Bombay Rents, Hotel and Lodging House Rates Control Act, mean very much the same thing as "of the ownership of", though not necessarily "of the absolute ownership of". At p. 693 the learned

Judge has observed that there may be in relation to property a dual ownership for a limited period of time and that the tests as to whether for a limited period of time a temporary ownership has been created are:

- (1) whether there is a demise of the property,
- (2) whether there is full dominion and control over the property in the demisee, and

(3) whether the risk of the property falls on the demisee, or the absolute owner. On the strength of the decision it has been urged that during the period of mortgage with possession there is dual ownership and that the property can be said to belong to both the mortgagor and the mortgagee. It is not necessary for us to decide this point in these applications, because for the other reasons which I have given above, it seems to us that the mortgagee in possession was not intended to be brought within the scope of s. 2A of the Tenancy Act of 1939.

We are accordingly of the opinion that a mortgagee in possession could not be deemed to be a tenant under s. 2A of the Bombay Tenancy Act of 1939. The view taken by the Full Bench of the Revenue Tribunal is, in our opinion, correct.

Rule in each application discharged. No orders as to costs.

Rule in C. A. No. 3162 of 1964 discharged. No order as to costs.

Rules discharged.

CRIMINAL REFERENCE.

Before Mr. Justice Patel.

STATE v. A. H. KHAN.*

Factories Act (LXIII of 1948), Secs. 101, 92—Whether either manager or occupier of factory entitled to prove that the other is guilty of offence under Act.

Under s. 101 of the Factories Act, 1948, it is open either to the manager or the occupier of a factory to allege and prove that it was the other who was guilty of an offence punishable under the Act.

State v. L. S. Dabholkar,¹ referred to.

THE facts appear in the judgment.

S. B. Sukthankar, for the accused.

S. B. Bhasme, Assistant Government Pleader, for the State.

PATEL J. These two references are made by the District Judge, Sholapur, under s. 438 of the Criminal Procedure Code recommending that the conviction and sentences recorded in both the cases should be set aside. The convictions are—one under s. 66(I)(b) and s. 92 read with ss. 63 and 66(I)(d) of the Factories Act.

The accused in the case is the owner of what is known as Munshi Bidi Works, which is a factory within the meaning of the Factories Act and is situated at 57/60, Guruwar Peth, Sholapur. He owned similar factories at several other places bearing the same name, while he himself stayed in Poona. The Factory Inspector visited the factory on October 9, 1963, at about 8.10 p.m. and found only six women workers out of many working in the factory and doing the work of tying Bidis into bundles. Now, the period of work, as stated on the painted board displayed in the factory, was between 10.30 a.m. to 2.30 p.m. and 3.00 p.m. to 7.00 p.m. These six women workers were found

*Decided, March 8, 1965. Criminal Reference No. 135 of 1964 (with Criminal Reference No. 136 of 1964).

¹ (1955) Criminal Appeal No. 1380 of

1955 (with Criminal Appeals Nos. 1381 to 1385 of 1955), decided by Shah and Vyas JJ., on February 29, 1955 (Unrep.).

to be working at 8.10 p.m. The accused was prosecuted in all the six cases, viz., cases Nos. 56, 57 and 59 of 1964 under s. 66(1)(b) and 58, 60 and 61 of 1964 under s. 63 read with s. 92. Within three days of the date of hearing fixed for the case, the accused gave notice in terms of s. 101 of the Factories Act stating that the manager was in charge of the Factory at Sholapur, that the accused was residing at Poona and that he had instructed the manager to observe all the provisions of the Factories Act, and, therefore, it was the manager, who was guilty of the offence, and not himself. In fact, this is the complaint to be made to the Court by the accused three days before the hearing so as to enable the Court to get the manager before it. The accused then also gave evidence in support of his contention that it was the manager who was guilty of the charge and not himself. The learned Magistrate refused to accept the plea of the accused and held that it was an after-thought. One does not know whether the manager was summoned before the Court in terms of the section. The accused filed an application in revision before the learned District and Sessions Judge, who has held that the evidence of the accused that it was the manager of the factory, who was responsible for the breach of the provisions of the Act ought to have been accepted and that in terms of s. 101 the factory manager ought to have been convicted and not the accused. In accordance with his findings, he has recommended that the conviction of the accused be set aside.

Mr. S. B. Sukthankar, who appears on behalf of the accused, has supported the reference, while Mr. Bhasme, learned Assistant Government Pleader, has opposed the reference very strongly. Mr. Bhasme contends in the first instance that under the Factories Act the liability of the manager and the occupier is concurrent and it is not open under s. 101 for either of them to allege and prove that it was the other who was guilty of the offence and get himself acquitted. In other words, that the liability of the manager and the occupier is absolute and they have no defence even under s. 101 of the Act, if any breach of the Rules or the Act is committed. Mr. Bhasme relies for this purpose upon the definition of "occupier" in cl. (n) of the Factories Act.

Section 7 requires an occupier to give notice within 15 days of the occupation of the factory to the Chief Inspector containing the particulars mentioned in the sub-clauses thereunder. By cl. (b) the name and the address of the occupier has to be given and by cl. (f) the name of the manager of the factory has to be given. Sub-section (5) provides that during such period for which no person has been designated as manager of a factory or during which the person designated does not manage the factory, any person found acting as manager, or if no such person is found, the occupier himself shall be deemed to be the manager of the factory for the purposes of the Act. Section 92 provides that save as otherwise provided in the Act and subject to the provisions of s. 93, if in, or in respect of, any factory there is any contravention of any of the provisions of the Act or of any rule made thereunder... the occupier and manager of the factory shall each be guilty of an offence and be punishable... Section 93 has no application, as it concerns the owner of the premises. Section 101 is headed "Exemption of occupier or manager from liability in certain cases". It reads:

"Where the occupier or manager of a factory is charged with an offence punishable under this Act, he shall be entitled, upon complaint duly made by him and on giving to the prosecutor not less than three clear days' notice in writing of his intention so to do, to have any other person whom he charges as the actual offender brought before the Court at the time appointed for hearing the charge; and if, after the commission of the offence has been proved, the occupier or manager of the factory, as the case may be, proves to the satisfaction of the Court—

(a) that he has used due diligence to enforce the execution of this Act, and

(b) that the said other person committed the offence in question without his knowledge, consent or connivance,—

that other person shall be convicted of the offence and shall be liable to the like punish-

ment as if he were the occupier or manager of the factory, and the occupier or manager, as the case may be, shall be discharged from any liability under this Act in respect of such offence;"

The two provisos are procedural and do not deal with the question of liability. The first proviso enables the occupier or the manager who has raised the defence and complained to examine himself on oath and also any witnesses he may bring in support of his case. The second proviso requires the Court to adjourn the matter from time to time for a period not exceeding three months, if the occupier or the manager, as the case may be, cannot be brought before the Court. It also further provides that if the actual offender cannot be brought before the Court, the Court must proceed to hear the charge against the person actually charged and if the offence is proved then convict him.

Mr. Bhasme contends that the Factories Act is an Act enacted for improving the working conditions of the workmen and therefore the same must be construed liberally so as to advance the purpose of the Act. He says that this can be achieved only if it is held that both the occupant and the manager are liable. There is nothing in the definition of "occupier" which can possibly advance the contention. He says s. 101 ought to be confined to a plea where either of them contend that some person other than the occupier and manager is guilty of the offence. In my view, it is not possible to accept the contention. Even though this is a beneficent provision and ought to be liberally construed, in my view it has to be construed sensibly and reasonably. One cannot lose sight of the fact that s. 92 which provides the penalty for breach of the Act and the Rules itself creates the exception, for it says "Save as is otherwise expressly provided in this Act", which includes s. 101 following it. The section assumes the possibility of prosecution of either the manager or the occupier alone and it gives an option to either of them to prove that some one else other than the one charged is guilty of the offence. The purpose of construction of a statute is to get at the intention of the maker. In doing so the Court must be guided primarily by the words of the statute. It may be that the meaning of words may be modified to some extent by the context in which they are used. For arriving at the correct meaning the Court must read the statute as a whole and give effect to all the words thereof. If the argument advanced is accepted, I will have to omit much from consideration which I have no right to do.

It is also contended that in a prosecution under the Factories Act there is no scope for the application of the doctrine of *mens rea* and, therefore, want of intention, even if any, is no bar to conviction. I agree that that is so but the exception created by s. 101 has no relation to *mens rea*. It requires much more than mere want of *mens rea* to take shelter under s. 101. It requires that the accused has used due diligence for the enforcement of the execution of the Act and has not either the knowledge of the offence being committed or has not consented to its commission or connived at it. It is not, therefore, that s. 101 creates an exception by the way of providing *mens rea* as an ingredient of the offence. The accused is expected to prove something much more than that.

I am supported in this view by the judgment of a Division Bench of this Court in *State v. L. S. Dabholkar*¹ where the Courts below had applied s. 101 and upheld the contention of the occupier that it was the manager who was the guilty party and not the occupier. The High Court refused to accept a similar contention as now made by the Assistant Government Pleader. This contention, therefore, must fail.

Mr. Bhasme then contended that the accused has not proved that any written instructions were given to the manager of the factory and oral instructions cannot be effective to sustain the defence under s. 101. No absolute rule can

1 (1955) Criminal Appeal No. 1380 of 1955, decided by Shah and Vyas JJ., 1955 (with Criminal Appeals Nos. 1381 to 1385 of 1955), decided by Shah and Vyas JJ., on February 29, 1955 (Unrep.).

be laid down in that respect. Everything must depend ultimately upon the nature of the evidence brought before the Court and it is for the Court to accept or reject the same. There is nothing in the Factories Act which requires that there should be written instructions.

Mr. Bhasme then contended that in any event the learned Sessions Judge cannot be right when he says that the accused has made out his defence under s. 101 of the Act. He refers me to exh. 7, which is a letter written by the accused himself from Poona on October 24, 1963, wherein he conveyed to the Factory Inspector that he approved the statement made by his manager at the time when he visited the factory on October 9, 1963, and that the incident had occurred because the electric light had failed and only six workers were then working at the Factory. In my view, the approval by the accused of the statement made by the manager cannot conflict with his defence, which he has now raised. The learned Sessions Judge has considered all the circumstances connected with the matter and has expressed the opinion that the defence of the accused was true. I have also had the advantage of referring to the learned Magistrate's judgment and it appears to me that his approach is erroneous. I agree that the defence of the accused is true.

Having regard to all these facts, I accept the reference. I accordingly set aside the order of conviction and sentence passed by the learned Magistrate in both the cases and make the rule absolute.

Rule made absolute.

Before Mr. Justice Patel.

STATE v. ISMAIL ALLISAHEB AWATE.*

Motor Vehicles Act (IV of 1939), Secs. 2(25) & (33), 42, 123—Private motor car used for carrying passengers for hire or reward—Whether such vehicle a "public service vehicle"—Length of user whether a relevant factor in determining whether vehicle a public service vehicle.

A private motor car used for carrying passengers for reward or hire is a "public service vehicle" within the meaning of s. 2(25) of the Motor Vehicles Act, 1939, and as such a "transport vehicle" as defined in s. 2(33) of the Act. Such user need not be habitual for if at a particular moment it is being used for carrying passengers on hire or reward then the vehicle becomes a public service vehicle and it cannot without any permit or licence for the purpose carry passengers.

*Manager, Indian Express, in re,*¹ agreed with.

*Jayaram v. State of Mysore,*² differed from.

THE facts appear in the judgment.

M. A. Rane, Assistant Government Pleader, for the State.

PATEL J. This reference is made by the II Additional Sessions Judge, Sholapur, recommending that the conviction of the accused under s. 123, read with s. 42(1) of the Motor Vehicles Act, and sentence of fine imposed upon him be set aside.

The accused was in charge of a private motor car bearing No. BYE 2717. On August 30, 1963, he was driving it from Sholapur to Pandharpur with passengers on hire. There were eight passengers in the motor car at the time and the evidence showed that they were charged Rs. 2.20 per head per trip. He was, therefore, prosecuted under s. 123 read with s. 42(1) of the Motor Vehicles Act. The learned trial Magistrate convicted him and the learned Additional Sessions Judge recommends that his conviction and sentence be set aside.

*Decided, March 9, 1965. Criminal Reference No. 14 of 1965.

¹ [1946] Mad. 222.

² [1962] II Cr. L.J. 707.

Two points were urged before the learned trial Magistrate; one was that it was only the owner of the vehicle who was liable and not the driver, and, secondly, in any event as the motor car in question was a private car, no permit was necessary as it was not a transport vehicle and therefore no offence was committed under ss. 42 and 123 read together. Both these contentions were negatived by the learned Magistrate. The accused went in revision to the Sessions Court which was heard by the II Additional Sessions Judge. He accepted the second of the contentions made by the accused relying upon the decision of the Mysore High Court in *Jayaram v. State of Mysore*,¹ which case indeed is in favour of the accused. The learned Additional Sessions Judge did not accept the first contention which was urged in support of the revisional application. I agree that there is no substance in the first contention.

As to the second contention, it is not enough to read merely one definition clause in the Motor Vehicles Act. Section 42 is as follows:

"(1) No owner of a transport vehicle shall use or permit the use of the vehicle in any public place, save in accordance with the conditions of a permit granted or countersigned by a Regional or State Transport Authority or the Commission authorising the use of the vehicle in that place in the manner in which the vehicle is being used:"

Ordinarily in common parlance a transport vehicle is one which transports either goods or passengers from one place to another. But then the Act has itself framed definitions which apply unless there is context to the contrary. The relevant definitions are those of "light motor vehicle", "motor cab", "motor car", "public service vehicle" and "transport vehicle". "Light motor vehicle" means a transport vehicle or omnibus the registered laden weight of which, or a motor car or tractor the unladen weight of which, does not exceed 3,000 kilograms. "Motor cab" means any motor vehicle constructed, adapted or used to carry not more than six passengers excluding the driver, for hire or reward. "Motor car" means any motor vehicle other than a transport vehicle, omnibus, road-roller, tractor, motor cycle or invalid carriage. "Public service vehicle" means any motor vehicle used or adapted to be used for the carriage of passengers for hire or reward, and includes a motor car, contract carriage, and stage carriage. "Transport vehicle" means a public service vehicle or a goods vehicle.

In order, therefore, to find out the meaning of the words "transport vehicle" as contained in s. 42, one must go to the definition of "public service vehicle" contained in cl. (25) of s. 2 which is as stated above. It must be noticed that by the definition, in order that a motor vehicle should become a "public service vehicle," it need not be habitually used nor is it required that it should be specially adapted for that purpose; even if the vehicle is used for that purpose it becomes a public service vehicle for the time being. The absence of the word "habitual" must suggest that if at a particular moment it is being used for carrying passengers on hire or reward, then the vehicle becomes public service vehicle. In connection with s. 42 one must also have regard to the other provisions of the Motor Vehicles Act before concluding that a private car can without any permit or licence for the purpose, carry passengers. The Act contains several provisions with regard to transport vehicles, and, the rules framed under the Act by the Government, contain elaborate provisions for different kinds of licences and permits for different kinds of vehicles. There are stringent restrictions on the drivers of passenger vehicles intended for public service such as motor cabs and transport buses in the interest of public safety and convenience. It is in the general interest of the public that such distinction should have been made between different kinds of vehicles. In order to give effect to the intention of the framers of the Act, it is impossible to qualify in any way the words "transport vehicle" and "public service

vehicle" by words which are not to be found in the statute. Once the Court comes to the conclusion that a private motor car was being used for carrying passengers for reward or hire, it becomes a "public service vehicle" within the meaning of cl. (25) and as such a "transport vehicle" as defined in cl. (33) of s. 2 of the Act. Admittedly the accused had no licence for plying the same in that manner and he would, therefore, fall within the mischief of s. 42 read with s. 123 of the Motor Vehicles Act.

In *Manager, Indian Express*, In re², a similar construction was placed on these clauses by the Madras High Court. In that case the accused who was the Manager of the Indian Express carried bundles of newspapers from the office of the Indian Express to the Railway Station on two occasions and having regard to the definition of "goods vehicle" in cl. 2(8) it was held that even if the goods were carried in a private motor car only on two occasions, it was "goods vehicle" within the meaning of the clause and, therefore, it contravened the provisions of s. 42(1) of the Act.

Having regard to what is stated above, it is impossible with great deference to agree with the decision of the Mysore High Court.

In the result the reference cannot be accepted. I, therefore, reject the same.

Reference rejected.

APPELLATE CIVIL.

Before Mr. Justice K. K. Desai and Mr. Justice Palekar.

SAKINABAI D.L. DAMANI v. SALEBHAI HASANALI ENGINEER.*

Presidency Small Cause Courts Act (XV of 1882), Sec. 41—Civil Procedure Code (Act V of 1908), O.XXII, rr. 1, 4—Indian Succession Act (XXXIX of 1925), Secs. 305, 306—Ejectment proceedings against licensee under s. 41, Presidency Small Cause Courts Act—Whether such proceedings can be continued after licensee's death against his legal representatives.

Ejectment proceedings against a licensee under s. 41 of the Presidency Small Cause Courts Act, 1882, do not expire with his death but are liable to be continued upon death of the licensee against his legal representatives.

The ejectment application proceedings against persons mentioned in s. 41 of the Act are proceedings relating to property rights and/or recovery of properties and are not proceedings which are relating to personal causes of action. These proceedings do not die with the death of a party to the proceedings whether he may be applicant and/or opponent but are such as could be continued against legal representatives of a deceased party to the proceedings.

Harendra Bhusan v. Purna Chandra,¹ agreed with.

Ranganatham Pillai v. Govindarajulu Naidu,² dissented from.

Chitman v. Ranjithammal,³ referred to.

THE facts appear in the judgment.

A. A. Peerbhoy, with M. V. Shah and Gilman Fernandes, for the applicants.
C. P. Patel, for the opponent.

K. K. DESAI J. This is a revisional application by heirs and legal representatives of one Damji Lavji Damani, being the original respondent, (hereinafter referred to as "the licensee"), in the Ejectment Application No. 98/1232/E of 1960 filed by the opponent (original applicant), (hereinafter referred to as "the licensor"), in the Court of Small Causes at Bombay under s. 41 in Chapter VII of the Presidency Small Cause Courts Act, seeking to eject the licensee

² [1946] Mad. 222.

*Decided, March 15, 1965. Civil Revision Application No. 963 of 1963.

¹ (1948) 52 C.W.N. 843.

² [1950] II Mad. L.J. 280.

³ (1930) I.L.R. 54 Mad. 554.

from the premises mentioned in the application. The licensee died intestate at Bombay on May 31, 1962, leaving him surviving as his only heirs and legal representatives the petitioners in this revisional application. By his application dated November 12, 1962, the licensor applied to the Court of Small Causes to set aside the abatement of his application and to condone delay in the making of the application and to bring on the record of the ejectment application the names of the above petitioners as defendants Nos. 1 to 8 as legal representatives of the licensee.

The petitioners in this revisional application contend that the Court of Small Causes ought not to have made the order dated February 21, 1963, granting the application of the licensor. Their case is that the Court below ought to have held that since the licensor's case against the deceased licensee was that he was a licensee and his licence had been revoked, the ejectment application came to an end (altogether) upon the death of the licensee on May 31, 1962. The proceedings for ejectment under s. 41 of the Act are such as cannot be continued against the legal representatives of the licensee. The reason for this, according to the petitioners, is that a licence is not heritable. The proceedings under s. 41 could only lie against a licensee. These proceedings filed against any particular person are not liable to be continued against his legal representatives, because a licence is not heritable and does not create any rights in the legal representatives of the original opponent in the ejectment application.

In this connection, the petitioners rely upon the decision of a single Judge of the High Court at Madras in the case of *Ranganatham Pillai v. Govindarajulu Naidu*.¹ In the above case, a landlord had filed an ejectment application under s. 41 of the Presidency Small Cause Courts Act against two defendants. Defendant No. 1 to whom the licence had been granted (licensee) died pending the hearing of the ejectment application. The applicant applied to the trial Court for having defendant No. 2 brought on record as legal representative of defendant No. 1 in the ejectment application. The trial Court granted that application. In the revisional petition before the High Court of Madras, on behalf of defendant No. 2, it was contended that

"the cause of action contemplated by section 41 of the Presidency Small Cause Courts Act, where a licensee happens to be the person against whom a proceeding is sought to be taken in the first instance is something which necessarily expires with the death of the licensee".

The contention urged was that with the death of defendant No. 1 there was no proceeding to be continued against defendant No. 2 as "holding under or by assignment from" defendant No. 1 within the language of s. 41 of the Act. The contention was accepted by the Court. In that connection, the Court disapproved of the observations made by the High Court of Calcutta in the case of *Hirendra Bhusan v. Purna Chandra*.² The Court referred to the decision of the High Court of Madras in the case of *Chinnan v. Ranjithammal*.³ It is necessary to point out that the first part of the observations in the case of *Chinnan v. Ranjithammal* quoted in the case of *Ranganatham Pillai v. Govindarajulu Naidu* relates to the position of a licensee whose licensor sells away the immovable property in question. It is observed that upon transfer and sale of the property the licensee ceases to have any rights altogether and the licence stands revoked upon transfer and sale of the property. The Court further observed (p. 556):

"...A license is not annexed to the property in respect of which it is enjoyed, nor is it a transferable or heritable right, but is a right purely personal between grantor and licensee. Unless a different intention appears, it cannot even be exercised by the licensee's servants or agents (section 56). Accordingly in their occupation of the plot, and especially so since the death of Ponjolai, the defendants have been mere trespassers.... We need not look further for authority than to *Vadapalli Narasimham v.*

1 [1950] II Mad. L.J. 280.

2 (1948) 52 C.W.N. 843, at p. 848.

3 (1930) I.L.R. 54 Mad. 554.

Dronamraju Seetharamamurthy,⁴ for the proposition that the representatives of a tenant on sufferance are mere trespassers, since they cannot be regarded as succeeding to any interest in the tenancy; and what is true of a tenant on sufferance would seem to be true also of a licensee."

Now, in connection with the above observations of the High Court of Madras in case of *Chinnan v. Ramjithammal*, we respectfully agree that a licence is not annexed to the property, nor is it transferable or heritable. We further agree that a tenant on sufferance is a mere trespasser and what is true of a tenant on sufferance would seem to be true also of a licensee. The total result of the above position is that upon revocation of a licence the licensee ceases to have any lawful right to enter upon and/or to continue in occupation of the property in question. The character of his possession and occupation subsequent to the valid revocation of the licence is that of a trespasser.

In this very connection and in connection with the contents of s. 41 of the Act, in the case of *Hirendra Bhushan v. Purna Chandra*, the Calcutta High Court, *inter alia*, observed (p. 848):

"...According to sec. 41, 'occupant' comprises a 'tenant or occupier or any person holding under or by assignment from him', and the first paragraph of the section suggests that by 'occupier' is meant a person occupying the property by permission of the applicant or any person through whom the applicant claims, that is to say, a licensee. The effect of the section, generally stated, therefore, is that the landlord may demand possession of a tenant or a licensee or a person holding under or by assignment from such tenant or licensee, as the case may be, and if the demand be not complied with, he may apply for summons against the person who failed to deliver possession on such demand".

Raghava Rao J., in deciding the case of *Ranganatham Pillai v. Govindarajulu Naidu*, dissented from the views expressed by the High Court of Calcutta as quoted above. As we will presently point out, it appears to us that the construction of s. 41 of the Act as decided by the High Court of Calcutta in the manner mentioned above is correct. With respect, we do not agree with Raghava Rao J. that the opinion expressed by the High Court of Calcutta is erroneous.

Now, in this connection, we will first refer to the relevant provisions in s. 41 of the Act which run as follows:

"41. *Summons against person occupying property without leave.*—When any person has had possession of any immoveable property... as the tenant, or by permission, of another person, or of some person through whom such other person claims, and such tenancy or permission has determined or been withdrawn, and such tenant or occupier or any person holding under or by assignment from him (hereinafter called the occupant) refuses to deliver up such property in compliance with a request made to him in this behalf by such other person, such other person (hereinafter called the applicant) may apply to the Small Cause Court..."

Apparently, the provisions in s. 41 provide for a summary application for ejectment of parties who by consent may have been enjoying rights of occupation of properties. These parties have been mentioned in the section as (i) tenants, (ii) occupants by permission of another person and (iii) occupants to whom permission may have been granted by the parties who had permission. Against all such parties, ejectment proceedings are liable to be instituted under s. 41. The only condition for institution of such application is that the tenancy or permission must be determined or must have been withdrawn. According to the licensor, the original licensee Damji Lavji Damani was given a licence to be on the premises mentioned in the application. His licence had been revoked by the licensor prior to the institution of the ejectment application. The obvious result of that revocation was as already discussed above that the licensee was from the date of revocation of the licence a trespasser in occupation of

the premises mentioned in the application. He thereafter had no right whatsoever according to the licensor to continue to occupy the premises. The question is as to how the proceedings by way of ejectment application were affected by reason of licensee's death on May 31, 1962. Now, in this connection the provisions which became applicable were the provisions in O. XXII, rr. 1 and 4, of the Code of Civil Procedure. The relevant parts of these rules provide:

"1. The death of a ... defendant shall not cause the suit to abate if the right to sue survives."

"2. (1) Where ... a sole defendant or sole surviving defendant dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit..."

In connection with the question of the right to sue surviving upon death of a person, the relevant statutory provisions are contained in ss. 305 and 306 of the Indian Succession Act. These sections provide as follows:

"305. An executor or administrator has the same power to sue in respect of all causes of action that survive the deceased, and may exercise the same power for the recovery of debts as the deceased had when living.

306. All demands whatsoever and all rights to prosecute or defend any action or special proceeding existing in favour of or against a person at the time of his decease, survive to and against his executors or administrators; except causes of action for defamation, assault, as defined in the Indian Penal Code, or other personal injuries not causing the death of the party; and except also cases where, after the death of the party, the relief sought could not be enjoyed or granting it would be nugatory."

The maxim of law in this connection is *actio personalis moritur cum persona* (the right of personal action dies with the person). The converse of this has been accepted as correct by all Courts throughout. The converse is that property rights in favour of and/or against any person continue to exist in favour of or against legal representatives of a deceased party-litigant. It is for this reason that one finds the above provisions in the Code of Civil Procedure and the Indian Succession Act. The question in connection with bringing legal representatives on record (in the language of s. 306 of the Indian Succession Act) would be:— whether the cause and/or the suit relates to defamation, assault, as defined in the Indian Penal Code, or it relates to other personal injuries not causing the death of the party and whether it is such as after the death of the party the relief sought could not be enjoyed or granting it would be nugatory. In this connection, reference may be made to the provisions in the Fatal Accidents Act and similar statutes. In our view, it is not possible for us to form the opinion that the ejectment application proceedings against persons mentioned in s. 41 of the Presidency Small Cause Courts Act are proceedings not relating to property rights and/or recovery of properties. These are not proceedings which are relating to personal causes of action. These proceedings do not die with the death of a party to the proceedings whether he may be applicant and/or opponent. On the contrary, these being proceedings for recovery of properties and for enforcing rights to properties, are such as could always be continued against legal representatives of a deceased party to the proceedings.

Having regard to the above discussion, with respect, we are unable to accept as correct the ratio of the decision in the case of *Ranganatham Pillai v. Govindarajulu Naidu* mentioned above. We respectfully disagree with the observation in that case that the ejectment proceedings under s. 41 of the Presidency Small Cause Courts Act are something which necessarily expire with the death of the licensee. In our view, these are proceedings which are liable to be continued upon death of the opponent in the proceedings against his legal representatives.

In this connection, it is necessary to mention that by the written statement filed by the licensee, it was, *inter alia*, contended that he was not a licensee as alleged in the application. In fact, he was a sub-tenant. Having regard to

his position as a sub-tenant, he also contended that by the notice mentioned in the application the applicant was not entitled to terminate his rights as a sub-tenant. He had acquired rights of a tenant. He was not liable to be ejected from the premises. Now, these were contentions relating to exercise and enforcement of proprietary rights on behalf of the licensee. It is difficult to see how the legal representatives of the licensee were not entitled to adopt these contentions and if they were right how they were liable to be ejected in the ejectment application proceedings. We have referred to the above contentions made in the written statement only because these go to show that contentions of various kinds relating to proprietary rights would generally arise in ejectment applications filed under s. 41 of the Act. In connection with the licensor's contention that the licensee had become a trespasser having regard to revocation of his licence and the contentions of the licensee of the nature mentioned above, it is clear that the proceedings were liable to be continued upon death of the licensee against his legal representatives.

In the result, the revisional application is dismissed. Rule discharged with costs.

Rule discharged.

SUPREME COURT.

Present: Mr. Justice K. Subba Rao, Mr. Justice K. N. Wanchoo, Mr. Justice M. Hidayatullah, Mr. Justice Raghubar Dayal and Mr. Justice Sikri.

N. B. JEEJEEBHAY

v.

THE ASSISTANT COLLECTOR, THANA PRANT.*

Land Acquisition (Bombay Amendment) Act (Bom. IV of 1948)—Constitution of India, Arts. 31-A, 31-B, 31—Government of India Act, 1935 [25 & 26 Geo. 5. Ch. 42], s. 299—Whether Bom. Act IV of 1948 void—Expression "compensation" in s. 299, Government of India Act, 1935, meaning of—Whether art. 31-B governed by art. 31-A.

The Land Acquisition (Bombay Amendment) Act, 1948, was void at its inception. The expression "compensation" in s. 299 of the Government of India Act, 1935, means a "just equivalent" of what the owner has been deprived of.

The State of West Bengal v. Bela Banerjee,¹ applied.

Article 31-B of the Constitution of India is not governed by art. 31-A of the Constitution and art. 31-B is a constitutional device to place the specified statutes beyond any attack on the ground that they infringe Part III of the Constitution.

THE facts are stated at 60 *Bombay Law Reporter* 1125.

J. C. Bhat, R. P. Bhat and R. A. Gagrati, of Gagrati & Co., for the appellant (in both the appeals).

C. K. Daphtary, Attorney General for India, and N. S. Bindra, with R. H. Dhebar and B. R. G. K. Achar, for the respondent (in both the appeals).

N. A. Palkhivala, with R. A. Gagrati, of Gagrati & Co., for interveners Nos. 1 and 2.

Purshottam Trikamdas, with J. B. Dadachanji, Ravinder Narain and K. R. Chaudhuri, for interveners Nos. 3 and 4.

SUBBA RAO J. These two appeals are directed against the judgment and decree of the High Court of Judicature at Bombay modifying those of the Civil Judge, Senior Division, Thana, in a reference arising out of land acquisition proceedings.

*Decided, October 5, 1964. Civil Appeals 1 [1964] S.C.R. 558.
Nos. 775 and 776 of 1962.

On May 28, 1948, the Government of Bombay issued a notification under s. 4 of the Land Acquisition Act, 1894, notifying that certain lands belonging to the appellant, along with lands belonging to others, were likely to be needed for the Government Housing Scheme, a public purpose. Notifications under s. 6 of the Land Acquisition Act were issued on July 14, 1949, August 1, 1949, and August 11, 1949. On December 31, 1949, possession of the lands so notified was taken under s. 17 of the Land Acquisition Act. The Land Acquisition Officer classified the said lands into six groups based upon certain criteria. Some of the lands of the appellant fell in group Nos. 4 and 5, and his khajan lands fell in group No. 6. He valued the khajan lands at Rs. 500 per acre, i.e., at anna 1 pies $7\frac{1}{2}$ per sq. yard, and the lands in group No. 4 at Rs. 1-6-0 per sq. yard, and those in group No. 5 at Rs. 1-4-0 per sq. yard. Though the appellant claimed before the Land Acquisition Officer Rs. 44,02,858-8-0 as compensation for the land and Rs. 10,696-14-0 as loss of assessment, the said Officer awarded a total amount of Rs. 1,31,096-4-0 as compensation. The appellant filed an application under s. 18 of the Land Acquisition Act for a reference to the District Court questioning the correctness of the compensation awarded to him by the Land Acquisition Officer. His reference was numbered as Reference No. 55 of 1953. The learned Civil Judge, Senior Division, Thana, heard that reference along with others made at the instance of different claimants and gave his award on November 30, 1953. The learned Civil Judge increased the compensation in respect of the khajan lands from 1 anna and $7\frac{1}{2}$ pies per sq. yard to annas 8 per sq. yard, and in respect of lands in groups 4 and 5 he increased the compensation by annas 2 per sq. yard: in the result, he awarded compensation in the sum of Rs. 2,97,676-15-0 instead of Rs. 1,31,096-4-0 awarded by the Land Acquisition Officer. The point to be noticed is that the learned Civil Judge valued the lands as on January 1, 1948, though the notification under s. 4 of the Land Acquisition Act was issued on May 28, 1948, as under the provisions of the Land Acquisition (Bombay Amendment) Act, 1948 (Bombay Act IV of 1948), hereinafter called the Amending Act, the former date was the crucial date for awarding compensation. He further did not award the additional 15 per cent. of the market value of the lands as solatium for compulsory acquisition, as under the Amending Act, unlike under the Land Acquisition Act, 1894, no solatium was provided for. Both the appellant and the respondent preferred appeals to the High Court against the said award, the appeal filed by the appellant being First Appeal No. 611 of 1954 and that filed by the respondent being First Appeal No. 318 of 1954. The High Court heard the said appeals along with the appeals filed by other claimants and delivered a common judgment on March 26, 1958. The High Court held that though the Act was hit by art. 14 of the Constitution, it was saved by art. 31-A thereof and that under s. 229 of the Government of India Act, 1935, which governed the statute, the compensation for compulsory acquisition did not necessarily mean equivalent in value to the owner of what he had been deprived and, therefore, the Amending Act was valid. In the result, it allowed the appeal filed by the respondent by restoring the award of the Land Acquisition Officer in respect of the khajan lands and dismissed the appeal filed by the appellant. Hence the appeals.

We have heard the arguments of Mr. Bhat for the appellant, Mr. Palkhivala for the interveners, the Attorney-General for the respondents and the counsel representing the Advocates-General of some of the States to whom notices were issued by the Court.

Mr. Bhat, appearing for the appellant, raised before us the following points: (1) The Amending Act, being a pre-Constitution Act, was governed by s. 299 of the Government of India Act, 1935, and as it did not provide for payment of compensation for property acquired in the sense the said expression was interpreted by this Court, the said Act was void. (2) The Act infringed art. 14 of the Constitution. And (3) it was not saved under art. 31-A of the Constitution, as, though the land acquired was an "estate" within the meaning of

the said provision, the acquisition had no concern with agrarian reforms or even with the regulation of village economy as laid down by the decisions of this Court.

Learned Attorney-General appearing for the respondent contended that the said Act was covered by art. 31-A of the Constitution and, therefore, its validity could not be questioned on the ground that it contravened either art. 14 or art. 31 of the Constitution. Assuming that his contention was wrong, he proceeded to argue that the Amending Act was saved by art. 31 (5)(a) of the Constitution and, therefore, the question of the adequacy of the compensation could not be questioned in Court. He further sought to ward off the attack based on art. 14 of the Constitution on the foot of the doctrine of classification.

The first question is whether the Amending Act was void on the ground that it did not comply with the provisions of s. 299 of the Government of India Act, 1935. To appreciate the contentions of the parties it would be convenient to notice at the outset the provisions of the Amending Act. The impugned Act was passed for the purpose of acquiring lands for Housing Schemes. It is a short Act consisting of 3 sections. It extends to the whole of the State of Bombay. At the time of enactment its life was fixed at 5 years, but later on extended to 10 years, and by Bombay Act XXIV of 1958 it was extended further to 20 years. Under the Amending Act, "housing scheme" is defined to mean

"any housing scheme which the Government may from time to time undertake for the purpose of increasing accommodation for housing persons and shall include any such scheme undertaken from time to time with the previous sanction of the State Government by a local authority or company."

Section 3 makes some changes in the Land Acquisition Act. The expression "public purpose" in s. 3(f) of the Land Acquisition Act includes a housing scheme as defined in the Amending Act. By s. 3(1)(c) of the Act in first clause of sub-section (1) of s. 23 of the Land Acquisition Act, after the words, brackets and figures "section 4, sub-section (1)" the words "or at the relevant date, whichever is less" have been inserted. "Relevant date" is defined to mean January 1, 1948; and sub-s. (2) of s. 23 has been omitted. The result is that under the Amending Act if a land is acquired for a housing scheme, the person whose land is acquired will not be entitled to the market value of the land at the date of the publication of the notification but only to the market value of the land at the date of the said notification or on January 1, 1948, whichever is less and he will not be entitled to a sum of 15 per cent. on the market value as solatium in consideration of the compulsory nature of the acquisition. In short, the Amending Act provides for acquiring lands for housing schemes on the payment of compensation which is likely to be less than that payable if the land is acquired under the Land Acquisition Act.

The Amending Act, being a pre-Constitution Act, was governed by s. 299 of the Government of India Act, 1935. Sub-section (2) of s. 299 of the Government of India Act, 1935, read as follows:

"Neither the Dominion Legislature nor a Provincial Legislature shall have power to make any law authorising the compulsory acquisition for public purposes of any land, or any commercial or industrial undertaking, or any interest in, or in any company owning, any commercial or industrial undertaking, unless the law provides for the payment of compensation for the property acquired and either fixes the amount of the compensation, or specifies the principles on which, and the manner in which, it is to be determined."

Under this sub-section the power to make any law by an appropriate Legislature was subject to the conditions laid down therein. The power thereunder could not be exercised unless the conditions were complied with. They were fetters on the legislative power. Section 299 of the Government of India Act in express terms said that the appropriate Legislature had no power to make

any law authorising the compulsory acquisition for public purposes of any land etc. unless the law provided for the payment of compensation for the property acquired. If "compensation" was not so provided, it affected the competency of the appropriate Legislature to make the said law. If it did not have power, the law so made was a nullity. It is as if it did not exist on the statute book.

The question is whether the Act provides for compensation within the meaning of s. 299(2) of the Government of India Act, 1935. This Court had the occasion to construe the meaning of that expression in art. 31(2) of the Constitution before it was amended by the Constitution (Fourth Amendment) Act, 1955. Under cl. (2) of art. 31, no property shall be taken possession of or acquired for a public purpose unless the law provides for compensation for the property taken possession of or acquired and either fixes the amount of compensation or specifies the principles on which and the manner in which the compensation is to be determined and given. Both under s. 299 of the Government of India Act, 1935, and art. 31(2) of the Constitution, fixation of the amount of compensation or specification of the principles on which and the manner in which it is to be determined are necessary conditions for a valid acquisition. Indeed, the relevant parts of the said two provisions are *pari materia* with each other. The scope of the said conditions fell to be considered in *The State of West Bengal v. Bela Banerjee*¹. That case was dealing with the West Bengal Land Development and Planning Act, 1948, which was passed primarily for the settlement of immigrants who had migrated into West Bengal due to communal disturbances in East Bengal, and which provided for the acquisition and development of land for public purposes including the said purpose. Under that Act it was provided that the amount of compensation paid thereunder should not exceed the market value of the land on December 31, 1946; that is to say, even if the notification under s. 4 or under s. 6 of the Land Acquisition Act was issued long after the said date, the market value of the land acquired could only be the market value of the said land on the said date. After reading the relevant articles of the Constitution, this Court proceeded to state:

"...While it is true that the legislature is given the discretionary power of laying down the principles which should govern the determination of the amount to be given to the owner for the property appropriated, such principles must ensure that what is determined as payable must be compensation, that is, a just equivalent of what the owner has been deprived of. Within the limits of this basic requirement of full indemnification of the expropriated owner, the Constitution allows free play to the legislative judgment as to what principles should guide the determination of the amount payable. Whether such principles take into account all the elements which make up the true value of the property appropriated and exclude matters which are to be neglected, is a justiciable issue to be adjudicated by the court."

Applying the said principles to the facts of the case before it, this Court held thus:

"...Considering that the impugned Act is a permanent enactment and lands may be acquired under it many years after it came into force, the fixing of the market value on December 31, 1946, as the ceiling on compensation, without reference to the value of the land at the time of the acquisition is arbitrary and cannot be regarded as due compliance in letter and spirit with the requirement of article 31(2). The fixing of an anterior date for the ascertainment of value may not, in certain circumstances, be a violation of the constitutional requirement as, for instance, when the proposed scheme of acquisition becomes known before it is launched and prices rise sharply in anticipation of the benefits to be derived under it, but the fixing of an anterior date which might have no relation to the value of the land when it is acquired, may be, many years later, cannot but be regarded as arbitrary."

This decision lays down the following principles: (1) The expression "compensation" in art. 31(2) of the Constitution means "just equivalent" of what

the owner has been deprived of; (2) the principles laid down by the Legislature shall be only for the determination of the compensation so defined; (3) whether the principles have taken into account the relevant elements to ascertain the true value of the property acquired is a justiciable issue; and (4) the fixation of an anterior date for the ascertainment of the value of the property acquired without reference to any relevant circumstances which necessitated the fixing of an earlier date for the purpose of ascertaining the real value is arbitrary. In our view, the principles laid down in this judgment directly govern the situation arising under s. 299 of the Government of India Act, 1935. In the context of the payment of compensation and prescribing of principles for ascertaining the amount of compensation, we cannot discover any relevant distinction between the two provisions so as to compel us to give a meaning to the expression "compensation" under s. 299 of the Government of India Act, 1935, different from that given to that expression in art. 31(2) of the Constitution by this Court. The High Court refused to rely upon the said decision in construing s. 299 of the Government of India Act, 1935, for the following reasons†:

"...But the context in which art. 31 of the Constitution occurs is entirely different from the context in which s. 299 of the Government of India Act occurred. Even if the two provisions have been made with the same object, the Court cannot ignore the circumstance that under s. 299 of the Government of India Act there was a restriction imposed upon the sovereign right of the Legislature to enact legislation in matters of compulsory acquisition of land and that provision had to be strictly construed, whereas art. 31 of the Constitution, which has undergone various changes during the last eight years, is, in form and substance, a declaration of a right to property in favour of all persons and of the incidents of that right."

We do not see how the said distinction between the two provisions would make any difference in the matter of construing the meaning of similar words and expressions used in both the provisions. It must also be remembered that the wording in the last part of s. 299 of the Government of India Act, 1935, was bodily lifted and introduced in art. 31(2) of the Constitution and, therefore, it is reasonable to assume that at any rate when the Constitution was originally framed the intention was not to give a different meaning to the said wording. If the intention of the Constitution-makers was to give a different meaning, they would have used appropriate words like "price", "consideration", etc. to indicate that they were departing from the framework of s. 299 of the Government of India Act, 1935. We cannot, therefore, share the opinion of the High Court that the expression "compensation" in s. 299 of the Government of India Act, 1935, should be given a meaning more restricted than that given by this Court to the said expression in art. 31(2) of the Constitution. Both must bear the same meaning. If so, the expression "compensation" in s. 299 of the Government of India Act, 1935, means a "just equivalent" of what the owner has been deprived of. Learned Attorney-General contends that the said decision has relevance only to a permanent enactment and that, as the Amending Act, when enacted, was only for 5 years, the said decision is not applicable. It is true that this Court was considering an enactment which was permanent in character; but that only represented the factual position and this Court did not base its decision on that circumstance. On principle, in the context of ascertainment of compensation there cannot be any justification for drawing a line solely based on the distinction between a permanent Act and a temporary one. Suppose a temporary law passed for 15 years in the year 1948 prescribed that the compensation in respect of the land acquired thereunder should be ascertained on the basis of its market value in the year 1930. Can it be said that the circumstance that the Act was temporary would make the compensation fixed any the less arbitrary? It is true that an earlier date may be fixed for ascertaining the value of the property acquired if it falls within the pro-

† 60 Bom. L.R. 1125, at p. 1130.

cess of acquisition or for any other relevant reason. But these are all special circumstances which are not present in the instant case. That apart, the Amending Act though initially was only for 5 years, the life of the Act was being extended from time to time and the latest extension was for 20 years and it may have a further lease of life. In effect and substance the Amending Act has turned out to be as good as a permanent one.

The Amending Act in the matter of fixing compensation demonstrably contravened the provisions of s. 299 of the Government of India Act, 1935. Under the Amending Act, as we have already noticed, though a land may be acquired subsequent to the said Act, the compensation payable in respect thereof will be the value of it as on January 1, 1948. Under the Amending Act the said dating back has no relevance to the matter of fixing the compensation for the land. It is not a "just equivalent" of what the owner has been deprived of, for the value of the land on that date may be far less than that obtaining on the date of the notification under s. 4 of the Land Acquisition Act. We, therefore, hold that the Amending Act was void as the Legislature made it in contravention of the express provisions of s. 299 of the Government of India Act. It was a still-born law.

The attempt to save the Amending Act under art. 31(5)(a) of the Constitution, in our view, cannot also succeed. The material part of art. 31(5)(a) reads:

"Nothing in clause (2) shall affect—

(a). the provisions of any existing law other than a law to which the provisions of clause (6) apply".

Clause (6) of art. 31 reads:

"Any law of the State enacted not more than eighteen months before the commencement of this Constitution may within three months from such commencement be submitted to the President for his certification; and thereupon, if the President by public notification so certifies, it shall not be called in question in any court on the ground that it contravenes the provisions of clause (2) of this article or has contravened the provisions of sub-section (2) of section 299 of the Government of India Act, 1935."

A combined reading of these two provisions discloses that cl. (2) of art. 31 of the Constitution shall not affect any existing law except a law of a State enacted not more than 18 months before the commencement of the Constitution unless such law was submitted within three months from such commencement to the President for his certification and the President certified it in the manner prescribed therein. The Amending Act does not fall under the exception. So, the only question is whether the Act was an existing law at the commencement of the Constitution. Learned Attorney-General contends that the expression "existing law" does not mean valid law and that if a law was factually made before the Constitution, it would be an existing law under the Constitution notwithstanding that it infringed cl. (2) of art. 31 of the Constitution. Before cl. (5) of art. 31 can be invoked there must be an existing law. "Existing law" under art. 366(10) means "any law, Ordinance, order, bye-law, rule or regulation passed or made before the commencement of this Constitution by any Legislature, authority or person having power to make such a law, Ordinance, order, bye-law, rule or regulation." To have the status of an existing law, the law should have been made by a Legislature having power to make such law. We have held that the Amending Act was still-born and it was void at the inception. Therefore, it was not an "existing law" within the meaning of art. 31(5) of the Constitution. Further, a comparison of the provisions of cls. (5) and (6) shows that in the latter the non-compliance of the provisions of s. 299 of the Government of India Act, 1935, was expressly saved, if the conditions laid down therein were satisfied, while in the former no such express protection was given and, therefore, no resuscitation of a dead law was possible thereunder.

This argument was repelled by a Division Bench of the Allahabad High Court in *H. P. Khandewal v. State of U. P.*²; by the Bombay High Court in *Assistant Collector, Thana v. Jannadas Gokuldas*³ and by the Calcutta High Court in *State of W. B. v. Bon Behari*⁴. For the reasons aforesaid we hold that art. 31(5) of the Constitution also does not save the amending Act.

Nor can we hold that art. 31-A of the Constitution saves the Act. The argument of the learned Attorney-General is that s. 299 of the Government of India Act, 1935, declared a fundamental right of a citizen, that it was bodily lifted and introduced by the Constitution in art. 31(2) thereof and that if art. 31-A saved an attack against the Amending Act on the ground that it infringed art. 31(2) thereof, it would equally save the attack based on the infringement of s. 299(2) of the Government of India Act, 1935. The argument is far-fetched. Article 31-A says that no law providing for the acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such rights shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by art. 14, art. 19 or art. 31. If a particular statute attracts art. 31-A(1) (a), it cannot be invalidated on the ground that it does not comply with the provisions of art. 31(2) of the Constitution, namely, that the Act has not fixed the amount of compensation. But art. 31-A cannot have any bearing in the context of an Act which had no legal existence at the time the Constitution came into force. It does not purport to revive laws which were void at the time they were made. The analogy drawn between a fundamental right under art. 31(2) and the conditions laid down in s. 299 of the Government of India Act, 1935, if it has any justification, is irrelevant in the context of a pre-Constitution void law. In this view, art. 31-A does not come into the picture at all. The learned Attorney-General relied upon two decisions of this Court, namely, *Dhirubha Devisingh Gohil v. The State of Bombay*⁵ and *The State of U. P. v. H. H. Maharaja Brijendra Singh*⁶. In the first case the validity of the Bombay Taluqdari Tenure Abolition Act, 1949 (Bombay Act LXII of 1949) was impugned on the ground that it took away or abridged the fundamental rights conferred by the Constitution. The said Act was passed in the year 1949. It received the assent of the Governor-General on January 18, 1950, and was gazetted on January 24, 1950. It was contended that, as the conditions laid down in cl. (6) of art. 31 of the Constitution were not complied with, the Act was void inasmuch as it was made in violation of the provisions of s. 299 of the Government of India Act, 1935. But as the Act was one of the Acts specified in the Ninth Schedule to the Constitution, being item 4 thereof, this Court held that on the language used in art. 31-B of the Constitution the validity of the Act could not be questioned on the ground of infringement of s. 299 of the Government of India Act, 1935. In that context, this Court observed:

"This is clearly a case where the concerned right which was secured under section 299 of the Government of India Act in the form of a fetter on the competency of the Legislature and which in substance was a fundamental right, was lifted into the formal category of a fundamental right along with other fundamental rights recognised in the present Constitution. There is therefore nothing inappropriate in referring to this right which was pre-existing, along with the other fundamental rights for the first time secured by this Constitution, when grouping them together, as fundamental rights 'conferred' by the Constitution. What is important to notice in the phraseology of article 31-B is that the protection is not merely against the contravention of certain provisions but an attack on the ground of unconstitutional abridgement of *certain rights*. It will be illogical to construe article 31-B as affording protection only so far as these rights are taken away by an Act in violation of the provisions of the new Constitution but not when they are taken away by an Act in violation of section 299 of the Government of

2 [1955] A.I.R. All. 12.

3 [1959] Bom. 98, s.o. 60 Bom L.R. 1125.

4 [1961] A.I.R. Cal. 112.

5 (1964) Civil Appeal No. 743 of 1963,

decided on August 8, 1964 (Supreme Court).

6 (1964) Civil Appeals Nos. 5 to 12 of 1963,

decided on March 3, 1964 (Supreme Court),

India Act which has been repealed. The intention of the Constitution to protect each and every one of the Acts specified in the Ninth Schedule from any challenge on the ground of violation of any of the fundamental rights secured under Part III of the Constitution, irrespective of whether they are pre-existing or new rights, is placed beyond any doubt or question by the very emphatic language of article 31-B which declares that none of the provisions of the specified Acts shall be deemed to be void or *ever to have become void* on the ground of the alleged violation of the rights indicated and 'notwithstanding any judgment, decree or order of any court or tribunal.'

This judgment was followed by this Court in the second decision cited above. The said decisions turned upon the express provisions of art. 31-B of the Constitution. Though the observations therein appear to be wide, they have no bearing on the question whether the Act was void before the Constitution came into force. The question whether a particular Act was void before the Constitution came into force would not arise if the Constitution itself included the said Act in the Ninth Schedule and declared that the said Act should not be deemed to be void or even to have become void. It was possible to construe the expression "any rights conferred by any provisions of this Part" so as to include similar pre-existing rights under the Government of India Act, 1935, but such a construction would be quite out of place in the context of the question whether the Legislature had the legislative competency to make the law before the Constitution came into force. The learned Attorney-General contended that art. 31-A and art. 31-B should be read together and that if so read art. 31-B would only illustrate cases that would otherwise fall under art. 31-A and, therefore, the same construction as put upon art. 31-B should also apply to art. 31-A of the Constitution. This construction was sought to be based upon the opening words of art. 31-B, namely "without prejudice to the generality of the provisions contained in article 31-A". We find it difficult to accept this argument. The words, "without prejudice to the generality of the provisions", indicate that the Acts and regulations specified in the Ninth Schedule would have the immunity even if they did not attract art. 31-A of the Constitution. If every Act in the Ninth Schedule would be covered by art. 31-A, this article would become redundant. Indeed, some of the Acts mentioned therein, namely, items 14 to 20 and many other Acts added to the Ninth Schedule, do not appear to relate to estates as defined in art. 31-A(2) of the Constitution. We, therefore, hold that art. 31-B is not governed by art. 31-A and that art. 31-B is a constitutional device to place the specified statutes beyond any attack on the ground that they infringe Part III of the Constitution. We, therefore, hold that, as the Amending Act was void from its inception, art. 31-A could not save it.

As we have held that the Amending Act is void, it is not necessary to express our opinion on the question whether it infringes the provisions of art. 14 of the Constitution.

We, therefore, hold that the Amending Act was void at its inception and that the lands acquired should be valued in accordance with the provisions of the Land Acquisition Act, 1894. In the result, the decree of the High Court is set aside and the appeals are remanded to the District Court with the direction that it should dispose them of in accordance with law. The respondents will pay to the appellants the costs of this Court and costs of the High Court. The costs of the District Court will abide the result.

Present: Mr. Justice K. Subba Rao, Mr. Justice N. Rajagopala Ayyangar and Mr. Justice J. R. Mudholkar.

THE STATE OF MAHARASHTRA v. MAYER HANS GEORGE.*

Foreign Exchange Regulation Act (VII of 1947), Secs. 8(1), 24(1), 23(1-A)—Defence of India Rules 1962. Rule 141—*Mens rea* whether an essential ingredient in respect of offence under s. 23(1-A)—Publication of rules of statute, what constitutes—Whether necessary for Indian law to be published outside country to operate in Indian territory—"Cargo", term used in Reserve Bank notification of November 8, 1962, connotation of.

Under s. 8(1) read with s. 24(1) of the Foreign Exchange Regulation Act, 1947, there is no scope for the invocation of the rule (of *mens rea*) that besides the mere act of voluntarily bringing gold into India any further mental condition is postulated as necessary to constitute an offence of the contravention referred to in s. 23(1-A) of the Act.

Lim Chin Aik v. The Queen,¹ explained and distinguished.

The Queen v. Tolson,² *Bruhn v. Rex*,³ *Regina v. St. Margarets Trust Ltd.*⁴ and *The Indo-China Steam Navigation Co. Ltd. v. Jasjit Singh*, Addl. Collector of Customs, Calcutta,⁵ referred to.

The very concept of "bringing" or "sending" would exclude an involuntary bringing or an involuntary sending. Thus, if without the knowledge of a person a packet of gold is slipped into his pocket it is possible to accept the contention that such a person did not "bring" the gold into India within the meaning of s. 8(1) of the Act. Similar considerations would apply to a case where the aircraft on a through flight which did not include any landing in India has to make a forced landing in India—owing say to engine trouble.

Where there is a statutory requirement as to the mode or form of publication and they are such that, in the circumstances, the Court holds to be mandatory, a failure to comply with those requirements might result in there being no effective order the contravention of which could be the subject of prosecution but where there is no statutory requirement the rule is that it is necessary that it should be published in the usual form i.e., by publication within the country in such media as is generally adopted to notify to all the persons concerned the making of the rules.

In most of the Indian statutes, including the Foreign Exchange Regulation Act, 1947, there is provision for the rules made being published in the Official Gazette. Therefore, publication in the Gazette of India is the ordinary mode of bringing a rule or subordinate legislation to the notice of the persons concerned.

For an Indian law to operate and be effective in the territory where it operates viz., the territory of India, it is not necessary that it should either be published or be made known outside the country.

Lim Chin Aik v. The Queen,⁶ distinguished

*Johnson v. Sargent & Sons*⁷ and *Imperator v. Leslie Gwilt*,⁸ referred to.

The knowledge of the existence or content of a law by an individual will not always be relevant, save on the question of the sentence to be imposed for its violation.

The term "cargo" occurring in the notification of the Reserve Bank of India published on November 8, 1962, is used as contra-distinguished from personal luggage in the law relating to the carriage of goods, the latter meaning as whatever a passenger takes with him for his personal use or convenience, either with reference to his immediate necessities or for his personal needs at the end of his journey.

Per Subba Rao J. It is a well settled principle of common law that *mens rea* is an essential ingredient of a criminal offence. A statute can exclude that element, but it is a sound rule of construction adopted in England and also accepted in India to construe a statutory provision creating an offence in conformity with the common

*Decided, May 8, 1964; August 24, 1964.
Criminal Appeal No. 218 of 1963.

1 [1963] A.C. 160.

2 (1889) 23 Q.B.D. 168.

3 [1909] A.C. 317.

4 [1958] 1 W.L.R. 522.

5 (1964) Civil Appeal No. 770 of 1962, decided on February 3, 1964 (Supreme Court).

6 [1963] A.C. 100.

7 [1918] 1 K.B. 101.

8 [1945] Bom. 681, s.c. 47 Bom. L.R. 431.

law rather than against it unless the statute expressly or by necessary implication excluded *mens rea*. There is a presumption that *mens rea* is an essential ingredient of a statutory offence; but this may be rebutted by the express words of a statute creating the offence or by necessary implication. But the mere fact that the object of a statute is to promote welfare activities or to eradicate grave social evils is in itself not decisive of the question whether the element of guilty mind is excluded from the ingredients of the offence. It is also necessary to enquire whether a statute by putting a person under strict liability help him to assist the State in the enforcement of the law; can he do anything to promote the observance of the law? A person who does not know that gold cannot be brought into India without a licence or is not bringing into India any gold at all cannot possibly do anything to promote the observance of the law. *Mens rea* by necessary implication can be excluded from a statute only where it is absolutely clear that the implementation of the object of a statute would otherwise be defeated and its exclusion enables those put under strict liability by their act or omission to assist the promotion of the law. The nature of *mens rea* that will be implied in a statute creating an offence depends upon the object of the Act and the provisions thereof.

THE facts are stated in 66 *Bombay Law Reporter* p. 262.

H. N. Sanyal, Solicitor General of India, and *N. S. Bindra* with *R. H. Dhebar*, for the appellant.

Soli Sorabji, *A. J. Rana*, *J. B. Dadachanji*, *O. C. Mathur* and *Ravinder Narain*, for the respondent.

ORDER.

By majority, the appeal is allowed and the conviction of the respondent is restored: but the sentence imposed on him is reduced to the period already undergone. The respondent shall forthwith be released and the bail bond, if any, cancelled. Reasons will be given in due course.

AYYANGAR J. (*J. R. Mudholkar J.*, concurring; *Subba Rao J.*, dissenting). This appeal by special leave is directed against the judgment and order of the High Court of Bombay setting aside the conviction of the respondent under s. 8(I) of the Foreign Exchange Regulation Act (VII of 1947), 1947 hereinafter called the "Act" read with a notification of the Reserve Bank of India dated November 8, 1962, and directing his acquittal. The appeal was heard by us at the end of April last and on May 8, which was the last working day of the Court before it adjourned for the summer vacation, the Court pronounced the following order:

"By majority, the appeal is allowed and the conviction of the respondent is restored; but the sentence imposed on him is reduced to the period already undergone. The respondent shall forthwith be released and the bail bond, if any, cancelled. Reasons will be given in due course."

We now proceed to state our reasons. The material facts of the case are not in controversy. The respondent who is a German national by birth is stated to be a sailor by profession. In the statement that he made to the Customs authorities, when he was apprehended the respondent stated that some person not named by him met him in Hamburg and engaged him on certain terms of remuneration, to clandestinely transport gold from Geneva to places in the Far East. His first assignment was stated by him to be to fly to Tokyo wearing a jacket which concealed in its specially designed pockets 34 bars of gold each weighing a kilo. He claimed he had accomplished this assignment and that he handed over the gold he carried to the person who contacted him at Tokyo. From there he returned to Geneva where he was paid his agreed remuneration. He made other trips subsequently being engaged in like adventures in all of which he stated he had succeeded, each time carrying 34 kilos of gold bars which on every occasion was carried concealed in a jacket which he wore, but we are now concerned with the one which he undertook at the instance of this international

gang of gold smugglers carrying, similarly, 34 kilo bars of gold concealed in a jacket which he wore on his person. This trip started at Zurich on November 27, 1962, and according to the respondent his destination was Manila where he was to deliver the gold to a contact there. The plane arrived in Bombay on the morning of the 28th. The Customs authorities who had evidently advance information of gold being attempted to be smuggled by the respondent travelling by that plane, first examined the manifest of the aircraft to see if any gold had been consigned by any passenger. Not finding any entry there, after ascertaining that the respondent had not come out of the plane as usual to the airport lounge, entered the plane and found him there seated. They then asked him if he had any gold with him. The answer of the respondent was "what gold" with a shrug indicating that he did not have any. The Customs Inspector thereupon felt the respondent's back and shoulders and found that he had some metal blocks on his person. He was then asked to come out of the plane and his baggage and person were searched. On removing the jacket he wore it was found to have 28 specially made compartments 9 of which were empty and from the remaining 19, 34 bars of gold each weighing approximately one kilo were recovered. The respondent, when questioned, disclaimed ownership of the gold and stated that he had no interest in these goods and gave the story of his several trips which we have narrated earlier. It was common ground that the gold which the respondent carried was not entered in the manifest of the aircraft or other documents carried by it.

The respondent was thereafter prosecuted and charged with having committed an offence under s. 8(I) of the Act and also of certain provisions of the Sea Customs Act, in the Court of the Presidency Magistrate, Bombay. The Presidency Magistrate, Bombay, took the complaint on file. The facts stated earlier were not in dispute but the point raised by the respondent before the Magistrate was one of law based on his having been ignorant of the law prohibiting the carrying of the gold in the manner that he did. In other words, the plea was that *mens rea* was an ingredient of the offence with which he was charged and, as it was not disputed by the prosecution that he was not actually aware of the notification of the Reserve Bank of India which rendered the carriage of gold in the manner that he did an offence, he could not be held guilty. The learned Magistrate rejected this defence and convicted the respondent and sentenced him to imprisonment for one year. On appeal by the respondent the learned Judges of the High Court have allowed the appeal and acquitted the respondent upholding the legal defence which he raised. It is the correctness of this conclusion that calls for consideration in this appeal.

Before considering the arguments advanced by either side before us it would be necessary to set out the legal provisions on the basis of which this appeal has to be decided. The Foreign Exchange Regulation Act, 1947, was enacted in order to conserve foreign exchange, the conservation of which is of the utmost essentiality for the economic survival and advance of every country, and very much more so in the case of a developing country like India. Section 8 of the Act enacts the restrictions on the import and export *inter alia* of bullion. This section enacts, to read only that portion which relates to the import with which this appeal is concerned:

"8. (1) The Central Government may, by notification in the Official Gazette, order that, subject to such exemptions, if any, as may be contained in the notification, no person shall, except with the general or special permission of the Reserve Bank and on payment of the fee, if any, prescribed, bring or send into India any gold or silver or any currency notes or bank notes or coin whether Indian or foreign.

Explanation.—The bringing or sending into any port or place in India, of any such article as aforesaid intended to be taken out of India without being removed from the ship or conveyance in which it is being carried shall nonetheless be deemed to be a bringing or as the case may be, sending into India of that article for the purpose of this section."

Section 8 has to be read in conjunction with s. 23 which imposes penalties on persons contravening the provisions of the Act. Sub-section (1) penalises the contravention of the provisions of certain named sections of the Act which do not include s. 8, and this is followed by sub-s. (1-A) which is residuary and is directly relevant in the present context and it reads:

"23. (1-A) Whoever contravenes—

(a) any of the provisions of this Act or of any rule, direction or order made thereunder, other than those referred to in sub-section (1) of this section and section 19 shall, upon conviction by a Court, be punishable with imprisonment for a term which may extend to two years, or with fine, or with both;

(b) any direction or order made under section 19 shall, upon conviction by a Court, be punishable with fine which may extend to two thousand rupees."

These have to be read in conjunction with the rule as to onus of proof laid down in s. 24(1) which enacts:

"24. (1) Where any person is prosecuted or proceeded against for contravening any provisions of this Act or of any rule, direction or order made thereunder which prohibits him from doing an act without permission, the burden of proving that he had the requisite permission shall be on him."

Very soon after the enactment of the Act the Central Government took action under s. 8(1), and by a notification published in the Official Gazette dated August 25, 1948, the Central Government directed that "except with the general or special permission of the Reserve Bank no person shall bring or send into India from any place out of India any gold bullion", to refer only to the item relevant in the present context. The Reserve Bank by a notification of even date (August 25, 1948) granted a general permission in these terms:

"The Reserve Bank of India is hereby pleased to give general permission to the bringing or sending of any gold or any such silver by sea or air into any port in India:

Provided that the gold or silver

(a) is on through transit to a place which is outside both

(i) the territory of India,

(ii) the Portuguese territories which are adjacent to or surrounded by the territory of India, and

(b) is not removed from the carrying ship or aircraft except for the purpose of transhipment".

On November 8, 1962, however, the Reserve Bank of India in supersession of the notification just now read, published a notification (and this is the one which was in force at the date relevant to this case) giving general permission to the bringing or sending of gold, gold-coin etc.

"into any port or place in India when such article is, on through transit to a place which is outside the territory of India:

Provided that such article is not removed from the ship or conveyance in which it is being carried except for the purpose of transhipment:

Provided further that it is declared in the manifest for transit as same bottom cargo or transhipment cargo".

This notification was published in the Gazette of India on November 24, 1962.

It was not disputed by Mr. Sorabjee—learned counsel for the respondent, subject to an argument based on the construction of the newly added second proviso to which we shall refer later, that if the second notification of the Reserve Bank restricting the range of the exemption applied to the respondent, he was clearly guilty of an offence under s. 8(1) of the Act read with the Explanation to the sub-section. On the other hand, it was not also disputed by the learned Solicitor-General for the appellant-State that if the exemption notification which applied to the present case was that contained in the notification of the Reserve Bank dated August 25, 1948, the respondent had not committed any offence since (a) he was a through passenger from Geneva to Manila as shown by the ticket which he had and the manifest of the aircraft, and besides, (b) he had not even got down from the plane.

Two principal questions have been raised by Mr. Sorabjee in support of the proposition that the notification dated November 8, 1962, restricting the scope of the permission or exemption granted by the Reserve Bank did not apply to the case. The first was that *mens rea* was an essential ingredient of an offence under s. 23(I-A) of the Act and that the prosecution had not established that the respondent knowingly contravened the law in relation to the carriage of the contraband article; (2) The second head of learned counsel's argument was that the notification dated November 8, 1962, being merely subordinate or delegated legislation, could be deemed to be in force not from the date of its issue or publication in the Gazette but only when it was brought to the notice of persons who would be affected by it and that as the same was published in the Gazette of India only on November 24, 1962 whereas the respondent left Zurich on November 27 he could not possibly have had any knowledge there of new restrictions imposed by the Indian authorities and that, in these circumstances, the respondent could not be held guilty of an offence under s. 8(I) or s. 23(I-A) of the Act. He also raised a subsidiary point that the notification of the Reserve Bank could not be attracted to the present case because the second proviso which made provision for a declaration in the manifest "for transit as bottom cargo or transshipment cargo" could only apply to gold handed over to the aircraft for being carried as cargo and was inapplicable to cases where the gold was carried on the person of a passenger.

We shall deal with these points in that order. First as to whether *mens rea* is an essential ingredient in respect of an offence under s. 23(I-A) of the Act. The argument under this head was broadly as follows: It is a principle of the Common law that *mens rea* is an essential element in the commission of any criminal offence against the Common law. This presumption that *mens rea* is an essential ingredient of an offence equally applies to an offence created by statute though the presumption is liable to be displaced by the words of the statute creating the offence, or by the subject-matter dealt with by it (Wright, J. in *Sherras v. De Rutzen*).¹ But unless the statute clearly or by fair implication rules out *mens rea*, a man should not be convicted unless he has a guilty mind. In other words, absolute liability is not to be presumed, but ought to be established. For the purpose of finding out if the presumption is displaced, reference has to be made to the language of the enactment, the object and subject-matter of the statute and the nature and character of the act sought to be punished. In this connection learned counsel for the respondent strongly relied on a decision of the Judicial Committee in *Srinivas Mall Bairoliya v. King-Emperor*.² The Board was, there, dealing with the correctness of a conviction under the Defence of India Rules, 1939, relating to the control of prices. The appellant before the Board was a dealer in wholesale who had employed a servant to whom he had entrusted the duty of allotting salt to retail dealers and noting on the buyer's licence the quantity which the latter had bought and received all of which were required to be done under the rules. For the contravention by the servant of the Regulations for the sale of salt prescribed by the Defence of India Rules the appellant was prosecuted and convicted as being vicariously liable for the act of his servant in having made illegal exactions contrary to the Rules. The High Court took the view that even if the appellant had not been proved to have known the unlawful acts of his servant, he would still be liable on the ground that "where there is an absolute prohibition and no question of *mens rea* arises, the master is criminally liable for the acts of his servant". On appeal to the Privy Council Lord Du Pareq who delivered the judgment of the Board dissented from this view of the High Court and stated (p. 468):

"...They see no ground for saying that offences against those of the Defence of India Rules here in question are within the limited and exceptional class of offences which can be held to be committed without a guilty mind. See the judgment of Wright,

1 [1895] 1 Q.B. 918.

2 (1947) I.L.R. 26 Patna 460, P.C.

J. in *Sherras v. De Rutzen*. Offences which are within that class are usually of a comparatively minor character, and it would be a surprising result of this delegated legislation if a person who was morally innocent of blame could be held vicariously liable for a servant's crime and so punishable 'with imprisonment for a term which may extend to three years'."

The learned Lord then quoted with approval the view expressed by the Lord Chief Justice in *Brend v. Wood*:³

"It is... of the utmost importance for the protection of the liberty of the subject that a court should always bear in mind that, unless the statute, either clearly or by necessary implication rules out *mens rea* as a constituent part of a crime, a defendant should not be found guilty of an offence against the criminal law unless he has got a guilty mind".

Mr. Sorabjee is justified in referring us to these rules regarding presumption and construction and it may be pointed out that this Court has, in *Ravula Hariprasada Rao v. The State*⁴ approved of this passage in the judgment of Lord Du Pareq and the principle of construction underlying it. We, therefore, agree that absolute liability is not to be lightly presumed but has to be clearly established. Besides, learned counsel for the respondent strongly urged that on this point the exposition by Lord Evershed in *Lim Chin Aik v. The Queen*,⁵ had clarified the principles applicable in this branch of the law, and that in the light of the criteria there laid down we should hold that on a proper construction of the relevant provisions of the Act, *mens rea* or a guilty mind must be held to be an essential ingredient of the offence and that as it was conceded by the prosecution in the present case that the respondent was not aware of the notification by the Reserve Bank of India dated November 8, he could not be held guilty of the offence. We might incidentally state that that decision was also relied on in connection with the second of the submissions made to us as regards the time when delegated legislation could be deemed to come into operation, but to that aspect we shall advert later.

In order to appreciate the scope and effect of the decision and of the observations and reasoning to which we shall presently advert it is necessary to explain in some detail the facts involved in it. Section 6(2) of the Immigration Ordinance, 1952, of the State of Singapore enacted:

"6(2). It shall not be lawful for any person other than a citizen of Singapore to enter the colony from the Federation... if such person has been prohibited by order made under section 9 of this Ordinance from entering the colony."

By sub-s. (3) it was provided that:

"Any person who contravenes the provisions of sub-section (2) of this section shall be guilty of an offence against this ordinance."

Section 9 which is referred to in s. 6(2) reads, to quote the material words of sub-section (1):

"The minister may by order... (1) prohibit either for a stated period or permanently the entry or re-entry into the colony of any person or class of persons."

Its sub-s. (3) provided:

"Every order made under sub-section (1) of this section shall unless it be otherwise provided in such order take effect and come into operation on the date on which it was made."

While provision was made by the succeeding portion of the sub-section for the publication in the Gazette of orders which related to a class of persons, there was no provision in the sub-section for the publication of an order in relation to named individuals or otherwise for bringing it to the attention of such persons. The appellant before the Privy Council had been charged with and convicted by the Courts in Singapore of contravening s. 6(2) of the Ordinance by remaining in Singapore when by an order made by the Minister under s. 9(1)

³ (1946) 110 J.P. 317, at p. 318.

⁵ [1963] A.C. 160.

⁴ [1961] S.C.R. 322, at p. 328.

he had been, by name, prohibited from entering the island. At the trial there was no evidence from which it could be inferred that the order had in fact come to the notice or attention of the accused. On the other hand, the facts disclosed that he could not have known of the order. On appeal by the accused, the conviction was set aside by the Privy Council. The judgment of the Judicial Committee in so far as it was in favour of the appellant, was based on two lines of reasoning. The first was that in order to constitute a contravention of s. 6(2) of the Ordinance *mens rea* was essential. The second was that even if the order of the Minister under s. 9 were regarded as an exercise of legislative power, the maxim 'ignorance of law is no excuse' could not apply because there was not, in Singapore, any provision for the publication, in any form, of an order of the kind made in the case or any other provision to enable a man, by appropriate enquiry, to find out what the law was.

Lord Evershed who delivered the judgment of the Board referred with approval to the formulation of the principle as regards *mens rea* to be found in the judgment of Wright, J. in *Sherras v. De Rutzen*, already referred to. His Lordship also accepted as correct the enunciation of the rule in *Srinivas Mall Bairolhya v. King-Emperor* (supra) in the passage we have extracted earlier. Referring next to the argument that where the statute was one for the regulation for the public welfare of a particular activity it had frequently been inferred that strict liability was the object sought to be enforced by the Legislature, it was pointed out (p. 174):

"...The presumption is that the statute or statutory instrument can be effectively enforced only if those in charge of the relevant activities are made responsible for seeing that they are complied with. When such a presumption is to be inferred, it displaces the ordinary presumption of *mens rea*."

Reference was then made to legislation regulating sale of food and drink and he then proceeded to state (p. 174):

"...it is not enough... merely to label the statute as one dealing with a grave social evil and from that to infer that strict liability was intended. It is pertinent also to inquire whether putting the defendant under strict liability will assist in the enforcement of the regulations. That means that there must be something he can do, directly or indirectly, by supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to influence or control, which will promote the observance of the regulations. Unless this is so, there is no reason in penalising him, and it cannot be inferred that the legislature imposed strict liability merely in order to find a luckless victim."

As learned counsel has laid great stress on the above passages, it is necessary to analyse in some detail the provisions in the Singapore Ordinance in relation to which this approach was made and compare them with the case on hand. Let us first consider the frame of s. 6(2) of the Singapore Ordinance the relevant portion of which we have set out earlier. It prohibits the entry of non-citizens into the colony from the Federation, only in the event of that entry being banned by a general or particular order made by the Minister under s. 9. In other words, in the absence of an order made under s. 9, there was freedom of entry or rather absence of any legal prohibition against entry of persons from the Federation. In the light of this situation, the construction adopted was that persons who normally could lawfully enter the colony, had to be proved to have a guilty mind i.e., actual or constructive knowledge of the existence of the prohibition against their entry before they could be held to have violated the terms of s. 6(2). It is in this context that the reference to "the luckless victim" has to be understood. The position under ss. 8 and 23 of the Act is, if we say so, just the reverse. Apart from the public policy and other matters underlying the legislation before us to which we shall advert later, s. 8(1) of the Act empowers the Central Government to impose a complete ban on the bringing of any gold into India, the act of "bringing" being understood in the sense indicated in the Explanation. When such a ban is imposed, the import

or the bringing of gold into India could be effected only subject to the general or special permission of the Reserve Bank. Added to this, and this is of some significance, there is the provision in s. 24(1) of the Act which throws on the accused in a prosecution the burden of proving that he had the requisite permission, emphasising as it were that in the absence of a factual and existent permission to which he can refer, his act would be a violation of the law. In pursuance of the provision in s. 8(1), Central Government published a notification on August 25, 1948, in which the terms of s. 8(1) regarding the necessity of permission of the Reserve Bank to bring gold into India were repeated. On the issue of this notification the position was that everyone who "brought" gold into India, in the sense of the Explanation to s. 8(1), was guilty of an offence, unless he was able to rely for his act on permission granted by the Reserve Bank. We, therefore start with this: The bringing of gold into India is unlawful unless permitted by the Reserve Bank,—unlike as under the Singapore Ordinance, where an entry was not unlawful unless it was prohibited by an order made by the Minister. In the circumstances, therefore, *mens rea*, which was held to be an essential ingredient of the offence of a contravention of a Minister's order under the Ordinance, cannot obviously be deduced in the context of the reverse position obtaining under the Act.

There was one further circumstance to which it is necessary to advert to appreciate the setting in which the question arose before the Privy Council. The charge against the appellant was that having entered Singapore on or about May 17, 1959, he remained there while prohibited by an order of the Minister under s. 9 and thereby contravened s. 6(2) of the Immigration Ordinance. At the trial it was proved that the order of the Minister was made on May 28, 1959, *i.e.*, over 10 days after the appellant had entered the colony. It was proved that the Minister's order which prohibited the appellant, who was named in it, from entering Singapore was received by the Deputy Assistant Controller of Immigration on the day on which it was made and it was retained by that Official with himself. The question of the materiality of the knowledge of the accused of the order prohibiting him from entering the colony came up for consideration in such a context. The further question as to when the order would, in law, become effective, relates to the second of the submissions made to us by the respondent and will be considered later.

Reverting now to the question whether *mens rea*—in the sense of actual knowledge that the act done by the accused was contrary to the law—is requisite in respect of a contravention of s. 8(1), starting with an initial prescription in favour of the need for *mens rea*, we have to ascertain whether the presumption is overborne by the language of the enactment, read in the light of the objects and purposes of the Act, and particularly whether the enforcement of the law and the attainment of its purpose would not be rendered futile in the event of such an ingredient being considered necessary.

We shall, therefore, first address ourselves to the language of the relevant provisions. Section 23 (1-A) of the Act which has already been set out merely refers to contravention of the provisions of the Act or the rule etc. So that it might be termed neutral in the present context, in that it neither refers to the state of the mind of the contravener by the use of the expression such as 'wilfully, knowingly' etc., nor does it, in terms, create an absolute liability. Where the statute does not contain the word 'knowingly', the first thing to do is to examine the statute to see whether the ordinary presumption that *mens rea* is required applies or not. When one turns to the main provision whose contravention is the subject of the penalty imposed by s. 23(1-A) viz., s. 8(1) in the present context, one reaches the conclusion that there is no scope for the invocation of the rule *mens rea*. It lays an absolute embargo upon persons who without the special or general permission of the Reserve Bank and after satisfying the conditions, if any, prescribed by the Bank bring or send into India any gold etc., the absoluteness being emphasised, as we have already pointed out, by the terms of s. 24(1) of the Act. No doubt, the very concept of

“bringing” or “sending” would exclude an involuntary bringing or an involuntary sending. Thus, for instance, if without the knowledge of the person a packet of gold was slipped into his pocket it is possible to accept the contention that such a person did not “bring” the gold into India within the meaning of s. 8(1). Similar considerations would apply to a case where the aircraft on a through flight which did not include any landing in India has to make a forced landing in India—owing say to engine trouble. But if the bringing into India was a conscious act and was done *with the intention of bringing it into India* the mere “bringing” constitutes the offence and there is no other ingredient that is necessary in order to constitute a contravention of s. 8(1) than that conscious physical act of bringing. If then under s. 8(1) the conscious physical act of “bringing” constitutes the offence, s. 23(1-A) does not import any further condition for the imposition of liability than what is provided for in s. 8(1). On the language, therefore, of s. 8(1) read with s. 24(1) we are clearly of the opinion that there is no scope for the invocation of the rule that besides the mere act of voluntarily bringing gold into India any further mental condition is postulated as necessary to constitute an offence of the contravention referred to in s. 23(1-A).

Next we have to have regard to the subject-matter of the legislation. For, as pointed out by Wills, J. in *The Queen v. Tolson*⁶:

“Although prima facie and as a general rule there must be a mind at fault before there can be a crime, it is not an inflexible rule, and a statute may relate to such a subject-matter and may be so framed as to make an act criminal whether there has been any intention to break the law or otherwise to do wrong or not”.

The Act is designed to safeguarding and conserving foreign exchange which is essential to the economic life of a developing country. The provisions have, therefore, to be stringent and so framed as to prevent unauthorised and unregulated transactions which might upset the scheme underlying the controls; and in a larger context, the penal provisions are aimed at eliminating smuggling which is a concomitant of controls over the free movement of goods or currencies. In this connection we consider it useful to refer to two decisions—the first a decision of the Privy Council and the other of the Court of Criminal Appeal. The decision of the Privy Council is that reported as *Bruden v. Rex*⁷ where the plea of *mens rea* was raised as a defence to a prosecution for importation of opium in contravention of the Straits Settlements Opium Ordinance, 1960. Lord Atkinson speaking for the Board, referring to the plea as to *mens rea*, observed (p. 324):

“The other point relied upon on behalf of the appellant was that there should be proof, express or implied, of a *mens rea* in the accused person before he could be convicted of a criminal offence. But that depends upon the terms of the statute or Ordinance creating the offence. In many cases connected with the revenue certain things are prohibited unless done by certain persons, or under certain conditions. Unless the person who does one of these things can establish that he is one of the privileged class, or that the prescribed conditions have been fulfilled, he will be adjudged guilty of the offence, though in fact he knew nothing of the prohibition.”

The criteria for the construction of statutes of the type we have before us laid down by the Court of Criminal Appeal in *Regina v. St. Margarets Trust Ltd.*⁸ is perhaps even nearer to the point. The offence with which the appellants were there charged was a violation of the Hire Purchase and Credit Sale Agreements (Control) Order, 1956 which, having been enacted to effectuate a credit-squeeze, as being necessary for the maintenance of British-economy, required by the rules made under it that every Hire Purchase agreement should state the price of the article and fix the maximum proportion thereof which a hirer might be paid by a Financing Company. The appellant-company advanced to the hirer of a motor-car more than the permissible percentage but did so

6 (1889) 23 Q.B.D. 168, at p. 172.

8 [1958] 1 W.L.R. 522.

7 [1909] A.C. 817.

as it was misled by the company which sold the motor-car as regards the price it charged to the customer. The plea raised in defence was that the Finance Company were unaware of the true price and that not having guilty knowledge, they could not be convicted of the offence. Donovan, J. who spoke for the Court said (p. 526):

"The language of article 1 of the Order expressly prohibits what was done by St. Margarets Trust Ltd., and if that company is to be held to have committed no offence some judicial modification of the actual terms of the article is essential. The appellants contend that the article should be construed so as not to apply where the prohibited act was done innocently. In other words, that mens rea should be regarded as essential to the commission of the offence. The appellants rely on the presumption that mens rea is essential for the commission of any statutory offence unless the language of the statute, expressly or by necessary implication, negatives such presumption."

The learned Judge then referred to the various decisions in which the question as to when the Court would hold the liability to be absolute was discussed and proceeded (p. 527):

"The words of the Order themselves are an express and unqualified prohibition of the acts done in this case by St. Margarets Trust Ltd. The object of the Order was to help to defend the currency against the peril of inflation which, if unchecked, would bring disaster upon the country. There is no need to elaborate this. The present generation has witnessed the collapse of the currency in other countries and the consequent chaos, misery and widespread ruin. It would not be at all surprising if Parliament, determined to prevent similar calamities here, enacted measures which it intended to be absolute prohibition of acts which might increase the risk in however small a degree. Indeed, that would be the natural expectation. There would be little point in enacting that no one should breach the defences against a flood, and at the same time excusing anyone who did it innocently. For these reasons we think that article 1 of the Order should receive a literal construction, and that the ruling of Diplock J. was correct.

It is true that Parliament has prescribed imprisonment as one of the punishments that may be inflicted for a breach of the Order, and this circumstance is urged in support of the appellants' argument that Parliament intended to punish only the guilty. We think it is the better view that, having regard to the gravity of the issues, Parliament intended the prohibition to be absolute, leaving the court to use its powers to inflict nominal punishment or none at all in appropriate cases."

We consider these observations apposite to the construction of the provision of the Act now before us.

This question as to when the presumption as to the necessity for *mens rea* is overborne has received elaborate consideration at the hands of this Court when the question of the construction of s. 52-A of the Sea Customs Act came up for consideration in *The Indo-China Steam Navigation Co. Ltd. v. Jasjit Singh, Addl. Collector of Customs, Calcutta*.⁹ Speaking for the Court, Gajendragadkar, C.J. said:

"The intention of the legislature in providing for the prohibition prescribed by s. 52A is, *inter alia*, to put an end to illegal smuggling which has the effect of disturbing very rudely the national economy of the country. It is well-known, for example, that smuggling of gold has become a serious problem in this country and operations of smuggling are conducted by operators [sic] who work on an international basis. The persons who actually carry out the physical part of smuggling gold by one means or another are generally no more than agents and presumably, behind them stands a well-knit organisation which, for motives of profit making, undertakes this activity."

This passage, in our opinion, is very apt in the present context and the offences created by ss. 8 and 23(1)(A) of the Act.

In our opinion, the very object and purpose of the Act and its effectiveness as an instrument for the prevention of smuggling would be entirely frustrated if a condition were to be read into s. 8(1) of s. 23(1)(A) of the Act qualifying

⁹ Civil Appeal No. 770 of 1962, decided on February 3, 1964 (Supreme Court).

the plain words of the enactment, that the accused should be proved to have knowledge that he was contravening the law before he could be held to have contravened the provision.

Summarising the position, the result would be this. If the Central Government, by notification in the Official Gazette, imposed a ban on any person bringing gold into India any person who brought such gold in contravention of the notification would be guilty of an offence under this section. This brings us to the notification of the Central Government dated August 25, 1948, whose terms we have set out. By reason of that notification the bringing of gold into India was made an offence. In this connection it is necessary to bear in mind the Explanation to s. 8(1) which we have already set out. By reason of that Explanation it would be seen that even if the gold continued to remain in a ship or aircraft which is within India without its being taken out and was not removed from the ship or aircraft it shall nevertheless be deemed to be a 'bringing' for the purpose of the section. We are referring to this Explanation because if the act of the respondent was an offence under the section—s. 8(1), he gets no advantage by his having remained on the aircraft without disembarking at Bombay, for if the carrying on his person of the gold was "the bringing" of the gold into India, the fact that he did not remove himself from the aircraft but stayed on in it would make no difference and he would nevertheless be guilty of the offence by reason of the Explanation to s. 8(1). We would only add that the learned counsel for the respondent did not dispute this. The position, therefore, was that immediately the Central Government published the notification on August 25, 1948, the bringing of gold into India in the sense covered by the Explanation would have brought it within s. 8(1) of the Act. So much is common ground. But by reason of a notification by the Reserve Bank of even date gold in through-transit from places outside India to places similarly situated which were not removed from the aircraft except for the purpose of transshipment was exempted from the operation of the notification of the Central Government issued under s. 8(1). If this notification had continued in force and had governed the right of persons to transport gold through India the respondent could not be guilty of a contravention of s. 8(1). The respondent would then have had the permission which saved his act of "bringing" from being an offence. However, as stated earlier, on November 8, 1962, the Reserve Bank of India modified the earlier notification and added an additional condition for exemption viz., that the gold must be declared in the manifest of the aircraft as same bottom cargo or transshipment cargo. Therefore when the respondent was in Bombay with the gold, he had not the requisite permission of the Reserve Bank and so he contravened the prohibition under s. 8(1).

The next submission of Mr. Sorabjee was that even assuming that *mens rea*, which in the present context was equated with knowledge of the existence and contents of the notification of the Reserve Bank dated November 8, 1962, was not necessary to be established to prove a contravention of s. 8(1)(a) of the Act, the notification of the Reserve Bank dated November 8, 1962 could not be deemed to have been in force and operation on November 28, 1962 when the respondent was alleged to have committed the offence of "bringing" gold into India. Accepting the general rule that ignorance of law is no excuse for its contravention and the maxim that everyone is presumed to know the law, learned counsel submitted an elaborate argument as regards the precise point of time when a piece of delegated legislation like the exemption notification by the Reserve Bank would in law take effect. There is no provision in the General Clauses Act as regards the time when subordinate legislation enacted under powers conferred by Acts of the Central Legislature shall come into effect. There is no provision either in the particular Act with which we are concerned determining the point of time at which orders made, or permission granted by virtue of powers conferred by the parent statute would come into operation. In the absence of a statutory provision such as is found in s. 5(1)

of the General Clauses Act, learned counsel submitted that such orders or notifications could have effect only from the date on which the person against whom it is sought to be enforced had knowledge of their making. In support of this position he relied strongly on the decision of the Privy Council already referred to—*Lim Chin Aik v. The Queen*.

We have dealt with that decision in regard to the point about *mens rea*, and have also pointed out that one of the grounds on which the appeal was allowed was that there had been no publication of the order of the Minister, banning the entry of the appellant, so as to render the appellant's act a contravention of s. 6(2) of the Singapore Ordinance. We have adverted to the circumstance that the order of the Minister there in question was communicated only to the officer in the Immigration department from whose custody it was produced at the trial. In that situation Lord Evershed observed (p. 171):

"...It was said on the respondent's part that the order made by the Minister under the powers conferred by section 9 of the Ordinance was an instance of the exercise of delegated legislation and therefore that the order, once made, became part of the law of Singapore of which ignorance could provide an excuse upon a charge of contravention of the section. Their Lordships are unable to accept this contention. In their Lordships' opinion, even if the making of the order by the Minister be regarded as an exercise of the legislative as distinct from the executive or administrative function (as they do not concede), the maxim cannot apply to such a case as the present where it appears that there is in the State of Singapore no provision, corresponding, for example, to that contained in section 3(2) of the English Statutory Instruments Act of 1946, for the publication in any form of an order of the kind made in the present case or any other provision designed to enable a man by appropriate inquiry to find out what 'the law' is. In this connection it is to be observed that a distinction is drawn in the Ordinance itself between an order directed to a particular individual on the one hand and an order directed to a class of persons on the other; for sub-section (3)(b) of section 9 provides in the latter case both for publication in the Gazette and presentation to the Legislative Assembly."

Based on this passage, it was urged that the notification of the Reserve Bank dated November 8, 1962, could not be deemed to be in force, at least not on November 28, 1962, when the respondent landed in Bombay and that consequently he could not be held guilty of the contravention of s. 8(1). This argument cannot, in our opinion, be accepted. In the first place, the order of the Minister dealt with by the Privy Council was never "published" since admittedly it was transmitted only to the Immigration official who kept it with himself. But in the case on hand, the notification by the Reserve Bank varying the scope of the exemption, was admittedly "published" in the Official Gazette—the usual mode of publication in India, and it was so published long before the respondent landed in Bombay. The question, therefore, is not whether it was published or not, for in truth it was published, but whether it is necessary that the publication should be proved to have been brought to the knowledge of the accused. In the second place, it was the contravention of the order of the Minister that was made criminal by s. 6(2) of the Immigration Ordinance. That is not the position here, because the contravention contemplated by s. 23(1-A) of the Act is, in the present context, of an order of the Central Government issued under s. 8(1) of the Act and published in the Official Gazette on November 25, 1948, and this order was in force during all this period. No doubt, for the period upto November 8, the bringing of gold by through passengers would not be a contravention because of the permission of the Reserve Bank exempting such bringing from the operation of the Central Government's notification. It was really the withdrawal of this exemption by the Reserve Bank that rendered the act of the respondent criminal. It might well be that there is a distinction between the withdrawal of an exemption which saves an act otherwise criminal from being one and the passing of an order whose contravention constitutes the crime. Lastly, the order made

by the Minister in the Singapore case, was one with respect to a single individual, not a general order, whereas what we have before us is a general rule applicable to every person who passes through India. In the first case, it would be reasonable to expect that the proper method of acquainting a person with an order which he is directed to obey is to serve it on him, or so publish it that he would certainly know of it, but there would be no question of individual service of a general notification on every member of the public, and all that the subordinate law making body can or need do, would be to publish it in such a manner that persons can, if they are interested, acquaint themselves with its contents. In this connection reference may be made to Rule 141 of the Defence of India Rules, 1962, which runs:

"141. *Publication, affixation and defacement of notices.*—(1) Save as otherwise expressly provided in these Rules, every authority, officer or person who makes any order in writing in pursuance of any of these Rules shall, in the case of an order of a general nature or affecting a class of persons publish notice of such order in such manner as may, in the opinion of such authority, officer or person be best adapted for informing persons whom the order concerns in the case of an order affecting an individual corporation or firm serve or cause the order to be served in the manner for the service of a summons in rule 2 of Order XXIX or rule 3 of Order XXX, as the case may be, in the First Schedule to the Code of Civil Procedure, 1908 (V of 1908) and in the case of an order affecting an individual person (not being a corporation or firm) serve or cause the order to be served on that person:—

(i) personally, by delivering or tendering to him the order, or

(ii) by post, or

(iii) where the person cannot be found, by leaving, an authentic copy of the order with some adult male member of his family or by affixing such copy to some conspicuous part of the premises in which he is known to have last resided or carried on business or personally worked for gain and thereupon the persons, corporation, firm or person concerned shall be deemed to have been duly informed of the order."

and this which is substantially the same as Rule 119 of the Defence of India Rules, 1939 brings out clearly the distinction between orders which are intended to apply to named individuals and orders of a general nature.

Reliance was also placed by Mr. Sorabjee on the judgment of Bailhache, J. in *Johnson v. Sargant & Sons*¹⁰ where speaking of an order of the Food Controller dated May 16 said to have been contravened on the same day, the learned Judge said (p. 103):

"...I have no reason to suppose that any one in the trade knew about it on May 16... While I agree that the rule is that a statute takes effect on the earliest moment of the day on which it is passed or on which it is declared to come into operation, there is about statutes a publicity even before they come into operation which is absent in the case of many orders such as that with which we are now dealing; indeed, if certain Orders are to be effective at all, it is essential that they should not be known until they are actually published. In the absence of authority upon the point I am unable to hold that this Order came into operation before it was known, and, as I have said, it was not known until the morning of May 17."

Referring to this case Prof. C. K. Allen says:^{10a}

"On the face of it, it would seem reasonable that legislation of any kind should not be binding until it has somehow been 'made known' to the public; but that is not the rule of law, and if it were, the automatic cogency of a statute which has received the royal assent would be seriously and most inconveniently impaired. In a solitary case, however, before the passing of the Act of 1946 (The Statutory Instruments Act) *Johnson v. Sargant*, Bailhache, J. held that an Order did not take effect until it became known. The reasoning was that statutes at least received the publicity of Parliamentary debate, and that therefore they were, or should be, known, but that this was not true of delegated legislation, which did not necessarily receive any publicity in Parliament or in any other way.

This was a bold example of judgment-made law. There was no precedent for it, and indeed a decision, *Jones v. Robson*^{10b} which, though not on all fours, militated strongly against the judge's conclusion, was not cited; nor did the judge attempt to define how and when delegated legislation became known. Both arguments and judgment are very brief. The decision has always been regarded as very doubtful, but it never came under review by a higher court."

We see great force in the learned author's comment on the reasoning in *Sargant's* case. Taking the present case, the question would immediately arise, is it to be made known in India or throughout the world, for the argument on behalf of the respondent was that when the respondent left Geneva on November 27, he was not aware of the change in the content of the exemption granted by the Reserve Bank. In a sense the knowledge of the existence or content of a law by an individual would not always be relevant, save on the question of the sentence to be imposed for its violation. It is obvious that for an Indian law to operate and be effective in the territory where it operates viz., the territory of India it is not necessary that it should either be published or be made known outside the country. Even if, therefore, the view enunciated by Bailhache, J. is taken to be correct, it would be apparent that the test to find out effective publication would be publication in India, not outside India so as to bring it to the notice of everyone who intends to pass through India. It was "published" and made known in India by publication in the Gazette on November 24 and the ignorance of it by the respondent who is a foreigner is, in our opinion, wholly irrelevant. It is, no doubt, admitted on behalf of the prosecution in the present case that the respondent did not have actual notice of the notification of the Reserve Bank dated November 8, 1962 but, for the reasons stated, it makes, in our opinion, no difference to his liability to be proceeded against for the contravention of s. 8(1) of the Act.

Learned counsel for the respondent also referred us to the decision of the Bombay High Court in *Imperator v. Leslie Gwilt*¹¹ where the question of the proper construction and effect of rule 119 of the Defence of India Rules, 1937, came up for consideration. The learned Judges held that there had not been a proper publication or notification of an order, as required by r. 119 and that in consequence the accused could not be prosecuted for a violation of that order. Other decisions of a like nature dealing with the failure to comply with the requirements of r. 119 of the Defence of India Rules or the Essential Supplies Act, or the Essential Commodities Act, were also brought to our notice but we consider that they do not assist us in the present appeal. Where there is a statutory requirement as to the mode or form of publication and they are such that, in the circumstances, the Court holds to be mandatory, a failure to comply with those requirements might result in there being no effective order the contravention of which could be the subject of prosecution but where there is no statutory requirement we conceive the rule to be that it is necessary that it should be published in the usual form i.e., by publication within the country in such media as is generally adopted to notify to all the persons concerned the making of rules. In most of the Indian statutes, including the Act now under consideration, there is provision for the rules made being published in the Official Gazette. It, therefore, stands to reason that publication in the Official Gazette viz., the Gazette of India is the ordinary method of bringing a rule or subordinate legislation to the notice of the persons concerned. As we have stated earlier, the notification by the Reserve Bank was published in the Gazette of India on November 24, 1962, and hence even adopting the view of Bailhache, J. the notification must be deemed to have been published and brought to the notice of the concerned individuals on November 25, 1962. The argument, therefore, that the notification dated November 8, 1962, was not effective, because it was not properly published in the sense of having been brought to the actual notice of the respondent must be rejected.

10b [1901] 1 Q.B. 673.

11 [1945] Bom. 681, s.c. 47 Bom. L.R. 431.

Before parting from this topic we would desire to make an observation. There is undoubtedly a certain amount of uncertainty in the law except in cases where specific provision in that behalf is made in individual statutes as to (a) when subordinate legislation could be said to have been passed, and (b) when it comes into effect. The position in England has been clarified by the Statutory Instruments Act of 1946, though there is a slight ambiguity in the language employed in it, which has given rise to disputed questions of construction as regards certain expressions used in the Act. We consider that it would be conducive to clarity as well as to the avoidance of unnecessary technical objections giving occasion for litigation if an enactment on the lines of the U.K. Statutory Instruments Act, 1946 were made in India either by an amendment of the General Clauses Act or by independent legislation keeping in mind the difficulties of construction to which the U.K. enactment has given rise. As we have pointed out, so far as the present case is concerned, even on the narrowest view of the law the notification of the Reserve Bank must be deemed to have been published in the sense of having been brought to the notice of the relevant public at least by November 25, 1962, and hence the plea by the respondent that he was ignorant of the law cannot afford him any defence in his prosecution.

The last of the points urged by learned counsel for the respondent was as regards the construction of the new second proviso which had been introduced by the notification of the Reserve Bank dated November 8, 1962. The argument was that the gold that the respondent carried was his personal luggage and not "cargo"—either "bottom cargo" or "transshipment cargo"—and that, therefore, could not, and need not have been entered in the manifest of the aircraft and hence the second proviso could not be attracted to the case. The entire submission on this part of the case was rested on the meaning of the word 'cargo', the point sought to be made being that what a passenger carried with himself or on his person could not be 'cargo', and that cargo was that which was handed over to the carrier for carriage. Reliance was, in this connection placed on the definition of the term 'cargo' in dictionaries where it is said to mean "the merchandise or wares contained or conveyed in a ship". We find ourselves unable to accept this argument. To say that the second proviso refers only to what is handed over to the ship or aircraft for carriage would make the provision practically futile and unmeaning. If all the goods or article retained by a passenger in his own custody or carried by him on his person were outside the 2nd proviso, and the provision were attracted only to cases where the article was handed over to the custody of the carrier, it would have no value at all as a condition of exemption. The goods entrusted to a carrier would be entered in the manifest and if they are not, it must be owing to the fault of the carrier, and it could hardly be that the passenger was being penalised for the default of the carrier. If the carriage of the goods on the person or in the custody of the passenger were exempt, there would be no scope at all for the operation of the second proviso. We, therefore, consider that the proper construction of the term 'cargo' when it occurs in the notification of the Reserve Bank is that it is used as contra-distinguished from personal luggage in the law relating to the carriage of goods. The latter has been defined as whatever a passenger takes with him for his personal use or convenience, either with reference to his immediate necessities or for his personal needs at the end of his journey. Obviously, the gold of the quantity and in the form in which it was carried by the respondent would certainly not be "personal luggage" in the sense in which "luggage" is understood, as explained earlier. It was really a case of merchandise not for the use of the passenger either during the journey or thereafter and therefore could not be called personal luggage or baggage. It was, therefore, "cargo" which had to be manifested and its value must have been inserted in the air consignment note. In this connection, reference may usefully be made to certain of the International Air Traffic Association's General Conditions of Carriage not as

directly governing the contract between the respondent and the aircraft but as elucidating the general practice of transport by air in the light of which the second proviso has to be understood. Part A entitled "Carriage of Passengers and Baggage" by its Art. 8, para. 1(c) excludes goods which are merchandise from the obligation of carriers to transport as luggage or as baggage, while Art. 3 of Part B dealing with carriage of goods provides that gold is accepted for carriage only if securely packed and its value inserted in the consignment note under the heading "Quantity and nature of goods".

Some point was made of the fact that if the second proviso were applied to the case of gold or articles made of gold carried on the person, a tie-pin or a fountain-pen which had a gold nib carried by a through passenger might attract the prohibition of s. 8(1) read with the exemption by the Reserve Bank as it now stands and that the Indian law would be unnecessarily harsh and unreasonable. We do not consider this correct, for a clear and sharp distinction exists between what is personal baggage and what is not and it is the latter that is 'cargo' and has to be entered in the manifest. If a person chooses to carry on his person what is not personal baggage or luggage as understood in the legal sense but what should properly be declared and entered in the manifest of the aircraft there can be no complaint of the unreasonableness of the Indian law on the topic.

The result, therefore, is that we consider that the learned Judges of the High Court erred in acquitting the respondent. The appeal has, therefore, to be allowed and the conviction of the respondent restored.

Now, coming to the question of sentence to be passed on the appellant, it is undoubtedly the settled rule of this Court that it would not interfere with the sentence passed by the courts below unless there is any illegality in it or the same involves any question of principle. The facts of the case before us have, however, presented some unusual features which had led us to technically interfere with the sentence of one year's imprisonment passed by the Chief Presidency Magistrate. The respondent was sentenced by the Presidency Magistrate on April 24, 1963, and thereupon he started serving the sentence till the judgment of the High Court which was rendered on December 10, 1963. The respondent was released the next day i.e., December 11, 1963. This court granted special leave on December 20, 1963 and thereafter on application made by the appellant-State, this Court directed the arrest of the respondent. The respondent was accordingly arrested and though the Magistrate directed his release on bail pending the disposal of the appeal in this Court, the respondent was unable to furnish the bail required and hence suffered imprisonment, though it would be noticed that such imprisonment was not in pursuance of the conviction and sentence passed on him by the Magistrate. Such imprisonment continued till May 8, 1964, when the decision of this Court was pronounced, so that virtually the respondent had suffered the imprisonment that had been inflicted on him by the order of the Presidency Magistrate. In these circumstances, we directed that though the appeal was allowed, the sentence would be reduced to the period already undergone which was only a technical interference with the sentence passed by the Presidency Magistrate, though in substance it was not.

SUBBA RAO J. I regret my inability to agree. This appeal raises the question of the scope of the ban imposed by the Central Government and the Central Board of Revenue in exercise of the powers conferred on them under s. 8 of the Foreign Exchange Regulation Act, 1947 (VII of 1947), hereinafter called the Act, against persons transporting prohibited articles through India.

In exercise of the powers conferred under s. 8 of the Act the Government of India issued on August 25, 1948, a notification that gold and gold articles, among others, should not be brought into India or sent to India except with the general or special permission of the Reserve Bank of India. On the same date the Reserve Bank of India issued a notification giving a general permission for

bringing or sending any such gold provided it was on through transit to a place outside India. On November 24, 1962, the Reserve Bank of India published a notification dated November 8, 1962, in supersession of its earlier notification placing further restrictions on the transit of such gold to a place outside the territory of India, one of them being that such gold should be declared in the "Manifest" for transit in the "same bottom cargo" or "transshipment cargo". The respondent left Zurich by a Swiss air plane on November 27, 1962, which touched Santa Cruz Air Port at 6.05 a.m. on the next day. The Customs Officers, on the basis of previous information, searched for the respondent and found him sitting in the plane. On a search of the person of the respondent it was found that he had put on a jacket containing 28 compartments and in 19 of them he was carrying gold slabs weighing approximately 34 kilos. It was also found that the respondent was a passenger bound for Manila. The other facts are not necessary for this appeal. Till November 24, 1962, there was a general permission for a person to bring or send gold into India, if it was on through transit to a place outside the territory of India; but from that date it could not be so done except on the condition that it was declared in the "Manifest" for transit as "same bottom cargo" or "transshipment cargo". When the respondent boarded the Swiss plane at Zurich on November 27, 1962, he could not have had knowledge of the fact that the said condition had been imposed on the general permission given by the earlier notification. The gold was carried on the person of the respondent and he was only sitting in the plane after it touched the Santa Cruz Airport. The respondent was prosecuted for importing gold into India under s. 8(1) of the Act, read with s. 23(1-A) thereof, and under s. 167(8)(i) of the Sea Customs Act. The learned Presidency Magistrate found the accused "guilty" on the two counts and sentenced him to rigorous imprisonment for one year. On appeal the High Court of Bombay held that the second proviso to the relevant notification issued by the Central Government did not apply to a person carrying gold with him on his body, that even if it applied, the *mens rea* being a necessary ingredient of the offence, the respondent, who brought gold into India for transit to Manila, did not know that during the crucial period such a condition had been imposed and, therefore, he did not commit any offence. On those findings, it held that the respondent was not guilty under any of the aforesaid sections. In the result the conviction made by the Presidency Magistrate was set aside. This appeal has been preferred by special leave against the said order of the High Court.

Learned Solicitor General, appearing for the State of Maharashtra, contends that the Act was enacted to prevent smuggling of gold in the interests of the economic stability of the country and, therefore, in construing the relevant provisions of such an Act there is no scope for applying the presumption of common law that *mens rea* is a necessary ingredient of the offence. The object of the statute and the mandatory terms of the relevant provisions, the argument proceeds, rebut any such presumption and indicate that *mens rea* is not a necessary ingredient of the offence. He further contends that on a reasonable construction of the second proviso of the notification dated November 8, 1962, issued by the Board of Revenue, it should be held that the general permission for bringing gold into India is subject to the condition laid down in the second proviso and that, as in the present case the gold was not disclosed in the Manifest, the respondent contravened the terms thereof and was, therefore, liable to be convicted under the aforesaid sections of the Foreign Exchange Act. No argument was advanced before us under s. 168(8)(i) of the Sea Customs Act and, therefore, nothing need be said about that section.

Learned counsel for the respondent sought to sustain the acquittal of his client practically on the grounds which found favour with the High Court. I shall consider in detail his argument at the appropriate places of the judgment.

The first question turns upon the relevant provisions of the Act and the notifications issued thereunder. At the outset it would be convenient to

read relevant parts of the said provisions and the notifications, for the answer to the question raised depends upon them.

Section 8. (1) The Central Government may, by notification in the Official Gazette, order that subject to such exemptions, if any, as may be contained in the notification, no person shall, except with the general or special permission of the Reserve Bank and on payment of the fee, if any, prescribed bring or send into India any gold...

Explanation.—The bringing or sending into any port or place in India of any such article as aforesaid intended to be taken out of India without being removed from the ship or conveyance in which it is being carried shall nonetheless be deemed to be bringing, or as the case may be, sending into India of that article for the purposes of this section.

In exercise of the power conferred by the said section on the Central Government, it had issued the following notification dated August 25, 1948 (as amended upto July 31, 1958) :

"In exercise of the powers conferred by sub-section (1) of section 8 of the Foreign Exchange Regulation Act, 1947 (VII of 1947) and in supersession of the Notification of the Government of India... the Central Government is pleased to direct that, except with the general or special permission of the Reserve Bank no person shall bring or send into India from any place out of India:—

(a) any gold coin, gold bullion, gold sheets or gold ingot, whether refined or not;..." The Reserve Bank of India issued a notification dated August 25, 1948, giving a general permission in the following terms:

"...the Reserve Bank of India is hereby pleased to give general permission to the bringing or sending of any such gold or silver by sea or air into any port in India provided that the gold or silver (a) is on through transit to a place which is outside both (i) the territory of India and (ii) the Portuguese Territories which are adjacent to or surrounded by the territory of India and (b) is not removed from the carrying ship or aircraft, except for the purpose of transshipment."

On November 8, 1962, in supersession of the said notification the Reserve Bank of India issued the following notification which was published in the official Gazette on November 24, 1962:

"...the Reserve Bank of India gives general permission to the bringing or sending of any of the following articles, namely,

(a) any gold coin, gold bullion, gold sheets or gold ingot, whether refined or not,... into any port or place in India when such article is on through transit to a place which is outside the territory of India. Provided that such article is not removed from the ship or conveyance in which it is being carried except for the purpose of transshipment;

Provided further that it is declared in the manifest for transit as same bottom cargo or transshipment cargo."

The combined effect of the terms of the section and the notifications may be stated thus: No gold can be brought in or sent to India though it is on through transit to a place which is outside India except with the general or special permission of the Reserve Bank of India. Till November 24, 1962, under the general permission given by the Reserve Bank of India such gold could be brought in or sent to India if it was not removed from the ship or aircraft except for the purpose of transshipment. But from that date another condition was imposed thereon, namely, that such gold shall be declared in the manifest for transit as "same bottom cargo" or "transshipment cargo."

Pausing here, it will be useful to notice the meaning of some of the technical words used in the second proviso to the notification. The object of maintaining a transit manifest for cargo, as explained by the High Court, is twofold, namely, "to keep a record of goods delivered into the custody of the carrier for safe carriage and to enable the Customs Authorities to check and verify the dutiable goods which arrive by a particular flight." "Cargo" is a shipload or the lading of a ship. No statutory or accepted definition of the word "cargo" has been placed before us. While the appellant contends that all the goods carried

in a ship or plane is cargo, the respondent's counsel argues that nothing is cargo unless it is included in the manifest. But what should be included and what need not be included in the manifest is not made clear. It is said that the expressions "same bottom cargo" and "transit cargo" throw some light on the meaning of the word "cargo". Article 606 of the Chapter on "Shipping and Navigation" in Halsbury's Laws of England, 3rd ed., Vol. 35, at p. 426, brings out the distinction between the two types of cargo. If the cargo is to be carried to its destination by the same conveyance throughout the voyage or journey it is described as "same bottom cargo." On the other hand, if the cargo is to be transhipped from one conveyance to another during the course of transit, it is called "transshipment cargo." This distinction also does not throw any light on the meaning of the word "cargo". If the expression "cargo" takes in all the goods carried in the plane, whether it is carried under the personal care of the passenger or entrusted to the care of the officer in charge of the cargo, both the categories of cargo can squarely fall under the said two heads. Does the word "manifest" throw any light? Inspector Darias Bejan Bhappu says in his evidence that manifest for transit discloses only such goods as are unaccompanied baggage but on the same flight and that "accompanied baggage is never manifested as Cargo Manifest". In the absence of any material or evidence to the contrary, this statement must be accepted as a correct representation of the actual practice obtaining in such matters. But that practice does not prevent the imposition of a statutory obligation to include accompanied baggage also as an item in the manifest if a passenger seeks to take advantage of the general permission given thereunder. I cannot see any inherent impossibility implicit in the expression "cargo" compelling me to exclude an accompanied baggage from the said expression.

Now let me look at the second proviso of the notification dated November 8, 1962. Under s. 8 of the Act there is ban against bringing or sending into India gold. The notification lifts the ban to some extent. It says that a person can bring into any port or place in India gold when the same is on through transit to a place which is outside the territory of India, provided that it is declared in the manifest for transit as "same bottom cargo or transshipment cargo." It is, therefore, not an absolute permission but one conditioned by the said proviso. If the permission is sought to be availed of, the condition should be complied with. It is a condition precedent for availing of the permission.

Learned counsel for the respondent contends that the said construction of the proviso would preclude a person from carrying small articles of gold on his person if such article could not be declared in the manifest for transit as "same bottom cargo or transshipment cargo" and that could not have been the intention of the Board of Revenue. On that basis, the argument proceeds, the second proviso should be made to apply only to such cargo to which the said proviso applied and the general permission to bring gold into India would apply to all other gold not covered by the second proviso. This argument, if accepted, would enable a passenger to circumvent the proviso by carrying gold on his body by diverse methods. The present case illustrates how such a construction can defeat the purpose of the Act itself. I cannot accept such a construction unless the terms of the notification compel me to do so. I do not see any such compulsion. The alternative construction for which the appellant contends no doubt prevents a passenger from carrying with him small articles of gold. The learned Solicitor General relies upon certain rules permitting a passenger to bring into India on his person small articles of gold, but *ex facie* those rules do not appear to apply to a person passing through India to a foreign country. No doubt to have international goodwill the appropriate authority may be well advised to give permission for such small articles of gold or any other article for being carried by a person with him on his way through India to foreign countries. But for one reason or other, the general permission in express terms says that gold shall be declared in the manifest and I do not see, nor any provision of law has been placed before us, why gold carried on a person cannot

be declared in the manifest if that person seeks to avail himself of the permission. Though I appreciate the inconvenience and irritation that will be caused to passengers *bona fide* passing through our country to foreign countries for honest purposes, I cannot see my way to interpret the second proviso in such a way as to defeat its purpose. I, therefore, hold that on a fair construction of the notification dated November 8, 1962 that the general permission can be taken advantage of only by a person passing through India to a foreign country if he declares the gold in his possession in the manifest for transit as "same bottom cargo" or "transshipment cargo."

The next argument is that *mens rea* is an essential ingredient of the offence under s. 8 of the Act, read with s. 23(I-A)(a) thereof. Under s. 8 no person shall, except with the general or special permission of the Reserve Bank of India, bring or send to India any gold. Under the notification dated November 8, 1962, and published on November 24, 1962, as interpreted by me, such gold to earn the permission shall be declared in the manifest. The section, read with the said notification, prohibits bringing or sending to India gold intended to be taken out of India unless it is declared in the manifest. If any person brings into or sends to India any gold without declaring it in such manifest, he will be doing an act in contravention of s. 8 of the Act read with the notification and, therefore, he will be contravening the provisions of the Act. Under s. 23(I-A)(a) of the Act he will be liable to punishment of imprisonment which may extend to two years or with fine or with both. The question is whether the intention of the Legislature is to punish persons who break the said law without a guilty mind. The doctrine of *mens rea* in the context of statutory crimes has been the subject matter of many decisions in England as well as in our country. I shall briefly consider some of the important standard textbooks and decisions cited at the Bar to ascertain its exact scope.

In "Russell on Crime", 11th edn., Vol. 1, it is stated at p. 64:

"...there is a presumption that in any statutory crime the common law mental element, *mens rea*, is an essential ingredient."

On the question how to rebut this presumption, the learned author points out that the policy of the courts is unpredictable. I shall notice some of the decisions which appear to substantiate the author's view. In Halsbury's Laws of England, 3rd edn., Vol. 10, in para. 508, at p. 273, the following passage appears:

"A statutory crime may or may not contain an express definition of the necessary state of mind. A statute may require a specific intention, malice, knowledge, wilfulness, or recklessness. On the other hand, it may be silent as to any requirement of *mens rea*, and in such a case in order to determine whether or not *mens rea* is an essential element of the offence, it is necessary to look at the objects and terms of the statute."

This passage also indicates that the absence of any specific mention of a state of mind as an ingredient of an offence in a statute is not decisive of the question whether *mens rea* is an ingredient of the offence or not: it depends upon the object and the terms of the statute. So too, Archbold in his book on "Criminal Pleading, Evidence and Practice," 35th edn., says much to the same effect at p. 48 thus:

"It has always been a principle of the common law that *mens rea* is an essential element in the commission of any criminal offence against the common law... In the case of statutory offences it depends on the effect of the statute... There is a presumption that *mens rea* is an essential ingredient in a statutory offence, but this presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals."

The leading case on the subject is *Sherras v. De Rutzen*.¹ Section 16(2) of the Licensing Act, 1872, prohibited a licensed victualler from supplying liquor

to a police constable while on duty. It was held that that section did not apply where a licensed victualler *bona fide* believed that the police officer was off duty. / Wright J., observed:

"There is a presumption that *mens rea*, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals, and both must be considered."

This sums up the statement of the law that has been practically adopted in later decisions. The Privy Council in *Bruhn v. Rex*² construed s. 73 of the Straits Settlements Opium Ordinance, 1906. Section 73 of the said Ordinance stated that if any ship was used for importation, landing, removal, carriage or conveyance of any opium or chandu contrary to the provisions of the said Ordinance or of the rules made thereunder, the master and owner thereof would be liable to a fine. The section also laid down the rule of evidence that if a particular quantity of opium was found in the ship that was evidence that the ship had been used for importation of opium, unless it was proved to the satisfaction of the court that every reasonable precaution had been taken to prevent such user of such ship and that none of the officers, their servants or the crew or any persons employed on board the ship, were implicated therein. The said provisions are very clear; the offence is defined, the relevant evidence is described and the burden of proof is placed upon the accused. In the context of that section the Judicial Committee observed:

"...By this Ordinance every person other than the opium farmer is prohibited from importing or exporting chandu. If any other person does so, he *prima facie* commits a crime under the provisions of the Ordinance. If it be provided in the Ordinance, as it is, that certain facts, if established, justify or excuse what is *prima facie* a crime, then the burden of proving those facts obviously rests on the party accused. In truth, this objection is but the objection in another form, that knowledge is a necessary element in crime, and it is answered by the same reasoning."

It would be seen from the aforesaid observation that in that case *mens rea* was not really excluded but the burden of proof to negative *mens rea* was placed upon the accused. In *Peark's Dairies, Lim. v. Tottenham Food Control Committee*³ the Court of Appeal considered the scope of Regulations 3 and 6 of the Margarine (Maximum Prices) Order, 1917. The appellant's assistant, in violation of their instructions, but by an innocent mistake, sold margarine to a customer at the price of 1sh. per lb. giving only 14½ ozs. by weight instead of 16 ozs. The appellants were prosecuted for selling margarine at a price exceeding the maximum price fixed and one of the contentions raised on behalf of the accused was that *mens rea* on the part of the appellants was not an essential element of the offence. Lord Coleridge, J., cited with approval the following passage of Channell, J., in *Pearks, Gunston & Tee, Lim. v. Ward*⁴:

"But there are exceptions to this rule in the case of quasi-criminal offences, as they may be termed, that is to say, where certain acts are forbidden by law under a penalty, possibly even under a personal penalty, such as imprisonment, at any rate in default of payment of a fine; and the reason for this is, that the Legislature has thought it so important to prevent the particular act from being committed that it absolutely forbids it to be done; and if it is done the offender is liable to a penalty whether he had any *mens rea* or not, and whether or not he intended to commit a breach of the law. Where the act is of this character then the master, who, in fact, has done the forbidden thing through his servant, is responsible and is liable to a penalty. There is no reason why he should not be, because the very object of the Legislature was to forbid the thing absolutely."

This decision states the same principle in a different form. It also places emphasis on the terms and the object of the statute in the context of the question whether *mens rea* is excluded or not. The decision in *Rex v. Jacobs*⁵ arose out

2 [1909] A.C. 317, 324.

3 (1919) 88 L.J.K.B. 623, 626.

4 (1902) 71 L.J.K.B. 656.

5 [1944] K.B. 417.

of an agreement to sell price-controlled goods at excess price. The defence was that the accused was ignorant of the proper price. The Court of Criminal Appeal held that in the summing up the direction given by the Judge to the jury that it was not necessary that the prosecution should prove that the appellants knew what the permitted price was but that they need only show in fact a sale at an excessive price had taken place, was correct in law. This only illustrates that on a construction of the particular statute, having regard to the object of the statute and its terms, the Court may hold that *mens rea* is not a necessary ingredient of the offence. In *Brend v. Wood*⁶ dealing with an emergency legislation relating to fuel rationing, Goddard, C.J., observed:

"There are statutes and regulations in which Parliament has seen fit to create offences and make people responsible before criminal Courts although there is an absence of *mens rea*, but it is certainly not the Court's duty to be acute to find that *mens rea* is not a constituent part of a crime. It is of the utmost importance for the protection of the liberty of the subject that a Court should always bear in mind that, unless a statute, either clearly or by necessary implication, rules out *mens rea* as a constituent part of a crime, the Court should not find a man guilty of an offence against the criminal law unless he has a guilty mind."

This caution administered by an eminent and experienced judge in the matter of construing such statutes cannot easily be ignored. The Judicial Committee in *Srinivas Mall Bairoliya v. King-Emperor*⁷ was dealing with a case in which one of the appellants was charged with an offence under the rules made by virtue of the Defence of India Act, 1939, of selling salt at prices exceeding those prescribed under the rules, though the sales were made without the appellant's knowledge by one of his servants. Lord du Parcq, speaking for the Board, approved the view expressed by Goddard, C.J., in *Brend v. Wood* and observed:

"Their Lordships agree with the view which was recently expressed by the Lord Chief Justice of England, when he said: 'It is in my opinion of the utmost importance for the protection of the liberty of the subject that a court should always bear in mind that, unless the statute, either clearly or by necessary implication, rules out *mens rea* as a constituent part of a crime, a defendant should not be found guilty of an offence against the criminal law unless he has got a guilty mind'."

The acceptance of the principle by the Judicial Committee that *mens rea* is a constituent part of a crime unless the statute clearly or by necessary implication excludes the same, and the application of the same to a welfare measure is an indication that the Court shall not be astute in construing a statute to ignore *mens rea* on a slippery ground of a welfare measure unless the statute compels it to do so. Indeed, in that case the Judicial Committee refused to accept the argument that where there is an absolute prohibition, no question of *mens rea* arises. The Privy Council again in *Lim Chin Aik v. The Queen*⁸ reviewed the entire law on the question in an illuminating judgment and approached the question, if I may say so, from a correct perspective. By s. 6 of the Immigration Ordinance, 1952, of the State of Singapore,

"It shall not be lawful for any person other than a citizen of Singapore to enter the colony from the Federation or having entered the colony from the Federation to remain in the Colony if... such person has been prohibited by order made under section 9 of this Ordinance from entering the colony"

and s. 9, in the case of an order directed to a single individual, contained no provision for publishing the order or for otherwise bringing it to the attention of the person named. The Minister made an order prohibiting the appellant from entering the colony and forwarded it to the Immigration Officer. There was no evidence that the order had in fact come to the notice or attention of the appellant. He was prosecuted for contravening s. 6(2) of the Ordinance. Lord Evershed, speaking for the Board, reaffirmed the formulations cited from the judgment of Wright, J., and accepted by Lord du Parcq in *Srinivas Mall*

6 (1949) 62 T.L.R. 462, 463.

8 [1963] A.C. 160, 174, 175.

7 (1947) I.L.R. 26 Pat. 460, 469, P.C.

Bairoliya's case. On a review of the case law on the subject and the principles enunciated therein, the Judicial Committee came to the following conclusion:

"But it is not enough in their Lordships' opinion merely to label the statute as one dealing with a grave social evil and from that to infer that strict liability was intended. It is pertinent also to inquire whether putting the defendant under strict liability will assist in the enforcement of the regulations. That means that there must be something he can do, directly or indirectly, by supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to influence or control, which will promote the observance of the regulations. Unless this is so, there is no reason in penalising him, and it cannot be inferred that the legislature imposed strict liability merely in order to find a luckless victim."

The same idea was repeated thus:

"...Where it can be shown that the imposition of strict liability would result in the prosecution and conviction of a class of persons whose conduct could not in any way affect the observance of the law, their Lordships consider that, even where the statute is dealing with a grave social evil, strict liability is not likely to be intended."

Dealing with the facts of the case before it, the Privy Council proceeded to illustrate the principle thus:

"But Mr. Le Quesne was unable to point to anything that the appellant could possibly have done so as to ensure that he complied with the regulations. It was not, for example, suggested that it would be practicable for him to make continuous inquiry to see whether an order had been made against him. Clearly one of the objects of the Ordinance is the expulsion of prohibited persons from Singapore, but there is nothing that a man can do about it if, before the commission of the offence, there is no practical or sensible way in which he can ascertain whether he is a prohibited person or not."

On that reasoning the Judicial Committee held that the accused was not guilty of the offence with which he was charged. This decision adds a new dimension to the rule of construction of a statute in the context of *mens rea* accepted by earlier decisions. While it accepts the rule that for the purpose of ascertaining whether a statute excludes *mens rea* or not, the object of the statute and its wording must be weighed, it lays down that *mens rea* cannot be excluded unless the person or persons aimed at by the prohibition are in a position to observe the law or to promote the observance of the law. We shall revert to this decision at a later stage in a different context. This Court in *Ravula Hariprasada Rao v. The State*,⁹ speaking through Fazl Ali, J., accepted the observations made by the Lord Chief Justice of England in *Brend v. Wood*. The decision of this Court in *The Indo-China Steam Navigation Co. Ltd. v. Jasjit Singh, Additional Collector of Customs, Calcutta*¹⁰ is strongly relied upon by the appellant in support of the contention that *mens rea* is out of place in construing statutes similar to that under inquiry now. There, this Court was concerned with the interpretation of s. 52-A of the Sea Customs Act, 1878. The Indo-China Steam Navigation Co. Ltd., which carries on the business of carriage of goods and passengers by sea, owns a fleet of ships, and has been carrying on its business for over 80 years. One of the routes plied by its ships is the Calcutta-Japan-Calcutta route. The vessel "Eastern Saga" arrived at Calcutta on October 29, 1957. On a search it was found that a hole was covered with a piece of wood and over-painted and when the hole was opened a large quantity of gold in bars was discovered. After following the prescribed procedure the Customs authorities made an order confiscating the vessel in addition to imposing other penalties. One of the contentions raised was that s. 52-A of the Sea Customs Act the infringement whereof was the occasion for the confiscation could not be invoked unless *mens rea* was established. Under that section no vessel constructed, adapted, altered or fitted for the purpose of concealing goods shall enter, or be within, the limits of any port in India, or the Indian customs waters. This Court in construing the scheme and object of the Sea Customs Act came to

⁹ [1951] S.C.R. 322.

decided on February 3, 1964 (Supreme Court).

¹⁰ (1964) Civil Appeal No. 770 of 1962,

the conclusion that *mens rea* was not a necessary ingredient of the offence, as, if that was so, the statute would become a dead-letter. That decision was given on the basis of the clear object of the statute and on a construction of the provisions of that statute which implemented the said object. It does not help us in construing the relevant provisions of the Foreign Exchange Regulation Act.

The Indian decisions also pursued the same line. A Division Bench of the Bombay High Court in *Emperor v. Isak Solomon Macmull*¹¹ in the context of the Motor Spirit Rationing Order, 1941, made under the Essential Supplies (Temporary Powers) Act, 1946, held that a master is not vicariously liable, in absence of *mens rea*, for an offence committed by his servant for selling petrol in absence of requisite coupons and at a rate in excess of the controlled rate. Chagla C.J. speaking for the Division Bench, after considering the relevant English and Indian decisions, observed:

"It is not suggested that even in the class of cases where the offence is not a minor offence or not quasi-criminal that the Legislature cannot introduce the principle of vicarious liability and make the master liable for the acts of his servant although the master has no *mens rea* and was morally innocent. But the Courts must be reluctant to come to such a conclusion unless the clear words of the statute compel them to do so or they are driven to that conclusion by necessary implication."

So too, a Division Bench of the Mysore High Court in *The State of Coorg v. P. K. Assu*¹² held that a driver and a cleaner of a lorry which carried bags of charcoal and also contained bags of paddy and rice underneath without permit as required by a notification issued under the Essential Supplies (Temporary Powers) Act, 1946, were not guilty of any offence in the absence of their knowledge that the lorry contained foodgrains. To the same effect a Division Bench of the Allahabad High Court in *State v. Sheo Prasad*¹³ held that a master was not liable for his servant's act in carrying oilseeds in contravention of the order made under the Essential Supplies (Temporary Powers) Act, 1946, on the ground that he had not the guilty mind. In the same manner a Division Bench of the Calcutta High Court in *C. T. Prim v. State*¹⁴ accepted as settled law that unless a statute clearly or by necessary implication rules out *mens rea* as a constituent part of the crime, no one should be found guilty of an offence under the criminal law unless he has got a guilty mind.

The law on the subject relevant to the present enquiry may briefly be stated as follows. It is a well settled principle of common law that *mens rea* is an essential ingredient of a criminal offence. Doubtless a statute can exclude that element, but it is a sound rule of construction adopted in England and also accepted in India to construe a statutory provision creating an offence in conformity with the common law rather than against it unless the statute expressly or by necessary implication excluded *mens rea*. To put it differently, there is a presumption that *mens rea* is an essential ingredient of a statutory offence; but this may be rebutted by the express words of a statute creating the offence or by necessary implication. But the mere fact that the object of a statute is to promote welfare activities or to eradicate grave social evils is in itself not decisive of the question whether the element of guilty mind is excluded from the ingredients of the offence. It is also necessary to enquire whether a statute by putting a person under strict liability help him to assist the State in the enforcement of the law: can he do anything to promote the observance of the law? A person who does not know that gold cannot be brought into India without a licence or is not bringing into India any gold at all cannot possibly do anything to promote the observance of the law. *Mens rea* by necessary implication can be excluded from a statute only where it is absolutely clear that the implementation of the object of a statute would otherwise be defeated and its exclusion enables those put under strict liability by their act or omission to assist the promotion of the law. The nature of *mens rea* that will be implied

11 (1948) 50 Bom. L.R. 190, 194.

12 [1955] Mysore 516.

13 [1956] A.I.R. All. 610.

14 [1961] A.I.R. Cal. 177.

in a statute creating an offence depends upon the object of the Act and the provisions thereof.

What is the object of the Act? The object of the Act and the notification issued thereunder is to prevent smuggling of gold and to conserve foreign exchange. Doubtless it is a laudable object. The Act and the notification were conceived and enacted in public interest; but that in itself is not, as I have indicated, decisive of the legislative intention.

The terms of the section and those of the relevant notification issued thereunder do not expressly exclude *mens rea*. Can we say that *mens rea* is excluded by necessary implication? Section 8 does not contain an absolute prohibition against bringing or sending into India any gold. It in effect confers a power on the Reserve Bank of India to regulate the import by giving general or special permission; nor the notification dated August 25, 1948, issued by the Government embodies any such absolute prohibition. It again, in substance, leaves the regulation of import of gold to the Reserve Bank of India; in its turn the Reserve Bank of India by a notification of the same date permitted persons to transit gold to a place which is outside the territory of India and the Portuguese territories without any permission. Even the impugned notification does not impose an absolute prohibition against bringing into India gold which is on through transit to a place outside India. It permits such import for such through transit, but only subject to conditions. It is, therefore, manifest that the law of India as embodied in the Act under s. 8 and in the notification issued thereunder does not impose an absolute prohibition against bringing into India gold which is on through transit to a place outside India; and indeed it permits such bringing of gold but subject to certain conditions. The Legislature, therefore, did not think that public interest would irreparably suffer if such transit was permitted, but it was satisfied that with some regulation such interest could be protected. The law does not become nugatory if the element of *mens rea* was read into it, for there would still be persons who would be bringing into India gold with the knowledge that they would be breaking the law. In such circumstances no question of exclusion of *mens rea* by necessary implication can arise.

If a person was held to have committed an offence in breach of the provision of s. 8 of the Act and the notification issued thereunder without any knowledge on his part that there was any such notification or that he was bringing any gold at all, many innocent persons would become victims of law. An aeroplane in which a person with gold on his body is travelling may have a forced landing in India, or an enemy of a passenger may surreptitiously and maliciously put some gold trinket in his pocket without his knowledge so as to bring him into trouble; a person may be carrying gold without knowledge or even without the possibility of knowing that a law prohibiting taking of gold through India is in existence. All of them, if the interpretation suggested by the learned Solicitor General be accepted, will have to be convicted and they might be put in jail for a period extending to 2 years. Such an interpretation is neither supported by the provisions of the Act nor is necessary to implement its object. That apart, by imposing such a strict liability as to catch innocent persons in the net of crime, the Act and the notification issued thereunder cannot conceivably enable such a class of persons to assist the implementation of the law: they will be helpless victims of law. Having regard to the object of the Act, I think no person shall be held to be guilty of contravening the provisions of s. 8 of the Act, read with the notification dated November 8, 1962, issued thereunder, unless he has knowingly brought into India gold without complying with the terms of the proviso to the notification.

Even so it is contended that the notification dated November 8, 1962, is law and that the maxim "ignorance of law is no defence" applies to the breach of the said law. To state it differently, the argument is that even the mental condition of knowledge on the part of a person is imported into the notification; the said knowledge is imputed to him by the force of the said maxim. As-

suming that the notification dated November 8, 1962, is a delegated legislation, I find it difficult to invoke that maxim as the statute empowering the Reserve Bank of India to give the permission, or the rules made thereunder do not prescribe the mode of publication of the notification. Indeed a similar question arose before the Privy Council in *Lim Chin Aik v. The Queen* and a similar argument was advanced before it; but the Board rejected it. I have already dealt with this decision in another context. There the Minister under the powers conferred on him by s. 9 of the Immigration Ordinance, 1952, issued an order prohibiting the appellant therein from entering Singapore. He was prosecuted for disobeying that order. Section 9, in the case of an order directed to a single individual, contained no provision for publishing the order or for otherwise bringing it to the knowledge of the person named. The Crown invoked the precept that ignorance of the law was no excuse. In rejecting the contention of the Crown, Lord Evershed, speaking for the Board observed at p. 171 thus:

"Their Lordships are unable to accept the contention. In their Lordships' opinion, even if the making of the order by the Minister be regarded as an exercise of the legislative as distinct from the executive or administrative function (as they do not concede), the maxim cannot apply to such a case as the present where it appears that there is in the State of Singapore no provision, corresponding, for example, to that contained in section 3(2) of the English Statutory Instruments Act of 1946, for the publication in any form of an order of the kind made in the present case or any other provision designed to enable a man by appropriate inquiry to find out what 'the law' is."

Here, as there, it is conceded that there is no provision providing for the publication in any form of an order of the kind made by the Reserve Bank of India imposing conditions on the bringing of gold into India. The fact that the Reserve Bank of India published the order in the Official Gazette does not affect the question for it need not have done so under any express provisions of any statute or rules made thereunder. In such cases the maxim cannot be invoked and the prosecution has to bring home to the accused that he had knowledge or could have had knowledge if he was not negligent or had made proper enquiries before he could be found guilty of infringing the law. In this case the said notification was published on November 24, 1962, and the accused left Zurich on November 27, 1962, and it was not seriously contended that the accused had or could have had with diligence the knowledge of the contents of the said notification before he brought gold into India. I, therefore, hold that the respondent was not guilty of the offence under s. 23(1-A) of the Act as it has not been established that he had with knowledge of the contents of the said notification brought gold into India on his way to Manila and, therefore, he had not committed any offence under the said section. I agree with the High Court in its conclusion though for different reasons.

Though the facts established in the case stamp the respondent as an experienced smuggler of gold and though I am satisfied that the Customs authorities *bona fide* and with diligence performed their difficult duties, I have reluctantly come to the conclusion that the accused has not committed any offence under s. 23(1-A) of the Act.

In the result, the appeal fails and is dismissed.

APPELLATE CIVIL.

[NAGPUR BENCH]

Before Mr. Justice Patel and Mr. Justice Wagle.

JAGANNATH GANBAJI CHIKHALE

v.

GULABRAO RAGHOBARI BOBDE.*

Letters Patent, Cl. 15—Constitution of India, Arts. 227, 367—General Clauses Act (X of 1897), Sec. 8—Whether appeal under cl. 15 of Letters Patent competent against order of Single Judge passed under art. 227 of Constitution.

An appeal does not lie under cl. 15 of the Letters Patent against the decision of a Single Judge given in a special civil application filed under art. 227 of the Constitution of India.

N. S. Thread Co. v. James Chadwick & Bros.,¹ Sukhendu v. Hare Krishna,² In re Tirupuliswami³ and Shrinivasa Reddiar v. Krishnaswami Reddiar,⁴ referred to.

S. N. Kherdekar, for the appellant.

PATEL J. Last week these letters patent appeals were before us but as we felt some doubt whether any such appeal could lie we directed that these matters be placed before us for hearing on the question whether an appeal lies under cl. 15 of the Letters Patent against the decision of a Single Judge given in a special civil application filed under art. 227 of the Constitution.

Clause 15 of the Letters Patent of this High Court which is in similar words as that of Calcutta and Madras High Courts, is as follows, so far as is relevant to the present case:—

“And we further ordain that an appeal shall lie to the said High Court of Judicature at Bombay from the judgment (not being a judgment passed in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court, and not being an order made in the exercise of revisional jurisdiction, and not being a sentence or order passed or made in the exercise of the power of superintendence under the provisions of section 107 of the Government of India Act, or in the exercise of criminal jurisdiction) of one Judge of the said High Court or one Judge of any Division Court, pursuant to section 108 of the Government of India Act,…”

The subsequent portion can have no possible application and, therefore, need not be reproduced. A reading of this clause shows that an appeal is provided by cl. 15 against the judgment of a Single Judge within the Court itself. While providing for this appeal, exceptions have been created and the exceptions are four in number:—(1) a judgment rendered by a Single Judge exercising appellate jurisdiction in respect of a decree which is made in the exercise of appellate jurisdiction by a subordinate Court—in common parlance called the second appellate jurisdiction, (2) an order rendered by a Single Judge in the exercise of revisional jurisdiction of the High Court, (3) an order or sentence rendered by a Single Judge in the exercise of powers of superintendence of the High Court under the provisions of s. 107 of the Government of India Act, 1915, and (4) an order rendered in the exercise of criminal jurisdiction. These are the four exceptions, to an appeal as a matter of right, against the judgment of the Single Judge within the Court. In respect of the first exception, a provision is made for an appeal on condition that the Judge, who decided the matter, gives a certificate that the matter is one fit for an appeal under cl. 15 and that is provided by the second part of the clause which we have omitted.

*Decided, March 25, 1965. Letters Patent Appeal No. 9 of 1965 (with Letters Patent Appeals Nos. 9, 10, 12 to 14 of 1965).

¹ [1953] A.I.R. S.O. 357.

² [1953] A.I.R. Cal. 636.

³ [1955] Mad. 1033.

⁴ [1955] A.I.R. Mad. 72.

It is argued by Mr. Kherdekar that whatever may be the position in respect of the decision of a Single Judge given under s. 115 of the Civil Procedure Code, it is impossible to regard exercise of power by a Single Judge under art. 227 of the Constitution as an exercise of revisional jurisdiction. He argues that art. 227 of the Constitution gives far wider power to a High Court to interfere with decisions of subordinate Courts and tribunals than s. 115 of the Civil Procedure Code, and, therefore, it is impossible to regard the exercise of such powers as exercise of revisional jurisdiction. He argues that exercise of powers of superintendence under art. 227 of the Constitution is not the same as exercise of powers under s. 107 of the Government of India Act, 1915, and hence the latter part of the exception cannot apply.

It is well settled that a right of appeal can only be given by a statute, there being no general right of appeal against the decision of one Court to another Court. It would be much more so in the case where a right of appeal is claimed from the judgment of a Single Judge to a larger Bench within the same Court. Unless, therefore, the right to appeal is discernible from the provisions of the clause itself, no such right can exist.

It is not necessary to trace the history of the statutes giving revisional powers to the High Courts and also the Letters Patent. It is sufficient to say that an order of a Single Judge made in the exercise of revisional jurisdiction was held to be appealable under cl. 15 of the Letters Patent. These came to be amended in 1919 by which the exception as to orders made in the exercise of revisional jurisdiction and of powers of superintendence was created. On a plain reading of clause 15 it is obvious that it is not necessary in order that a decision be not appealable, that the decision of the Single Judge must have been rendered in the exercise of the revisional powers of the High Court. Even if the judgment is given while exercising the powers of superintendence, under the then provisions of s. 107 of the Government of India Act, 1915, an appeal is excluded.

Now, it is true that when the Government of India Act, 1915, was replaced by the Government of India Act, 1935, the corresponding provision, s. 224 of the said Act, did not enable a High Court to exercise powers of superintendence in judicial matters over the decisions of subordinate Courts. To that extent, until the Government of India Act, 1935, continued to be in force, the reference to s. 107 in cl. 15 of the Letters Patent would not have carried much meaning, as the High Court could not have exercised any powers of revising the orders of the subordinate Courts under s. 224 of the Government of India Act, 1935. By the Constitution, the Government of India Act, 1935, was repealed and instead of s. 224 of that Act, art. 227 came to be substituted. It cannot be denied that the power of superintendence given by art. 227 is as wide as was available to the High Court under s. 107 of the Government of India Act, and there can be no doubt that the exercise of power by the High Court, by a Single Judge, under art. 227 is one of superintendence, as has been stated by the article itself, over subordinate Courts and tribunals, unlike the exercise of power under art. 226 which is entirely of a different nature and which probably cannot be resorted to as long as a matter falls under art. 227 which is a special provision relating to Courts and tribunals. Then the only question that arises is whether it is permissible to substitute "Article 227 of the Constitution" for "section 107 of the Government of India Act," 1915 in this clause.

In this connection it must be remembered that by cl. 44 of the Letters Patent, the provisions of the Letters Patent are subject to the legislative powers of the Governor-General in Legislative Council and also of the Governor-General in Council under s. 71 of the Government of India Act, 1915, and also of the Governor-General in cases of emergency under s. 72 of that Act. The provisions being subject to the legislative powers of the Indian Legislature, they would be subject to any rules of interpretation of statutory provisions

framed by the Indian Legislature i.e. the General Clauses Act, 1897. Section 8 of the General Clauses Act, 1897, provides that where that Act, or any Central Act or Regulation made after the commencement of that Act, repeals and re-enacts, with or without modification, any provision of a former enactment then references in any other enactment or in any instrument to the provision so repealed shall, unless a different intention appears, be construed as references, to the provision so re-enacted. Now, it is true that the Constitution can hardly be regarded as a Central Act or a Regulation made after the enactment of the General Clauses Act. Article 367, however, of the Constitution provides that the General Clauses Act of 1897 shall apply for the interpretation of the Constitution as it applies for the interpretation of an Act of the Legislature of the Dominion of India. It would seem, therefore, that s. 8 would be applicable in the present case. Apart from this, it has been recognised that the rule stated in s. 8 of the General Clauses Act is not a special rule of interpretation but one generally accepted on fundamental principles and, if that is so, apart from the provisions of that clause, inasmuch as s. 107 of the Government of India Act, 1915, was repealed and s. 224 was re-enacted by the Government of India Act, 1935, and later that section was repealed and was re-enacted in the form of art. 227 of the Constitution, the reference to s. 107 of the Government of India Act must be read as reference to art. 227 of the Constitution. In this view we are supported by the decision of the Supreme Court in *N. S. Thread Co. v. James Chadwick & Bros.*,¹ where the question was whether the words “pursuant to section 108 of the Government of India Act” in cl. 15 of the Letters Patent could be read as “pursuant to article 225 of the Constitution”. The Court applied the provisions of s. 8 of the General Clauses Act. The Court also observed (p. 360):

“...Assuming however but not conceding, that strictly speaking the provisions of the Interpretation Act and the General Clauses Act do not for any reason apply, we see no jurisdiction for holding that the principles of construction enunciated in those provisions have no application for construing these charters.”

Consequently, the reference to s. 108 of the Government of India Act was read as reference to art. 225 of the Constitution.

There being, therefore, no doubt that the Single Judge deciding writ petitions under art. 227 against the decisions of the Revenue Tribunal exercises the powers of superintendence of the High Court under art. 227 of Constitution and an appeal against such a decision having been expressly barred, the question as to whether it is akin to or wider than the revisional jurisdiction of the High Court does not fall to be considered.

The view which we have taken finds support in the views of the Madras and Calcutta High Courts. The question came to be considered by the Calcutta High Court as early as 1953 in the case of *Sukhendu v. Hare Krishna*.² The dispute arose under the Rent Restriction Act out of an application for ejectment under s. 41 of the Presidency Small Cause Courts Act against the decision of a Bench. A petition purporting to be one under s. 115 of the Civil Procedure Code and art. 227 of the Constitution was filed in the High Court and was eventually dealt with by a Single Judge. Against the decision of the Single Judge a Letters Patent was filed by the defendant. The learned Judges traced the history of the Civil Procedure Code and also the powers vested in the High Court under the various statutes and came to the conclusion that the power exercised by a Single Judge in a writ petition under art. 227 being power of superintendence, the decision in such a matter rendered by him would not be appealable. Similar view has been taken in *In re Tirupuliswamy*³ and *Srinivasa Reddiar v. Krishnaswami Reddiar*.⁴ It is true that the distinction sought to be made by Mr. Kherdekar between the revisional jurisdiction and the general power of superintendence vested in

1 [1953] A.I.R. S.C. 367.

2 [1953] A.I.R. Cal. 636.

3 [1955] Mad. 1033.

4 [1955] A.I.R. Mad. 72.

the High Court under art. 227 of the Constitution was not made in *Tirupuli-swamy's* case. But, as we have stated above, it is really not necessary to go into that question inasmuch as an appeal against the judgment of a Single Judge rendered in the exercise of the power of superintendence of the High Court is excluded.

In the result, we must hold that the appeals are incompetent. They will, therefore, stand dismissed.

Appeals dismissed.

[NAGPUR BENCH]

Before Mr. Justice Patel and Mr. Justice Wagle,

INDUBAI PANDHARI NAIK

v.

VYANKATI VITHOBA SAWADHA.*

Hindu Succession Act (XXX of 1956), Secs. 14(1), 4(2)—Madhya Pradesh Land Revenue Code (II of 1955), Secs. 151, 152—Central Provinces and Berar Hindu Women's Rights to Property (Extension to Agricultural Land) Act (C. P. & Berar Act No. VI of 1942)—“Possessed”, meaning of word in s. 14(1) of Hindu Succession Act—Widow getting interest in joint family property on husband's death whether in possession of such property within s. 14(1)—Whether member of joint family loses rights in joint property on his going out for considerable time and not enjoying benefit of property—M. P. Land Revenue Code whether a tenancy legislation—“Subject to his personal law,” meaning of expression in s. 151 of Code.

In s. 14(1) of the Hindu Succession Act, 1956, the word “possessed” means the state of “owning and having a disposing power” i.e. a right in the property which is capable of enjoyment whenever the widow wills so to do.

A Hindu widow who has interest in the joint family property which she got on her husband's death can be said to have possession of the property within the meaning of that phrase in s. 14(1) of the Hindu Succession Act, 1956. It is not necessary under that section that she should reduce her share to possession either by actual partition or even by asking for partition.

*Venkayamma v. Veerayya*¹ and *Kotturuswami v. Veeravva*,² referred to.

In the case of members of a joint family even if a member has gone out for a considerable length of time and has not enjoyed the benefit of the property his rights in the property are not lost. In order that adverse title can be prescribed ouster must be proved.

*Babaji v. Jivaji*³ and *Mst. Kirpal Kuar v. Bachan Singh*,⁴ explained.

*Nargisbai Acidwala v. Jehangir Mody*⁵ and *Sudarsan Das v. Ram Kirpal Das*,⁶ referred to.

The Madhya Pradesh Land Revenue Code, 1954, is not a tenancy legislation and, therefore, the exception in s. 4(2) of the Hindu Succession Act, 1956, does not apply to it.

Under s. 151 of the Madhya Pradesh Land Revenue Code, 1954, the ordinary law of inheritance, survivorship or bequest operates. If a holder is governed by any special law, customary or statutory, then the devolution is intended to be governed by the same.

The words “subject to his personal law” in s. 151 of the Madhya Pradesh Land Revenue Code, 1954, mean personal law by which he was governed when the succession opened.

Sitabai v. Kothulal,⁷ dissented from.

*Decided, March 26, 1965. Civil Revision Application No. 222 of 1963.

¹ [1957] A.I.R. Andhra Pra. 280.

² [1959] A.I.R. S.C. 577.

³ [1930] A.I.R. Bom. 333, s.c. 32 Bom. L. R. 314.

⁴ [1958] A.I.R. S.C. 199.

⁵ [1942] 45 Bom. L.R. 104.

⁶ [1950] A.I.R. P.C. 44, s.c. 52 Bom. L.R. 493.

⁷ [1959] A.I.R. Bom. 78, s.c. 60 Bom. L.R. 408.

THE facts appear in the judgment.

V. R. Manohar, for the applicant.

A. V. Khare, for opponents Nos. 1 and 2.

D. N. Belekar, for opponents Nos. 3, 4 and 6 to 10.

PATEL J. This revisional application arises out of an order made under the provisions of O. XXII, r. 4, of the Code of Civil Procedure in a suit.

The short facts are that one Balaji left two sons Vithoba and Pandurang after his death, who were members of a joint family. Vithoba died in 1912 leaving behind him Vyankati, defendant No. 1 and Gopala, defendant No. 2. Pandurang died in 1941 leaving his widow Sarubai and a daughter Indubai who was married. At the time of his death, the joint family was possessed of the suit properties. In August 1961, Pandurang's widow Sarubai filed a suit claiming partition of her share in the property against the defendants. After issues were framed, Sarubai was examined on commission. Thereafter she died on October 20, 1962. Before her death she had executed a will and bestowed her properties in favour of her daughter Indubai. Indubai then made an application under the provisions of O. XXII, r. 3, for being brought on record in place of her mother as the plaintiff, claiming the properties under the will or, in any event, by reason of s. 15 of the Hindu Succession Act, 1956. She claimed, therefore, to be the legal representative of the deceased plaintiff. Further evidence had not been led. The learned trial Judge dismissed the application.

The learned Judge rejected the contention of the petitioner that s. 14 of the Hindu Succession Act, 1956, applied as Sarubai was not in possession of the property at the date of the suit. He relied upon her evidence on commission that after her husband's death she did not live with the defendants, that is, since 1941 she did not stay in the family house saying

"she remained aloof from the family for more than twenty years after her husband's death. Therefore, it could not be inferred that she was in possession as a widow of her husband and her interest became enlarged by reason of section 14 of the Hindu Succession Act."

Then he relied upon *Sudarsan Das v. Ram Kirpal Das*¹ and *Babaji v. Jivaji*² and said

"the doctrine is that possession of a joint estate is adverse to any claim to such an estate as a separate one, and that possession by a joint family may by lapse of time become adverse to a separate estate."

Then while considering the decision in *Kotturuswami v. Veeravva*³ he observed

"Sarubai never showed any concern to the suit property right after 1941. She remained away immediately after Pandurang's death. The defendants' possession therefore became adverse"

and held that in such a case rights of her reversionary heirs would of course be barred at the expiration of twelve years from Pandurang's death and relied upon *Mst. Kirpal Kuar v. Bachan Singh*.⁴ As to agricultural land, he relied upon s. 151 of the Madhya Pradesh Land Revenue Code, 1954, and the decision, *Sitabai v. Kothulal*.⁵

Mr. Manohar relies on s. 14 of the Hindu Succession Act, 1956, in support of the will in favour of the applicant and her right to succeed to Sarubai's interest otherwise than under the will.

Section 14 of the Hindu Succession Act, 1956, effected a change in the old Hindu law and converted widow's estate into an absolute estate in respect of

1 [1950] A.I.R. P.C. 44, s.c. 52 Bom. L.R. 493.

2 [1930] A.I.R. Bom. 333, s.c. 32 Bom. L.R. 314.

3 [1959] A.I.R. S.C. 577.

4 [1958] A.I.R. S.C. 199.

5 [1959] A.I.R. Bom 78, s.c. 60 Bom. L.R. 408.

all "property possessed by her". In *Venkayamma v. Veerayya*⁶ "possession" was construed in its widest sense to mean the state of "owning or having in one's hands or power". Similar view was taken by this High Court. This view has been affirmed by the Supreme Court in *Kotturuswami v. Veeravva*. The application of this meaning of the phrase was also not left in doubt in this case. In this case A, the husband of B, had died in 1920 and by will authorised her to adopt a son. She adopted a son C in 1942 and he was placed in possession of the property. D alleged that he was the nearest reversioner of A and filed the suit for declaration that the adoption was invalid and not binding on him. He failed in the trial Court and also in the High Court and at the hearing of his appeal to the Supreme Court a preliminary objection was taken under s. 14 of the Hindu Succession Act, 1956, the contention being that inasmuch as the widow had become the full owner of the estate, his suit could not succeed. Their Lordships said that if the adoption was invalid, the widow would become the absolute owner under the section as C's possession must be regarded permissive possession and the appeal was dismissed.

The question is whether Sarubai possessed the property in the above sense. Mr. Khare contends that she did not possess the property at all and so there is no question of s. 14 of the Hindu Succession Act applying. His contention is that Sarubai no doubt acquired an interest in the property, but on her death the cause of action did not survive and the suit abated. He relied on the decisions in *Shamrao v. Kashibai*,⁷ *Subba Rao v. Krishna Prasad*⁸ and *Jivanandan Singh v. Sia Ram Prasad Singh*.⁹ We must, therefore, consider the nature of her interest in the property when the Hindu Succession Act, 1956, came into force and the effect of her filing the suit.

Under old Hindu law a widow had no right except that of maintenance in the property of the joint family of which her husband died as a member. Even in the case of separate property if her husband left a male issue then her only right was one of maintenance. By Hindu Women's Rights to Property Act, 1937, substantial change was made in her rights. Section 3, the most important, is divided into four parts. Sub-section (2) gave her on the death of her husband as a member of the joint family "the same interest as her husband had." By sub-s. (1) as to separate property of a coparcener and in the case of those governed by the Dayabhaga school, the widow took equally with the son. However, she got a limited estate known as widow's estate but got the right to claim partition.

The Legislature gave her full right in the property that her husband had without any limitation except that she got the estate as a widow. It is clear that this right is given to her not in lieu of maintenance or only for the purpose of maintenance. It was, therefore, held that she could alienate her interest in the coparcenary property for legal necessity as she could the separate property of her husband which she got as his heir under the same Act: *Harekrishna Das v. Jujesthi Panda*¹⁰ and *Pem Mahton v. Bandhu Mahto*.¹¹ It was also held by this Court in *Dagadu Balu v. Namdeo Rakhamaji*¹² that she could alienate her own restricted interest to enjoy the property during her life time and that the alienee could also enjoy the property during her life time and for this purpose he could claim partition. The ratio of these decisions is that she had disposing power over the property.

The decisions in *Subba Rao v. Krishna Prasad*, *Shamrao v. Kashibai*, *Jivanandan Singh v. Sia Ram Prasad Singh* and *Alamelu Ammal v. Chellammal*¹³ were given with reference to the position obtaining before the Hindu Succession Act, 1956, came to be enacted. Apart from this, it seems to us with great respect

6 [1957] A.I.R. Andhra Pra. 280.

7 [1956] A.I.R. Nag. 110.

8 [1954] A.I.R. Mad. 227.

9 [1961] A.I.R. Pat. 347.

10 [1956] A.I.R. Orisa 73.

11 [1958] A.I.R. Pat. 20.

12 [1954] Bom. 1069, s.c. 56 Bom. L.R. 513.

13 [1959] A.I.R. Mad. 100, F.B.

that the scope of s. 14 of the Act which gives the widow rights in the property of her husband is considerably narrowed down by considerations of old law. The decisions in *Dagadu's* case and *Mahadu Kashiba v. Gajarabai Shankar*¹⁴ do not support this view. There is no justification in our view for saying that the right of the widow in the property ended with the death of the widow. If the husband could put an end to his joint status by declaring his intent to effect partition she also could, as she had the same interest in the property as that of the husband. There can also not be any doubt that the interest in her husband's property which she got under sub-s. (2) was also by devolution, in the same way that she got a share in the separate property of her husband as a son under sub-s. (1), as sub-s. (3) of that Act speaks of both as devolution. The argument sometimes made that because the word "succession" is not used in the Act the widow's rights are personal and end with her death is not justified as the word has been applied in many statutes even to survivorship also. (See *In re Hindu Women's Rights To Property Act.*)¹⁵ It is not necessary however to pursue the question further as, in our view, s. 14 of the Hindu Succession Act has considerable effect on the matter.

As stated earlier "possessed" as used in the section means the state of "owning and having a disposing power". This must mean a right in the property which is capable of enjoyment whenever the widow wills so to do. Having regard to decisions in *Harekrishna Das v. Jujesthi Panda*, *Prem Mahton v. Bandhu Mahto* and *Dagadu v. Namdeo* she had ownership over her interest in the joint family property that she got on her husband's death without even claiming partition and, if that is so, she must be regarded as being in possession of the property. It is not necessary, in our view, that she should reduce her share to possession either by actual partition or even asking for partition. By reason of s. 14 of the Hindu Succession Act her limited estate became transformed into full estate with all its incidents including that of its passing to her heirs in accordance with s. 15 of the Act. It is not necessary for us to decide whether she could will away the property without demanding partition. In the present case, she had demanded partition and she would, therefore, be entitled to make valid bequest by will.

The learned trial Judge held that defendant No. 1 had prescribed adverse joint family title and at another place he has held that he became owner by adverse possession. Without a trial the learned Judge ought not to have gone in these matters. It seems to us that there has been confusion of thought in the reasoning of the learned Judge. It is well settled that in the case of members of a joint family even if a member has gone out for a considerable length of time and has not enjoyed the benefit of the property his rights in the property are not lost. Even in the case of co-owners, possession of one is regarded as that of all. In other words, mere non-enjoyment of the property as a co-owner does not mean that those in possession prescribe adverse title to that of the non-participating owner. In order that adverse title can be prescribed ouster must be proved. (See *Nargisbai Acidwala v. Jehangir Mody*¹⁶ and *Sudarsan Das v. Ram Kirpal Das*). The learned Judge has also misunderstood the decisions in *Babaji v. Jiwaji*, as well as the decision in *Mst. Kirpal Kuar v. Bachan Singh*. In *Babaji's* case joint family possessed certain property as joint property which a coparcener was claiming as separate property and the Court held that the joint family had prescribed an adverse title. In *Mst. Kirpal Kuar's* case, a widow who had no right in the property except that of maintenance had been in enjoyment of the property as if she were entitled to it and it was held that she had become owner by adverse possession. The learned Judge was in error in holding that Sarubai's right in the property was lost.

Mr. Khare has contended as a last resort that at least *qua* the agricultural property, the applicant has no right to come on the record. Mr. Khare has

¹⁴ [1954] Bom. 885, s.c. 56 Bom. L.R. 387.

¹⁵ [1941] A.I.R. F.C. 72.

¹⁶ (1942) 45 Bom. L.R. 104.

invited our attention to the provisions of s. 151 of the Madhya Pradesh Land Revenue Code, 1954, and contended that the section prescribes a special mode of succession and, therefore, its operation is not affected by reason of s. 4(2) of the Hindu Succession Act, 1956. Such a view was taken by Vyas J. in *Sitabai v. Kothulal*.

Section 151 of the Madhya Pradesh Land Revenue Code runs as follows:—

"Subject to his personal law, the interest of a tenure-holder shall on his death pass by inheritance, survivorship or bequest, as the case may be."

Section 4 of the Hindu Succession Act was intended to give overriding effect to the provisions of the Act over all other laws applicable to Hindus except as provided by the Act. Out of this, an exception has been created by sub-s. (2). It says:

"For the removal of doubts it is hereby declared that nothing contained in this Act shall be deemed to affect the provisions of any law for the time being in force providing for the prevention of fragmentation of agricultural holdings or for the fixation of ceilings or for the devolution of tenancy rights in respect of such holdings."

In this case no reliance is placed on any law providing for the prevention of fragmentation of agricultural holdings or for the fixation of ceilings. It is said however that s. 151 provides for the devolution of agricultural lands and, therefore, this sub-section applies. This argument, therefore, must be examined.

In order that the exception created by s. 4(2) of the Hindu Succession Act can apply the legislation must provide for devolution of tenancies. Tenancy legislations were and are well known. It is impossible to regard the Land Revenue Act as tenancy legislation. So far as the four districts of the Central Provinces are concerned the earliest Act is the Central Provinces Land Revenue Act. It speaks of proprietary rights in the land and the tenure of land prevalent seems to be similar to Bhagdari and Narwadari tenures of Gujarat in some respects. As the occupants of land were proprietors they had hereditary and transferable title and, therefore, no express provision seems to exist in this respect. Then came the Central Provinces Land Revenue Act, 1917. As the rights were proprietary rights, again, no specific provision was made since widow's right to inheritance was such as she would get in other property on the death of her husband. In Raiyatwari villages by s. 212 the rights of Raiyats were declared heritable but not transferrable. As to the ceded districts of Berar the Governor General in Council made a law known as the Berar Land Revenue Code, 1928, under the Indian (Foreign Jurisdiction) Order in Council, 1902. Section 56 of the same is in terms similar to s. 151 of the present Land Revenue Code and the marginal note is "Occupant's rights heritable and transferrable". The present Code of 1954 seems to be a sequel to abolition of special tenures and Jamindaris. It has prescribed the condition under which a tenure holder occupies the land. There are two classes of tenure holders, Bhumiswamis and Bhumidharis; but s. 151 applies to both. The holding of the tenure holders are not tenancies. Not being a tenancy legislation, exception in s. 4(2) of the Hindu Succession Act does not apply.

Even apart from this, the contention cannot be accepted. The section occurs in Chapter XII of the Code which defines the classes of tenures, their liabilities and privileges. The tenure holders have permanent rights in the land and the section is intended to make it clear that the right is heritable. No doubt the language is not very happy but having regard to the legislative history it is clear beyond doubt that ordinary law of the holder is intended to apply. It also recognises the right of the holder to pass it on by bequest. If the holder is an individual, it would pass to heirs by inheritance and by bequest if he has left a will. If a joint family held the land, it would go by survivorship according to the ordinary law. It is not as if that a special rule has been laid down in order to preserve the integrity of land and prevent its further sub-divisions or for the convenience of the collection of the revenue or the rent. The ordinary law, therefore, of inheritance, survivorship or bequest operates. If a

holder is governed by any special law, customary or statutory, then the devolution is intended to be governed by the same.

What Mr. Khare contends is that the words "subject to his personal law" meant the personal law as it existed when the statute was passed, that is, in 1954. He contends that s. 151 (of Land Revenue Code) is a reproduction of s. 11 of the Central Province Tenancy Act, 1920, as amended in 1941, and the words "subject to his personal law" must be confined only to the law as then obtaining. The history of the legislation does not justify the contention. It may be that the Tenancy Act came to be repealed by the Code but that may be due to the very comprehensive recent tenancy legislations. Does it mean the personal law as in force in 1928, 1941 or the personal law as in force in 1954? The purpose of s. 151 was one of applying the law of succession by which a holder was governed. It can only mean personal law by which he was governed when the succession opened. There are no words in this section to mean personal law as applicable on a particular day. The normal rule of construction is that "the language of a statute is generally extended to new things which are not known and could have been contemplated by the legislation when it was passed." (Maxwell on Interpretation of Statutes, pp. 75 and 262). Until 1956 the personal law of a Hindu was the ordinary law applicable to him. By the enactment of Hindu Succession Act, his personal law was changed in supersession of all his old law and, therefore, on the date when the question arose this became his personal law.

True, the decision in *Sitabai v. Kothulal* supports Mr. Khare. With respect, we find it very much difficult to agree with the conclusions of the learned Judge. The learned Judge assumes that s. 151 of the Madhya Pradesh Land Revenue Code prescribed a particular law of devolution and secondly that it is with respect to tenancies. It only provided that the holding was heritable and his personal law of succession applied. The next s. 152 makes the Bhumiswami-tenure transferable and Bhumidhari-tenure transferable except by mortgage. In view of what we have said there can be no question of s. 4(2) of the Hindu Succession Act saving the rights of survivors.

We may also observe that this does not involve constructing the words "any law for the time being in force", in sub-s. (2) of s. 4 of the Hindu Succession Act to mean "any law which came into force", as has been supposed in the above case, once it is held that s. 151 of the Code merely recognises that the tenure is heritable and will pass according to the law applicable to the tenure holder.

There is a serious difficulty in accepting the ratio in *Sitabai's* case. Section 151 of the Madhya Pradesh Land Revenue Code applies to all land holders from the Government, that is, rural as well as urban and open as well as built upon. We may take the case of land in a city on which huge building has been built. According to the decision in the above case in a case like the present, the land would be taken by the survivor or survivors while the structure would be taken by the heir of the husband of the widow. One has to imagine the chaos resulting in such cases. It is true that if the language of an enactment is clear, then the Court has no concern with the consequences and it must apply the law. Giving a reasonable and natural meaning to the section, as we have done, avoids such a consequence.

The matter may be viewed from another point of view. The law applicable to Pandurang under the Land Revenue Acts was the ordinary Hindu law as amended by Hindu Women's Rights to Property Act, as a result of which Sarubai took the property on his death. The limitation of her rights in the property is a limitation on her and that has been removed. This does not affect in any manner anything that is prescribed in s. 151 of the Madhya Pradesh Land Revenue Code, 1954, since the section does not place any restriction on a woman acquiring absolute rights of ownership. This contention, therefore, also fails.

It was lastly contended by Mr. Khare that in any event the Hindu Women's

Rights to Property Act, 1937, could not possibly apply to agricultural property. Originally when the Act was passed, it was hardly realised that the Central legislature would have no power to legislate with regard to agricultural lands. It was only after the decision of the Federal Court *In the matter of the Hindu Women's Rights to Property Act, 1937*, that this position seemed to have been crystallised. Different States, therefore, enacted Acts giving similar rights to widows in respect of agricultural lands. In this area the Central Provinces and Berar Act (No. VI of 1942) being the Central Provinces and Berar Hindu Women's Rights to Property (Extension to Agricultural Land) Act, 1942, received the assent of the Governor on June 6, 1942, and it provided that the term "property" in the Hindu Women's Rights to Property Act, 1937, and the Hindu Women's Rights to Property (Amendment) Act, 1938, as in force in Madhya Pradesh, shall include, and shall be deemed always to have included, agricultural land. The proviso thereof is not material for our present purposes. This proviso creates an exception. It was attempted to be argued that inasmuch as this Act was passed in 1942 and Pandurang died in 1941 the Act will not apply to agricultural land left by Pandurang. The simplest answer is that the Act has been made retrospective expressly by its very language. By now it is well settled so far as this Court is concerned that the words "shall be deemed always to have" gave retrospective operation to a statute. We have, no doubt, therefore, that the Act applied to cases where the owner died even before the local Act was enacted provided that the provisions of the Hindu Women's Rights to Property Act, 1937, and Hindu Women's Rights to Property (Amendment) Act, 1938, were applicable.

In the result, we set aside the order made by the learned trial Judge and direct that the petitioner be shown as the legal representative of Sarubai in her place and the suit be proceeded with forthwith. In view of the fact that the suit is of 1961 and four years have already elapsed, we direct that the trial Judge shall hear the suit from day to day and decide it within three months after the vacation. The petitioner will get her costs from the opponents in this Court and also in the trial Court in respect of this application.

Order set aside.

CRIMINAL APPELLATE.

Before Mr. Justice Tambe and Mr. Justice Kantawala.

LAKSHMIPAT CHORARIA v. STATE.*

Criminal Procedure Code (Act V of 1898), Secs. 337, 494, 169, 170, 204—Sea Customs Act (VIII of 1878), Secs. 167(81), 187A—Person against whom process not issued by Magistrate whether competent witness against his accomplice—Admissibility of such person's evidence—Whether police officer bound to forward to Magistrate every person who might be guilty of commission of offence—Magistrate whether bound to issue process against all persons shown to be accused—Mere admission of guilt or confession during investigation of offence whether amounts to sufficient evidence within s. 170, Criminal Procedure Code—Whether such admission or confession amounts to sufficient ground for proceeding under s. 204 of Code—Magistrate before whom complaint made by Customs Officer under s. 167(8) of Sea Customs Act—Whether Magistrate can proceed against person whose name not mentioned in complaint.

A person becomes an accused person only when a process is issued against him by a Magistrate. It is only such an accused who is incompetent to depose at the trial against his other co-accused in absence of any conditional grant of pardon

*Decided, January 17, 1964. Criminal Appeal No. 961 of 1962 (with Criminal Appeals Nos. 960, 962 to 964 of 1962, Criminal Appeal No. 989 of 1962, and Criminal Revision Application No. 492 of 1962), against the order of

conviction and sentence passed by V. M. Gehani, Special Judicial Magistrate and Presidency Magistrate, II Court, Esplanade, Bombay, in Criminal Case No. 1/W of 1962.

under s. 337, Criminal Procedure Code, 1898, by a competent authority, or withdrawal of the prosecution case against him under s. 494, Criminal Procedure Code and after a formal order of discharge or acquittal having been recorded by a Magistrate in that respect. A person over whom the Magistrate does not exercise jurisdiction by issuing a process against him is a competent witness against his accomplice. There is no legal bar to the admissibility of his evidence.

Govinda v. Emperor,¹ *Ramsaran v. Emperor*,² *Reg v. Hanmanta*,³ *Queen-Empress v. Dala Jiva*,⁴ *Paban Singh v. The Emperor*⁵ and *Baru Singh v. Emperor*,⁶ distinguished.

Emperor v. Keshav Kortikar,⁷ explained.

*Amdumiyar Guljar Patel v. Emperor*⁸ and *Queen-Empress v. Mona Puna*,⁹ referred to.

It is not obligatory on a police officer to forward to a Magistrate each and every person who might be guilty of having committed an offence. A discretion has been given to him in this matter. Sections 169 and 170 of the Criminal Procedure Code read together make it clear that on completion of the investigation, the investigating officer has to consider whether there is "sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate to stand his trial." If he comes to the conclusion that there is sufficient evidence or reasonable ground to justify the forwarding of the accused then s. 170 makes it obligatory on him to forward him to a Magistrate and not otherwise.

Similarly, when an accused is forwarded to a Magistrate, and the Magistrate has taken cognizance of an offence, it is not obligatory on the Magistrate to issue process against each and every person, shown to be an accused, and forward him for trial. But, on the other hand, under the provisions of s. 204 the Magistrate, has at that stage, before issuing process, to apply his mind and, it is only if in his opinion there is sufficient ground for proceeding against the person on the material placed before him, he has to issue a process.

A mere admission of guilt or confession during the investigation of an offence does not necessarily amount to sufficient evidence within the meaning of s. 170 of the Criminal Procedure Code, requiring the Police Officer to forward an accused person to a Magistrate; neither such admission or confession necessarily amounts to a sufficient ground for proceeding against him within the meaning of s. 204 of the Code.

When a complaint is made by a Customs Officer under s. 167(81) of the Sea Customs Act, 1878, it is open to the Magistrate before whom the complaint is lodged, to proceed against a person against whom in his opinion there is sufficient material on record, even if his name is not mentioned as an accused in the complaint filed by the Customs Officer.

Cri. Appeal No. 961 of 1962.

N. C. Chattarjee, with *M. J. Mirchandani*, for the appellant-accused No. 1.

K. J. Khandalawala, *S. R. Vakil* and *B. A. Pandya* (appointed), Special Public Prosecutors, and *V. S. Deshpande*, Assistant Government Pleader, for the State.

Cri. Appeal No. 960 of 1962.

Porus Mehta and *B. B. Kantawala*, with *L. G. Khare*, for the appellant-accused No. 6.

K. J. Khandalawala, *S. R. Vakil* and *B. A. Pandya* (appointed), Special Public Prosecutors, and *V. S. Deshpande*, Assistant Government Pleader, for the State.

Cri. Appeal No. 962 of 1962.

N. C. Chattarjee, with *B. G. Wadhwa*, for the appellant-accused No. 2.

K. J. Khandalawala, *S. R. Vakil* and *B. A. Pandya* (appointed), Special

1 [1920] A.I.R. Nagpur 255.

2 [1945] A.I.R. Nagpur 72.

3 (1877) I.L.R. 1 Bom. 610.

4 (1885) I.L.R. 10 Bom. 190.

5 (1906) 10 C.W.N. 847.

6 (1906) I.L.R. 33 Cal. 1353.

7 (1934) 37 Bom. L.R. 179.

8 [1937] A.I.R. Nag. 17, F.B.

9 (1892) I.L.R. 16 Bcm. 661.

Public Prosecutors, and V. S. Deshpande, Assistant Government Pleader, for the State.

Cri. Appeal No. 963 of 1962.

R. Jethmalani and Kumar Mehta, with R. M. Kothari, for the appellant-accused No. 3.

K. J. Khandalawala, S. R. Vakil and B. A. Pandya (appointed), Special Public Prosecutors, and V. S. Deshpande, Assistant Government Pleader, for the State.

Cri. Appeal No. 964 of 1962.

R. Jethmalani and Kumar Mehta, with Mrs. Ratna Jethmalani, for the appellant-accused No. 5.

K. J. Khandalawala, S. R. Vakil and B. A. Pandya (appointed), Special Public Prosecutors, and V. S. Deshpande, Assistant Government Pleader, for the State.

Cri. Appeal No. 989 of 1962 (By State).

K. J. Khandalawala, S. R. Vakil and B. A. Pandya (appointed), Special Public Prosecutors, and V. S. Deshpande, Assistant Government Pleader, for the State.

R. Jethmalani, Kumar Mehta and Mrs. K. P. Hariyani, with B. L. Kapadia, for the respondent-accused No. 8.

Cri. Revision Application No. 492 of 1962 (By State for enhancement).

K. J. Khandalawala, S. R. Vakil and B. A. Pandya (appointed), Special Public Prosecutors, and V. S. Deshpande, Assistant Government Pleader, for the State.

TAMBE J. All the aforesaid appeals and revision applications could be disposed of together as they arise out of the same trial held by the Special Judicial Magistrate and Presidency Magistrate, II Court, Esplanade, Bombay. The first five appeals are by the accused-Laxmipat, accused No. 1; Punamchand, accused No. 2; Balchand, accused No. 3; Kundanmal, accused No. 5; and Sanchital Daga, accused No. 6. The other appeal is by the State of Maharashtra against the order of the Special Magistrate acquitting the accused Hanmantlal Kothari, accused No. 8 at the trial. The revision application is by the State of Maharashtra, praying that the sentences passed against the aforesaid convicted accused be adequately enhanced.

The aforesaid six accused were being prosecuted for an offence under s. 120-B, Indian Penal Code, for being parties to a criminal conspiracy along with one Yau Mokchi Ethyl Wong and others, between February 1, 1959 and February 31, 1959, to acquire possession of and to be concerned in carrying, removing, harbouring, keeping, concealing and dealing with gold and precious and semi-precious stones chargeable with duty knowingly and with intent to defraud Government of duty payable thereon, and with intent to evade the prohibitory restriction for the time being in force with respect to gold and thereby having committed an offence punishable under s. 120-B, Indian Penal Code, read with s. 167(81) of the Sea Customs Act, 1878. The accused were further charged on four specific counts for having committed an offence under s. 167(81) in pursuance of the aforesaid conspiracy. It is not necessary to refer to all the details. All the aforesaid appellants-accused are convicted under s. 120-B, Indian Penal Code. Further, accused No. 1, Laxmipat, accused No. 2, Punamchand and accused No. 6, Sanchital Daga, are convicted under s. 167(81) on all the four counts, and accused No. 3, Balchand, has been convicted under s. 167(81) on three counts and accused No. 5 has been convicted under s. 167(81) on two counts. They have all been sentenced to various terms of imprisonment and also fine has been imposed on them.

The following facts are now no more in dispute. Laxmipat, Punamchand, Balchand and Kundanmal are brothers, Punamchand being the oldest of all

of them. Sanchitlal Daga was their employee. Laxmipat and Punamchand, at the material time, resided at 144, Cotton Street, Calcutta and did business there. Accused No. 1, Laxmipat, also has business in Hong Kong and is doing business there under the name and style of Global Agencies at 28 Hollywood Road, Hong Kong. Accused No. 6 was the manager at Hong Kong, managing the business of Global Agencies since 1957 to March 4, 1959. Accused No. 5, Kundanmal, went to Hong Kong on February 25, 1959, to relieve accused No. 6, Sanchitlal Daga. From March 4, 1959, Kundanmal was the manager of Global Agencies till September 27, 1959. Accused No. 6 again went back to Hong Kong on or about August 19, 1959, and was its sole manager at any rate after September 27, 1959, to the end of the period of conspiracy. At the material time, accused No. 3, Balchand, was in charge of the Bombay branch of the business, and was residing at the top floor of Shalimar Building situate opposite Marine Lines Station. The business premises were situated on the third floor of Hanuman Buildings, Tambakanta Road, Bombay. The telephone numbers and telegraph addresses of these persons as well as the Global Agencies, which were at one time in dispute, are now admitted.

Yau Monkchi resides in Hong Kong and is doing business at his office located at 910 Yu To Sang building, Queens Road, Hong Kong. Yau is referred to in the correspondence as Yau or Yasmin. He is a Chinese citizen.

Sophia Wong P. W. 3, was an Air Hostess on the B.O.A.C. Air Lines, till the end of October 1959, and in course of her duties had to fly on the Hong Kong Calcutta route. In Calcutta, she used to stay at the Great Eastern Hotel. In her first trip to Calcutta, she met Yau Monkchi on being introduced by another Air Hostess Miss Tina Yup. Yau told her that he was in a tea business. During her stay in Calcutta, she met Yau three or four times and they exchanged cards as appears to be the custom among the Chinese. Sometime in September 1959, Yau rang her up and told her that he would like to come to see her at her house. She was not inclined to receive him at her house, and therefore she fixed up an appointment with him at the Grand Hotel Restaurant in Hong Kong. He kept the appointment and met her there. During the course of the conversation, he told her that he was purchasing a boat and invited her to join the cruise. She asked him what was the purpose of his meeting her and he replied that he wanted to do some business with her. She inquired as regards the nature of the business, and he told her that he wanted her to carry gold from Hong Kong to India and hand it over to somebody in Calcutta. He further informed her that she would be carrying gold concealed in a suit case. He also told her that he would pay her 1500 Hong Kong dollars for every trip she carried gold for him to India and further stated that before she carried the gold, he would tell her the name of the person in Calcutta and he would show the photograph of the person to whom the gold was to be delivered in Calcutta and also his telephone number, so that she would be in a position to contact and recognise him. He further promised to provide a suit case in which the gold would be carried. She considered the proposal to be a dangerous one, but Yau assured her that there was no risk involved therein and there was nothing to worry. He further warned her that she should not speak about it to anybody and if she divulged the secret he would get her anywhere. Feeling uneasy in her mind about the talk which she had with Yau, she spoke about it to Miss Curtin, P. W. 10, who was the Supervisor of the Air Hostesses in the B.O.A.C. office in Hong Kong, and told her that in these circumstances she would resign her job as an Air Hostess as she was frightened. Later she also told about the talk she had with Yau to one Olson whom she knew, and who at the material time was the service manager of B.O.A.C. She further told the same story to Mr. Harris, Police Officer in Hong Kong. As a result of her conversation with Mr. Olson and Mr. Harris, she agreed to meet Yau again, and on September 24, 1959, she met him at the Grand Hotel Restaurant by previous arrangement. He asked her to take gold from Hong Kong to Calcutta and to bring American Travellers' cheques from Calcutta. He stated that he had his men at Calcutta

as well as at Bombay. Her next trip was to Delhi. He, therefore, proposed that she should carry gold on her next flight to Delhi and from Delhi she should send the gold by postal parcel to Calcutta. Thereafter he put in a telephone call and told her to forget about it and stated that he would contact her again and she should carry gold to Calcutta on her next trip. I should have stated earlier that Sophia at that time was not married, but was engaged to one Shielt, Police Sub-Inspector, whom she married by the time she gave evidence in Court. After the aforesaid conversation with Yau, she straight way went to her fiancée Shielt and told him in detail about the conversation she had with Yau. Shielt recorded on the typewriter what she had told him. She read the typed copy and satisfied herself that Shielt had correctly recorded what she told him. Shielt then called Mr. Harris on telephone and on his arrival at Shielt's flat handed over the statement to him. That statement has been filed on record and it is marked as exh. 9. It bears Sophia's signature. It appears that Mr. Harris informed about these happening to Mr. Buchanan, Senior Security Officer of the B.O.A.C., having his office in London, and in response Mr. Buchanan had come to Hong Kong sometime in October 1959. On October 27, 1959, Yau contacted Sophia and she fixed up an appointment to meet him on October 29, 1959. It appears that a false roster was prepared for her showing that she was to fly to Calcutta on her next flight. On meeting Yau on October 29, she told him that she was prepared to carry gold and showed him the roster. Yau then told her that he would meet her at her flat that evening and bring the suit case and gold with him at that time. That suit case was to be used by her as her own suit case, and she should fill in the suit case with her clothes, so that the suit case should look filled. After this interview, she told Shielt about the arrangement she had made with Yau and it was arranged that Sub-Inspector Yu Tat Ming, P.W. 4, with two detectives should go to her flat before Yau arrived and lay in a trap. Mr. Yu and the two detectives accordingly went to her place and kept themselves hiding in a bed-room which was in use of Sophia's mother. It was arranged between Mr. Yu and her that when Yau showed her gold, she should give him a signal by going into the bath room and slamming its door twice. Yau came to her flat at about 8 p.m. that night with a grey suit case. They sat in the sitting room and she asked him to show gold. He stated that he would not show her gold in the sitting room as they might be seen by others. Both of them then went into the bed-room and she drew up the curtain of the bed-room but did not close the bed-room door, telling that there was nobody in the house. It appears that at the bottom of the bed-room doors both of hers as well as her mother's bed-room there was a small opening in which bars were fixed and by kneeling down one could see through the bars what was happening in the other bed-room. After going into her bed-room, he put the suit case on the bed and showed her where the gold was hidden. He unscrewed the right hand bottom metal corner with a specially made key and when the corner was opened two small pieces of thread became visible. He then removed the corner and pulled two strips of gold from each side of the suit case meeting at that corner. He then similarly took out two more strips of gold from the diagonally opposite corner by removing the metal corner with the same key. He then put back the gold strips and refastened the metal corners and locked it. He then handed over the key to her and asked her to take out the gold. By following the method shown, she then took out the strips and put them back again. They then left the suit case in the bed-room and came back in the sitting room. There he showed her the photograph and gave the visiting card and told her that the photograph was of the man to whom gold was to be handed over and on the visiting card was his name and the address and telephone number. He did not hand over either the photograph or the visiting card, but asked her to copy the name, address and telephone number appearing on the visiting card. She then copied the same and went to the bath-room and gave the agreed signal and locked herself in the bath-room. On getting the signal, Sub-Inspector Yu and the

two detectives came out of the other bed-room and on being asked to come out by Mr. Yu she came out of the bath-room after five minutes. She saw Sub-Inspector Yu, two detectives, Police Officers, Mr. Harris and Mr. Buchanan along with Yau standing in the lounge. She then told them where the suit case was and also the place where the gold was concealed in the suit-case. She also gave to the police officer a slip of paper on which she had copied the name, address and the telephone number from the visiting card. She then showed how gold was to be taken out of the suit case and actually took out of the gold in their presence. Sub-Inspector Yu then searched Yau and took out from his pockets some money, a leather wallet and some papers. In the leather wallet were found two photographs, one of accused No. 1 and the other of accused No. 3; three pieces of paper bearing the name, address and telephone number of accused No. 3, and the visiting card of accused No. 1. Besides 26 other visiting cards including one of Ethyl Wong, P.W. 1. and one of Sophia. Mr. Yu also seized the suit case, the gold strips in the suit case on being taken out by Sophia, the key by which Sophia had opened the bottom corners of the suit case, and the paper exh. "Q" on which she had copied the name, address and telephone number of accused No. 1 from the visiting card shown to her by Yau. Yu then arrested Yau.

Mr. Buchanan thereafter went and met the Indian High Commissioner at Hong Kong and asked him to intimate Mr. Shriwastava, P.W. 27, Deputy Director of Revenue Intelligence at Delhi. Information was given to him of the names, addresses and telephone numbers which had come out of the search of Yau. Mr. Yu also on receiving further instructions, took Yau to his office at No. 910 Yu To Sank Building and carried out the search of the premises and there seized some cables, visiting cards, goldsmith bills and a paper-slip containing addresses. He also seized the account books of Yau. Amongst the papers seized included one visiting card of accused No. 6, and five cables including one from Ethyl Wong saying "Happy Birthday Evelyn" dated September 14, 1959, sent to Hong Kong from Bombay. In due course, Yau was put up for trial and was sentenced to six months rigorous imprisonment in connection with the gold seized from Sophia's house for attempting to employ Sophia to get the gold out of Hong Kong.

On October 30, 1959, on receiving instructions, Detective Inspector Williams of the Hong Kong Police, P.W. 6, executed a search warrant in the premises of Global Agencies situate at 28 Hollywood Road, Hong Kong. He entered the premises at 3.30 p.m. At that time, only an office boy and a servant were present. At 4 o'clock, accused No. 6, Sanchitlal came in the premises. Williams disclosed to him the identity and showed him his search warrant and his identity card. Accused No. 6 then told him that he was the person in charge of the premises and a search was then taken of the premises. A large number of documents which consisted of letters, cables, accounts, cheque counter-foils, cheque books, files of gold and documents and other documents were seized and were taken to the police headquarters and kept secured for the night. On the next day, on a request being made by accused No. 6, the current cheque books were returned to him. Accused No. 6 in return passed a receipt in token of having received those cheque books. This receipt is on record and is admitted by accused No. 6 to be the receipt executed by him. The other documents remained in the office of Williams under his lock and key. On November 1, 1959, Mr. Shriwastava, Deputy Director of Revenue Intelligence, New Delhi, came to Hong Kong and examined the documents which had been seized from the premises of Global Agencies. Mr. Shriwastava then asked that some of the documents be photo-stated. Accordingly, those documents were taken in batches to a room and photo-stated by the clerk of the Police Department in charge of photo-stating. After each batch was photo-stated, the originals were compared with the photo-stated copies by Williams as well as the Indian Embassy Official, and a special stamp paper for the purpose was affixed on each document showing that it was a correct photo-stat of the original. Out of the

cables seized, only 8 have been photo-stated, and of the rest copies were prepared as the photo-stat paper ran out. On the copies made by hand also, the aforesaid seal has been affixed as they being correct copies of the originals. After this was done, the originals of all the documents were taken back by Williams and kept in office till February 17, 1960, on which date they were returned to accused No. 6 on his request, under instructions of Superintendent Hanais. At the time of returning the documents to him, Mr. Williams took an undertaking from accused No. 6 that he would produce the documents when required and also obtained from him a receipt for having received the documents back. The undertaking executed by accused No. 6 is on record and is exh. Z-4. The photo-stats and other copies of these documents were given to Mr. Shrivastava. On receiving further instructions, Williams went to the premises of Global Agencies on April 29, 1960, and reminding accused No. 6 of his undertaking asked him to produce the documents. Accused No. 6 then handed back the original documents which had been seized from the premises of the Global Agencies to Williams. Later, however, in consequence of the order made by the Supreme Court of Hong Kong, these documents were returned by Mr. Williams to the clerk of the solicitors representing accused No. 6, on obtaining a receipt from him. At the trial, a notice was issued to all the accused to produce the original documents. All the accused except accused No. 6 stated that they did not receive the documents while accused No. 6 stated that the documents were not with him. The learned Magistrate has therefore allowed the prosecution to file the photo-stat copies made of these documents as secondary evidence of the contents of these documents. It may be stated that those documents contained letters written by the accused persons and in particular by accused Nos. 1, 2 and 3 and certain cables which form the material evidence in the case connecting the accused with the commission of the offence.

Now, on receiving the information from the Indian High Commissioner in Hong Kong about the seizure of photographs of accused Nos. 1 and 3, the visiting card of accused No. 1, and slips of paper containing the address of accused No. 3 from the person of Yau, the Director of Revenue Intelligence, Delhi, ordered searches to be carried out at various places both at Bombay and at Calcutta. Accordingly on October 31, 1959, P. W. 31, Basu, a Customs Officer at Calcutta, searched the residence of accused No. 1 at 144, Cotton Street, of which the telephone number was mentioned on the visiting card of accused No. 1 found with Yau. The flat was on the third floor, and consisted of three rooms, an open space, a kitchen, bath-room and a lavatory. Accused No. 2 and the wife and children of accused No. 1 were present in the house. Accused No. 1 also returned to the flat sometime after Basu had entered the flat. He was informed by accused No. 1 that one bed-room and a drawing room were occupied by accused No. 2. Accused No. 2 also confirmed this information. In the search a number of documents were seized including two diaries belonging to accused No. 1. They are Z-54 and Z-74, and some letters addressed to accused Nos. 1 and 2. On the same day, another Customs Officer, Datta, searched the premises of Bhuramal Manekchand at 4, Doyahatta Street, which was the address mentioned in the visiting card of accused No. 1 found with Yau Mok Chi, and in the search, a number of documents were seized including letters addressed to one P. C. Jain, a partnership deed, and an assessment order relating to accused No. 2 in regard to his firm at Mymensingh and some other documents relating to accused Nos. 1 and 2. At Bombay also on the same day, i.e. October 31, 1959, Preventive Officer Shirur of Bombay Customs searched the premises of B. L. Choraria & Co., Hanuman Building, third floor, Tambakanta Street, the address of accused No. 3, found in the papers seized from the person of Yau. At the premises, accused No. 3 was present. Shirur took charge of certain documents including a letter addressed to accused No. 3 from Assam. On February 22, 1960, Chaudhary, an officer of the Calcutta Customs, again searched the premises of Bhuramal at 4, Doyahatta Street, and seized a number of documents including letters addressed to accused Nos. 1 and 2, a

dissolution deed of B. L. Choraria & Co., Calcutta, between accused Nos. 1 and 5 and their brother Girdharilal. On the same day, Preventive Officer Shirur of Bombay Customs searched the flat of accused No. 3 in the Shalimar Building, opposite Marine Lines Station, and took charge of a number of documents including an agreement for the purchase of that flat. On the same day, Preventive Officer Kazi of the Calcutta Customs, in the presence of the Assistant Collector, Mehta, searched the premises of B. L. Choraria & Co. in Hanuman Building and seized a number of documents which are Z-103 to Z-109. At this time also, accused No. 3 was present at the premises. On the next day, i.e. February 23, 1960, Basu, Officer from Calcutta Customs, searched the premises of accused No. 1 at 1, Minto Park, which is another residence of accused No. 1. Accused No. 1 was not present then. In the search, 34 visiting cards of accused No. 1 were seized from his cupboard. On the same day, Gupta, another Officer of Calcutta Customs, again searched the premises of Bhuramal at 4, Doyahatta Street, and took charge of a number of documents including 4 greeting cards and one picture card addressed to accused No. 2. We should have mentioned earlier that on November 4, 1959, Preventive Officer Mitter of Calcutta Customs searched the premises of the firm of Balchand in room No. 27 at 4, Doyahatta Street and recovered therefrom a number of letters addressed to accused No. 1, including one from the Ordnance Club, Calcutta. On June 15, 1960, Pande, Inspector of the Central Excise of Rajasthan, searched at Village Bidsar in Rajasthan the ancestral house of accused Laxmipat, Punamchand, Balchand, Kundanmal and Begraj. The documents seized included a diary of accused No. 2, a letter purporting to be written by accused No. 3 to Bhograj, and an insurance certificate of the car of accused No. 3. On January 13, 1961, Preventive Officer Advani of Bombay Customs again searched the premises of Balchand at Tambakanta Street, Bombay.

In September 1959, Williams took charge of a number of cheques from Chu Tai Bank and the Wing Lang Bank of Hong Kong, and they had also been seized and photo-stated. Similarly, in November 1959, under the instructions of Deputy Director Shriwastava, Williams made inquiries from cable and Wireless Hong Kong about the telegraphic addresses "Daga Co." and "Bomcal" to which various cables seized from the Global Agencies appeared to be addressed, and also about another telephonic address "Chorpken". He found that "Bomcal" was the address of Global Agencies, 28 Hollywood Road, Hong Kong, and "Daga Co." the address of S. L. Daga for the same premises, and "Chorpken" the telegraphic address of Yau Mok Chi's office premises. The Calcutta Customs had also taken charge of the originals of some of the cables found at Global Agencies, Hong Kong, and Inspector Sampat took charge of them from Calcutta Customs along with two letters and a receipt admittedly to be of accused No. 1 seized by the Calcutta Customs and lying with them.

A number of all these documents seized from the various premises along with the originals of the cables and diaries were sent to the Handwriting Expert for comparison. So also various letters seized from the office of Global Agencies, Hong Kong, were sent to the Handwriting Expert. The letters seized from the Global Agencies were divided into different series. Those purporting to be written by Laxmipat were marked as LC series; those purporting to be written by Punamchand were marked as PC series; those written by Balchand, BC series; those written by Kundanmal as KC series; and that by Hanmantlal Kothari, as HK series.

In March 1960, Mr. Shriwastava left the Directory, and thereafter he was not directly responsible for the investigation and the investigation appears to have been taken over by Mishra. But before he retired, it appears that Shriwastava had already been making inquiries in Hong Kong about the whereabouts of Ethyl Wong, Air Hostess, a wire "Happy Birthday Evelyn" from whom was seized from the premises of Yau, but he was unable to locate her. That information appears to have been placed by him on record and the investigation in that matter was taken over by Mishra. On April 6, 1960, a complaint was filed in the Court of the Chief Presidency Magistrate by K. S.

Dulipsinghji, Assistant Collector of Customs Preventive Department, Bombay, against the accused Laxmipat, Punamechand, Balchand, Bhuramal, Kundanmal, Sanchitlal Daga, Bhegraj, Hanmantlal Kothari, Ganeshmal, Bhivraj, and Yau Mok Chi, and in this complaint, accused No. 12 was shown as an unknown carrier. Bhegraj, Ganeshmal and Bhivraj were discharged. The trial did not proceed against Bhuramal and Yau Mok Chi, they being outside India, and not being brought into India. The trial, therefore, proceeded only against Laxmipat, Punamechand, Balchand, Kundanmal, Hanmantlal Kothari and Sanchitlal Daga, of whom Hanmantlal Kothari has been acquitted. The prosecution case in brief was that during the period commencing from about the beginning of March 1959 and extending upto October 31, 1959, the aforesaid accused and others unknown, conspired at Calcutta, Bombay and other places, for acquiring and/or causing to be acquired possession of, and/or carrying and/or causing to be carried, and/or removing and/or causing to be removed, and/or harbouring and/or causing to be harboured, and/or depositing and/or causing to be deposited, and/or keeping and/or causing to be kept, and/or concealing and/or causing to be concealed and/or otherwise dealing with and/or for being concerned with one or more of the aforesaid operations connected with contraband gold and precious stones and semi precious stones in large quantities of the total value of Rs. 3,00,000 knowingly and with intent to defraud the Government of the duty payable thereon and to evade the restrictions for the time being in force in respect of the importation of these articles. The said conspiracy between the above mentioned persons was a continuing conspiracy throughout the period March 1959 to October 31, 1959, at various centres including Bombay and Calcutta. The prosecution further alleged that in pursuance of the said conspiracy the aforesaid persons and others unknown from time to time on various occasions during the period mentioned above, acquired and/or caused to be acquired possession of diverse quantities of contraband gold weighing not less than 2900 tolas and contraband precious and semi-precious stones at Bombay, Calcutta and other places, and/or carried and/or caused to be carried in and to Bombay and Calcutta and other places, and/or harboured or deposited the same in Bombay and Calcutta and other places and/or removed and/or caused to be removed the same in or to Bombay and Calcutta and other places, and/or kept and concealed and/or caused to be kept and concealed the same in Bombay, Calcutta and other places, and/or otherwise dealt with, and/or concerned themselves with one or more of the said operations connected with the said contraband gold and precious and semi-precious stones in Bombay, Calcutta and other places. The prosecution further alleged that all the aforesaid contraband gold was illegally imported into India in contravention of the various notifications referred to in the complaint. On these facts, the complainant submitted that the accused were guilty of offences punishable under s. 120B, Indian Penal Code, read with s. 167(81) of the Sea Customs Act, 167(81) of the Sea Customs Act, and s. 167(81) of the Sea Customs Act read with s. 109 or 114 of the Indian Penal Code.

The learned Magistrate has found that the prosecution has not been able to establish its case so far as the importation of precious stones is concerned, but the learned Magistrate, as stated above, has found that the prosecution has been able to establish its case so far as the conspiracy to import contraband gold is concerned, and its importation on four occasions in Bombay.

All the accused denied to have been parties to any conspiracy or of being in any way concerned with the deliveries of gold alleged to have been made to them. Accused No. 1 admitted that the firm of Global Agencies is his and that accused No. 6 was its manager from December 1957 to February 1959. He further admitted that accused No. 5, his brother Kundanmal, was the manager of Global Agencies from February 1959 to September 27, 1959, and accused No. 6 who had gone to Hong Kong on August 19, 1959, took charge from his brother Kundanmal. He, however, denied that the Global Agencies had anything to do with gold smuggling business or with Yau Mok Chi.

According to him, his business was export and import business with foreign countries. He denied that the cables and letters found in the Global Agencies, which purported to have been written by him, were written by him, or that he had anything to do with those letters. He also denied that the account books on which the prosecution relied and which were found in the office of Global Agencies were his account books. According to him, these accounts were of Kundanmal and Sanchital Daga, accused Nos. 5 and 6. He denied having any acquaintance with Yau. He denied that he knew Ethyl Wong or had at any time met her or received gold from her. Accused No. 2 similarly denied that the letters and cables found in the office of Global Agencies and which purported to have been written by him were either written or sent by him. According to him, he had nothing to do with that business, as he was doing business in Mymensingh, Pakistan, and was in India for the last two years merely because he was unable to get a visa on his passport. He denied any connection with the firm of Bhuramal at 4, Doyahatta Street, Calcutta. He also denied any connection with B. L. Choraria & Co. at Bombay except that he holds a power-of-attorney for that firm from Kundanmal. Accused No. 3, Balchand, also denied that he received any gold from Ethyl Wong or that he knew her. According to him, he has been falsely implicated. He also denied his connection with the company of B. L. Choraria in Bombay except that he holds a power-of-attorney from Kundanmal, who is the proprietor of that firm. According to him, he has never operated that power-of-attorney. He admits that he was staying at 91, Shalimar. He also denied that the letters found in the office of the Global Agencies and purported to have been written by him were written by him. Accused No. 5 admitted that he was in Hong Kong in charge of Global Agencies and had issued cheques in exhs. Z-12 and Z-13, but, according to him, Daga was doing separate business while at Hong Kong, and before he had left he had told him to do the work of his business and also to make payments to the parties producing slips bearing his code words which he had given. According to him, it was Daga who had opened accounts in his own name in the two banks and he was making payments by cheques only as per the instructions given by Daga. Accused No. 6, Sanchital Daga, admits that he was in charge of Global Agencies upto February 1959 and went again to Hong Kong on August 19, 1959. He, however, states that even though he had gone, accused No. 5 was looking after the business of Global Agencies till his return on September 27, 1958. He admits that he was in charge of the Global Agencies upto February 1959 and also after Kundanmal, accused No. 5, had returned to India. He, however, denies that he was a member of the conspiracy. According to him, he had no inkling of what kind of business was being conducted by the Global Agencies when he went back to Hong Kong. When he was asked about cheques, issued by him on September 28, 1959, he stated that Kundanmal before leaving had instructed him that, in case any instructions about payments regarding Yasmin or 'Lali' were received from Balchand, he was to send the cheque to Yau whose telephone number had been given to him by Kundanmal before leaving. According to him, he had issued that cheque for a foreign exchange transaction at the rate of 97½ as the counterfoil shows. When asked about the entries in the account books for his period in respect of Yasmin and Yau, he explained that these entries were made on the basis of instructions given to him by accused No. 5 before leaving. He admits that the documents, letters, cables, account books, and counter-foils etc., seized from the office of the Global Agencies were of the Global Agencies and he also admits photo-stat copies produced by the prosecution as copies of the documents so seized. He admits all the letters of the period of his stay received by the Global Agencies as having been received by him from the respective accused. He admits that they are in the handwriting of the respective accused as proved by the Handwriting Expert's evidence, except those purporting to have been written by Hanmantlal Kothari.

We have already stated that the complaint was filed on April 6, 1960. At that time, the prosecution had not been able to know the whereabouts of Ethyl Wong, and the material evidence in possession of the prosecution at the time consisted of the photo-stat copies of various letters purported to be written by the accused, and seized from the office of Global Agencies, the account-books of Global Agencies, the counter-foils of cheques, cables and cheques obtained from the bank of Hong Kong and the evidence of Sophia Shieltz and the Police Officers of Hong Kong. Later, during the pendency of the case, the Customs Officer, Mr. Mishra learnt that Ethyl Wong was coming to Bombay during the course of her duties on December 27, 1960. On receiving this information that she was due to arrive in Bombay on December 27, 1960, by Air India International Plane from Hong Kong, he met her at the Air Port when the plane arrived there at about 4 a.m. He then questioned her about her activities in Bombay. She first gave vague answers, but after some time when Mishra confronted her with her visiting card which was found in possession of Yau Mok Chi, exh. A in the case, and the cable sent by her to Yau "Happy Birth Day Evelyn" exh. B in the case, she came out with her story and made a statement admitting her part in the affair, though in that statement she mentioned her Bombay visits as having taken place before the Calcutta visits. She was asked to describe the man to whom she had delivered gold. She actually gave the name of the man as accused No. 1 as the person to whom she had delivered gold at Calcutta. When asked as regards the person to whom she had delivered gold in Bombay, she could not give his full name, but stated that she had delivered gold to one Choraria. She was then asked to describe the two persons to whom she had delivered gold one at Calcutta and one at Bombay, and after she had given the description of these two persons, she was shown two photographs, exhs. T and U, which admittedly are of accused Nos. 1 and 3, respectively, and which had been found with Yau at Hong Kong. After seeing the photos, she identified the photo of accused No. 1 as the person to whom she had delivered gold in Calcutta and the photo of accused No. 3 as the person to whom she had delivered gold in Bombay. When asked about the visiting card of accused No. 1, she gave description of the visiting card as a light blue with red design, and identified exh. "V" as the visiting card of accused No. 1. It may be mentioned that exh. V is the visiting card of accused No. 1 which was found with Yau and seized from his person. She also told Mishra that she would be able to point out the place where accused No. 1 resides. After she had completed her statement, she was allowed to go to the Air Lines Hotel in which accommodation is usually reserved for the Air Hostesses of Air India International.

Subsequently, on going through the statement, Mishra P.W. 69, found a number of discrepancies. He, therefore, sent another Customs Officer, Kazi, P.W. 36. Kazi accordingly went to her on December 29, 1960. She corrected some misstatements which had crept in her first statement, the material correction being that her Calcutta visits were prior to Bombay visits, and not Bombay visits first and Calcutta visits later, as stated by her in her first statement. Kazi then told her to point out the house where she had delivered gold. She then took Kazi to the Marine Lines Station and pointed out the Shalimar Building opposite Marine Lines Station. She further stated that accused No. 3 was residing on the top floor of Shalimar Building. It appears that the case was fixed for evidence on January 2, 1961, and on that day Ethyl Wong was put in the witness box as the first prosecution witness. She was examined on January 2, January 3, January 4, January 5, and January 6, on which date, it appears, her examination-in-chief was concluded, and her cross-examination appears to have been postponed to March 1, 1961.

When Ethyl Wong appeared on March 1, 1961, for being cross-examined, an application was filed on behalf of the accused that the Court should direct that she be joined as a co-accused and tried for the offences mentioned in the charge framed by the Court against the accused. The grounds on which this

application was founded were that on her admission she had been a party to the said offence; that she has not been discharged or acquitted by any Court of competent jurisdiction, nor has she secured lawful pardon; that the customs authorities had no right or power to let go an admitted offender merely for the purpose of securing her evidence against others; that the evidence given by the said witness is evidence against her inasmuch as she has not been compelled to answer any incriminating questions and has voluntarily chosen to give evidence in consideration of the Customs Authorities refraining from prosecuting her; that she has also made a confession to the Customs Officers; that the cognizance of the offences having been taken upon a proper complaint filed as required by s. 187A of the Sea Customs Act there is no bar to trying any person who appears to the Court to be concerned therein; and that under the binding authorities of the Bombay High Court, the Court is under an obligation to have her tried for the said offences. This application was opposed on behalf of the prosecution. The learned Magistrate did not feel called upon to consider the question of making her an accused person at that stage. In the order rejecting the application he, however, observed:

"I do not feel called upon to consider the question of making her an accused person at this stage. I will, however, consider the question at the end of this trial when I have full and clear picture of the case and of the criminality or otherwise of the act of various persons involved in it including this witness."

The material incriminating prosecution evidence thus consists, besides the aforesaid pieces of evidence to which we have already made reference, of the evidence of Ethyl Wong also. In view of the corroborative evidence tendered by the prosecution to her evidence, the learned Magistrate has accepted her evidence. Her evidence is direct evidence and clearly establishes that she brought gold given to her by Yau, smuggled it at the Customs barrier and delivered it to accused No. 1 at Calcutta and accused No. 3 at Bombay. Deliveries in Calcutta were made on ten occasions and those in Bombay were made on four occasions. There is no substantive charge in respect of the deliveries made at Calcutta, but the substantive charge is only in respect of the four deliveries made in Bombay.

Turning to the appeals filed by the accused, it is first necessary to consider certain legal contentions raised by Mr. N. C. Chattarjee and Mr. Jethmalani, who appear for accused Nos. 1, 2, 3 and 5, and Mr. Porus Mehta, who adopted their contentions for accused No. 6.

The first point raised by the learned counsel refers to the admissibility of the evidence of Ethyl Wong. The contentions are three-fold. Firstly, it is contended that Ethyl Wong has, in fact, been arraigned as an accused along with other accused. She has not been granted pardon under s. 337 of the Criminal Procedure Code, nor has the prosecution been withdrawn against her under s. 494, Criminal Procedure Code. She is, therefore, not a competent witness. In the second instance, it is contended that her evidence has been admitted on record in violation of the provisions of art. 21 of the Constitution, and therefore, her evidence is wholly inadmissible. Lastly, it is contended that the prosecution in putting her up as a prosecution witness, has violated the provisions of art. 14 of the Constitution, and therefore, her evidence is inadmissible. The argument on the first contention is that in the complaint filed, the carrier of gold has been made an accused by showing unknown carrier as accused No. 12. The unknown carrier became a known carrier when Mishra recorded the statement of Ethyl Wong. Her statement recorded by Mishra is self-incriminating and she has condemned herself by her own statement. Her statement being to the Customs Officer is admissible in evidence. She is, therefore, in fact, an accused person at the trial, and an accused person cannot be a competent witness against the co-accused in absence of grant of pardon to her under s. 337, Criminal Procedure Code, or withdrawal of the case against her under s. 494, Criminal Procedure Code. As regards the second and third contentions, the argument in short is that

there is an obligation on the agency charged with administering criminal laws to send up for trial any person against whom there is sufficient evidence to warrant a conviction or at least warrant a framing of a charge. There is no power vested in the prosecution agencies to pick and choose those whom they would prosecute and whom they would not with a view of securing their evidence. The legitimate methods for securing their evidence are either to put up a person for trial and secure a pardon under s. 337, Criminal Procedure Code, or withdraw the prosecution under s. 494, Criminal Procedure Code, or on a plea of guilty of that person, convict and sentence him and then examine him as a witness, or by ordering a separate trial of that person, examine him as a witness as against the other accused. But, in any event, the person, who is found to have committed an offence, must be arraigned as an accused and not examined as a witness without his having first been arraigned as an accused. Securing the evidence of such a person without sending him up for trial is improper and illegal. In a case where the prosecuting agency fails to perform its duty, it is obligatory duty of the Court to proceed against such person under s. 204, Criminal Procedure Code, and make him an accused along with other accused, or start a separate criminal case against him under s. 351, Criminal Procedure Code. In the instant case, there has been a breach of this obligatory duty both on the part of the prosecuting agency as well as the trying Magistrate.

Ethyl Wong has been examined as a witness without following any of the aforesaid courses and without having been made an accused. Prejudice to the other accused is apparent. It has been further alleged that following this improper course of examining her without taking proper steps for securing her evidence has resulted in violation of arts. 21 and 14 of the Constitution, and therefore, the evidence of Ethyl Wong is wholly inadmissible.

In this connection, learned counsel for the accused have referred us to the decisions in *Govinda v. Emperor*¹; *Queen-Empress v. Mona Puna*²; *Emperor v. Keshav Kortikar*³; *Ramsaran v. Emperor*⁴; *Reg v. Hamanta*⁵; *Queen-Empress v. Dala Jiva*⁶; *Paban Singh v. The Emperor*⁷; *Santokhi Beldar v. Emperor*⁸; *Banu Singh v. Emperor*⁹; and in particular to the observations made in *Govinda v. Emperor*; *Emperor v. Keshav Kortikar*; and *Ramsaran v. Emperor*.

Mr. Khandalawala, on the other hand, contends that the whole argument of the learned counsel for the appellants-accused is misconceived. It proceeds on the assumption that Ethyl Wong was an accused person. According to Mr. Khandalawala, she has not been made an accused inasmuch as no process was issued against her by the Magistrate. On the day the complaint was filed, her whereabouts were not known; even her name was not known to the complainant. She had not been forwarded to the Magistrate to stand her trial. She was, therefore, a competent witness on the day she entered the witness box, and in examining her, neither art. 14 nor art. 21 has been infringed. At any rate the matter has been decided by the trying Magistrate and he has refused to join her as an accused. The order may be erroneous, but no infringement of either art. 14 or art. 21 is involved in a judicial order of the Court even if it may be erroneous. In the alternative, Mr. Khandalawala argued that under the Sea Customs Act, there is an absolute right vested in the customs authorities either to forward a person for trial or not, and unless and until a customs officer in a complaint under s. 187A of the Act names a person as an accused, it is not open to the Magistrate to proceed against him treating him as an accused person. Reference was made to some observations in *Budhan Choudhry v. State of Bihar*.¹⁰

1 [1920] A.I.R. Nag. 255.
2 (1892) I.L.R. 16 Bom. 661.
3 (1934) 37 Bom. L.R. 179.
4 [1945] A.I.R. Nag. 72.
5 (1877) I.L.R. 1 Bom. 610.

6 (1885) I.L.R. 10 Bom. 190.
7 (1906) 10 C.W.N. 847.
8 [1933] A.I.R. Pat. 149, S.B.
9 (1906) I.L.R. 33 Cal. 1353.
10 [1955] A.I.R. S.C. 191.

Now, all these rival contentions raised by counsel for the parties relating to the admissibility of evidence of Ethyl Wong could be conveniently disposed of together inasmuch as the arguments are overlapping. The relevant Act relating to the competency of a witness to depose is the Indian Evidence Act, 1872, and when we turn to s. 118, we find that all persons have been considered competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind. To this general rule, ss. 121 to 129 are exceptions. Ethyl Wong undoubtedly is a competent witness under s. 118 of the Evidence Act, and her case does not fall under any of the exceptions contained in ss. 121 to 129 of the Act. Further, s. 133 in terms provides that an accomplice shall be a competent witness against an accused person; and the conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. The rule of prudence, however, has been stated in ill. (b) to s. 114, that an accomplice is unworthy of credit, unless he is corroborated in material particulars. It would thus be seen that under the provisions of the Indian Evidence Act Ethyl Wong, though she might have been an accomplice, was a competent witness to testify against the accused who were charged with having committed offences and were put on trial.

It has next to be seen whether there are any other provisions in any other Act which operate as a bar to the competency of Ethyl Wong to testify, and, as already stated, reliance has been placed on certain provisions of the Criminal Procedure Code. Chapter XIV of the Code deals with the information to the police and their powers to investigate. Section 154 relates to the procedure to be followed in recording information in cognizable cases. Section 155 relates to the procedure to be followed in recording information in non-cognizable cases. A police officer, by virtue of s. 156 is empowered to investigate into cognizable cases. He is not authorised to investigate into non-cognizable cases unless the Magistrate orders him to do so. Powers to investigate include power to summon witnesses, power to examine witnesses, recording their statements, power to search, and the report by the subordinate officer, when the investigation has been made by him, to the police officer in charge of the police station. It may be stated that in the event the investigating officer finds that the investigation could not be completed within 24 hours, s. 167 requires the person arrested or detained in custody to be sent to the nearest Judicial Magistrate and obtain a remand order from him. Section 169 provides that if, upon an investigation made under this Chapter, it appears to the officer in charge of the police station or to the police officer making the investigation that there is not sufficient evidence or reasonable ground of suspicion to justify forwarding of the accused to a Magistrate, such officer shall, if such person is in custody release him on his executing a bond, with or without sureties, as such officer may direct, to appear, if and when so required, before a Magistrate empowered to take cognizance of the offence on a police report and to try the accused or commit him for trial. Sub-section (1) of s. 170 provides that if, upon an investigation under this Chapter, it appears to the officer in charge of the police station that there is sufficient evidence or reasonable ground as aforesaid, such officer shall forward the accused under custody to a Magistrate empowered to take cognizance of the offence upon a police report and to try the accused or commit him for trial, or, if the offence is bailable and the accused is able to give security shall take security from him for his appearance before such Magistrate on a day fixed and for his attendance from day to day before such Magistrate, until otherwise directed. The other sub-sections of s. 170 are not material for the purposes of this case. Section 190 relates to cognizance of offences by Magistrates. Section 204(1) provides that if in the opinion of a Magistrate taking cognizance of an offence there is sufficient ground for proceeding, and the case

appears to be one in which, according to the fourth column of the second schedule, a summons should issue in the first instance, he shall issue his summons for the attendance of the accused. If the case appears to be one in which, according to that column, a warrant should issue in the first instance, he may issue a warrant, or, if he thinks fit, a summons, for causing the accused to be brought or to appear at a certain time before such Magistrate or if he has no jurisdiction himself, some other Magistrate having jurisdiction. It is not necessary to refer in detail to the provisions relating to examination of witnesses, framing of charges etc., or the different procedure to be followed in a trial of a summons case or a warrant case, or the procedure to be followed in a summary trial. It is, however, necessary to notice certain general provisions as to inquiries and trial contained in Chapter XXIV of the Code. Section 337(1) relates to the tender of pardon to an accomplice, and it provides that in the case of any offence triable exclusively by the High Court or Court of Session, or any offence punishable with imprisonment which may extend to seven years or any offence under any of the following sections of the Indian Penal Code, namely, ss. 161, 165, 165A, 216A, 369, 401, 435 and 477A, the District Magistrate, a Presidency Magistrate, a Sub-Divisional Magistrate or any Magistrate of the first class may, at any stage of the investigation or inquiry into, or the trial of, the offence, with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to the offence, tender a pardon to such person on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof. Section 338 provides that at any time after commitment, but before judgment is passed, the Court to which the commitment is made may, with the view of obtaining on the trial the evidence of any person supposed to have been directly or indirectly connected in, or privy to, any such offence, tender, or order the committing Magistrate or the District Magistrate to tender, a pardon on the same condition to such person. Sub-section (1) of s. 342 provides that for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the Court may, at any stage of any inquiry or trial without previously warning the accused put such questions to him as the Court considers necessary, and shall, for the purpose aforesaid, question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence. Sub-section (2) of s. 342 provides that the accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them; but the Court and the jury, if any, may draw such inference from such refusal or answers as it thinks just. Sub-section (3) is not material for the purpose of this case. Sub-section (4) provides that no oath shall be administered to the accused when he is examined under sub-s. (1). Section 342A provides that any person accused of an offence before a Criminal Court, shall be a competent witness for the defence and may give evidence on oath in disproof of the charges made against him or any person charged together with him at the same trial, provided that (a) he shall not be called as a witness except on his own request in writing; or (b) his failure to give evidence shall not be made the subject of any comment by any of the parties or the Court or give rise to any presumption against himself or any person charged together with him at the same trial. Section 343 provides that except as provided in ss. 337 and 338, no influence, by means of any promise or threat or otherwise, shall be used to an accused person to induce him to disclose or withhold any matter within his knowledge.

Nowhere in the Criminal Procedure Code, the term "accused" has been defined. But the word has been used in two senses—first, in the sense of a person against whom an accusation has been made but against whom no process has been issued; secondly, a person over whom a Magistrate is exercising

jurisdiction by issuing a process against him. The only sections which operate as a bar on examining an accused person as a witness are ss. 342 and 342A, and there is no other section in the Criminal Procedure Code of which we are aware, or which has been pointed out to us, which enacts a bar preventing an accused person from entering the witness box. In this connection, it may be stated that s. 342 has recently been amended by Amending Act of 1955, and the concluding words "when he is examined under sub-section (1)" have been added by the said Amending Act in sub-s. (4). Prior to the amendment, sub-s. (4) read "No oath shall be administered to the accused." This amendment was necessitated because s. 342A was added by the Amending Act, and this new section enabled the accused to enter the witness box and give evidence on oath "in disproof of the charges made against him or any person charged together with him at the same trial." Having regard to the legislative history of s. 342 and the aforesaid amendments recently effected, it is clear that prior to the amendment, there was a total bar in the matter of administering oath to an accused person. That total bar has to certain extent been relaxed, and the oath is allowed to be administered to an accused person for the limited purpose of rendering him a competent witness in favour of his own defence or for the purpose of defence of his co-accused. The statutory bar thus created prohibiting oath to be administered to the accused and thereby preventing him from being a competent witness in a trial is applicable only to a person who has been an accused in the stricter sense in the trial, namely, a person over whom the Court has exercised jurisdiction by issuing process against him. There is thus no bar in the Criminal Procedure Code anywhere prohibiting a person who has committed a crime from giving evidence, save and except at the trial in which he has been made an accused, the Court having issued process against him. To avail the evidence of such a person in the trial the procedure contemplated by the Criminal Procedure Code is one contained in s. 337, namely, grant of pardon. Consideration of the aforesaid relevant provisions would also show that it has not been rendered obligatory on a police officer to forward to a magistrate each and every person who might be guilty of having committed an offence. A discretion has been given to him in this matter. Sections 169 and 170 when read together make it clear that on completion of the investigation, the investigating officer has to consider whether there is "sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate to stand his trial." If he comes to the conclusion that there is sufficient evidence or reasonable ground to justify the forwarding of the accused then s. 170 makes it obligatory on him to forward him to a Magistrate, and not otherwise. Similarly, when an accused is forwarded to a Magistrate, and the Magistrate has taken cognizance of an offence, it is not obligatory on the Magistrate to issue process against each and every person, shown to be an accused, and forwarded to him for trial. But, on the other hand, the provisions of s. 204, Criminal Procedure Code, enact that the Magistrate has, at that stage, before issuing process, to apply his mind and, it is only if in his opinion there is sufficient ground for proceeding against the person on the material placed before him, he has to issue a process. It is thus clear that both the investigating officer as well as the Magistrate has a discretion conferred on him in this matter, obviously because the very object of forwarding an accused to a Magistrate or the Magistrate issuing a process against him, is to ascertain his guilt, and unless there be any legal evidence available against the accused, forwarding the person to stand his trial or issuing a process against him would result in waste of public time and money.

Turning to the facts of the case, no process has been issued by the trying Magistrate against Ethyl Wong. She is not, therefore, an accused along with the other accused who were put on trial. The bar created by s. 342 or 342A, Criminal Procedure Code, therefore, did not operate on her, and no question of granting pardon to her under s. 337, Criminal Procedure Code or with-

drawing the prosecution against her under s. 494, Criminal Procedure Code arose, before she was put in the witness box. As already stated, there is no section in the Evidence Act which renders her an incompetent witness to testify at the trial of the accused. On the other hand, in view of the express provisions of the Evidence Act, she is a competent witness to testify at the trial. The mere fact that the complaint mentioned the unknown carriers as accused does not render the carrier as an accused person unless the Court issues a process against any one of those carriers, to bring their case within the mischief of s. 342 or 342A, Criminal Procedure Code.

It has next to be considered whether it was obligatory on the Customs Officer to send her up for trial along with the other accused after he had recorded her statement, in which she has confessed to the smuggling of gold, and whether it was obligatory on the Magistrate to allow the application of the appellants-accused wherein they had prayed that she be made a co-accused along with them. We have already stated that the provisions of ss. 169 and 170 confer a discretion on the investigating officer in the matter of forwarding a person for trial. He has to make up his mind and consider whether there is sufficient evidence to justify the forwarding of the person, and if there is sufficient evidence, he is required to forward the person to a Magistrate. On the other hand, if there is no sufficient evidence justifying the forwarding of a person, s. 169 requires him to release the person on his executing a bond. Similarly, ss. 202 and 204, Criminal Procedure Code, require a Magistrate to apply his mind to the material on record, and it is only when he comes to the conclusion on an examination of the material on record that there is sufficient evidence that he would be justified in issuing a process against him. Now, when Ethyl Wong's statement was recorded by the Customs Officer at the Air Port on December 27, 1960, or when her second statement was recorded on December 29, 1960, the only material evidence against her which the Customs Officer had before him were these two statements. It has not been urged before us that there was any other material. We have in narrating facts referred to the application made by the accused persons before the Magistrate, and the only material to which reference has been made in the application, which according to the appellants-accused, is evidence against her, is her own evidence. That material can hardly be said to be sufficient evidence justifying forwarding her for trial or issuing a process against her. There is no doubt that had she been put on trial, she would have retracted the statements made by her to the Customs Officer. It is well settled principle of prudence that even a confession duly recorded by a Magistrate is a very weak piece of evidence against the accused, unless it finds corroboration in material particulars. It is true that the statement having been recorded by the Customs Officer, the bar under s. 162, Criminal Procedure Code, may not come into play in respect of its admissibility as a substantive piece of evidence, but the weight that could be attached to it cannot be higher than that to a retracted confession. The statement recorded by the Customs Officer would, therefore, not necessarily amount to a sufficient ground for proceeding against her within the meaning of s. 204, Criminal Procedure Code. It has to be noticed that the trying Magistrate has in his order stated that he would consider the question of proceeding against her after this trial is over when he has a full and clear picture before him. In our opinion, therefore, neither the Customs Officer nor the Magistrate has committed a breach of either s. 170 or s. 204, Criminal Procedure Code, respectively. We may observe that s. 170 is, in terms, applicable only to the police officer and not to the Customs Officer. However, the case having been argued on the footing that the principle underlying the provisions of ss. 169 and 170, Criminal Procedure Code also governed the investigation made by Customs Officer, we are proceeding to consider the case on that footing. As already stated, on the facts and in the circumstances of the case, there has been no breach of s. 170 on the part of the Customs Officer, and no breach of s. 204 on the part of the trying Magistrate. It, therefore, also cannot be said that there has been any violation of

art. 21 of the Constitution, inasmuch as, in our opinion, in examining Ethyl Wong, there has been no breach of any procedure prescribed by law. On the other hand, in our judgment, the appellants-accused have been convicted in accordance with the procedure prescribed by law.

In our opinion, there has been no breach of art. 14 of the Constitution also. Article 14 has been recently considered by their Lordships of the Supreme Court in *Ram Krishna Dalmia v. Justice Tendolkar*¹¹ and the general principle is well summarised in the Head-Note(d) in the following terms:

"It is now well established that while article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely (i) that the classification must be founded on an intelligible differential which distinguishes persons or things that are grouped together from others left out of the group and (ii) that that differential must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different bases, namely, geographical, or according to objects or occupations or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. It is also well established by the decisions of the Supreme Court that article 14 condemns discrimination not only by a substantive law but also by a law of procedure."

In the matter of forwarding a person, who might have committed a crime, ss. 169 and 170, Criminal Procedure Code make a distinction between those against whom there is sufficient evidence or reasonable ground of suspicion justifying their forwarding and those against whom there is not sufficient evidence or reasonable ground of suspicion to justify their forwarding. This classification is intelligible having regard to the object of forwarding the accused for trial. The object of forwarding the accused is to ascertain his guilt. If there is no sufficient legal evidence against a person, there can be little doubt that forwarding such a person to a Magistrate to stand his trial would only involve waste of public time and money. Further, the discretion left to the Investigating Officer in the matter is not absolute. The Investigating Officer may not forward a person, and yet it is open to the Magistrate, taking cognizance of the offence, to issue a process against him under s. 204, Criminal Procedure Code, if, in his opinion, there is sufficient ground for proceeding against such a person. Sections 169 and 170, Criminal Procedure Code have not been challenged before us as unconstitutional. On the other hand, what is challenged before us is the action of the Customs Officer in not forwarding Ethyl Wong for trial as being violative of art. 14 of the Constitution. The appellants-accused and Ethyl Wong are not similarly situated. The evidence against the appellants-accused does not consist of confession or admission of guilt made by them during the investigation, while the evidence, if there be any, against Ethyl Wong is only her statement made by her during the investigation. We have already discussed that a mere admission of guilt or confession during the investigation does not necessarily amount to sufficient evidence within the meaning of s. 170, Criminal Procedure Code, requiring the Police Officer to forward an accused person to a Magistrate. That being the position, there has been no violation of art. 14 in not forwarding her to stand her trial along with the accused.

For reasons stated above, in our opinion, the three-fold contentions raised on behalf of the appellants-accused relating to the admissibility of the evidence of Ethyl Wong should fail.

And this brings us to the consideration of the decisions to which reference has been made by the learned counsel for the appellants-accused. In our opinion, these decisions are distinguishable on facts, and hardly assist the case of the appellants-accused.

In *Govinda v. Emperor*, the facts were that the appellants-accused together with one S were members of a gang and had jointly fabricated a bond. One

of the accused had used that bond in a civil suit. It was discovered that the bond, on the basis of which the suit was filed by the accused, was fabricated. Sanction of the civil Court was necessary to prosecute that accused and others for fabricating false documents. The police promised to grant pardon to S, and he was examined as a witness before the civil Court. The civil Court granted sanction. At the trial, however, S was not made an accused, nor was pardon granted to him under s. 337, Criminal Procedure Code. On the other hand, S was examined at the trial as a witness against the appellants-accused, and on the strength of his evidence, they were convicted and sentenced. An objection was raised that S should have been placed before the Magistrate as an accused, and pardon granted to him under s. 337, Criminal Procedure Code; that not having been done, his evidence was inadmissible. It was further contended that his evidence was irrelevant under s. 24 of the Evidence Act, because the police inspector had granted pardon to S. In these circumstances, it was held that S ought to have been tried along with the appellants-accused, and the Magistrate ought to have issued a process against him under s. 204, Criminal Procedure Code, and the failure on the part of the Magistrate to issue process against him had seriously prejudiced the other appellants-accused, and consequently vitiated the whole proceedings. The observations on which particular reliance has been placed are in the following terms (p. 260):

"...It is true that the prosecution is not bound to have a pardon tendered to a person against whom there is evidence and is at liberty to put him up either for a joint or separate trial. But it is evasion of the law not to adopt any of these courses and tender him as witness under an unauthorised promise of pardon by pledging public faith not to prosecute him."

It is contended that such is the case here. The Customs Officer has neither put her up for trial along with the other accused, nor has he put her up to stand a separate trial, but, on the other hand, has granted her unauthorised pardon. We would later consider whether an unauthorised pardon has been granted to her by the Customs Officer. The aforesaid observations have been made in the context of the facts of that case, inasmuch as it appears that in the view of the learned Judge, there was evidence against S besides his own statement which would have justified his being put up for trial, and in these circumstances, it has been observed that he ought to have been put up for trial along with the other accused or separately tried, and that not having been done, it amounted to an evasion of the provisions of the Criminal Procedure Code. The following observations that precede the aforesaid observations make the position clear (p. 259):

"...An accomplice against whom there is no case apart from his own confession to the police may lawfully be kept back and tendered as a witness, for even a 'reasonable suspicion' cannot be based on what the law declares to be irrelevant. This however is not the position taken up here on behalf of the Crown, and in view of the manner in which the case was presented before the Magistrate it would be difficult to maintain it." Further, the view taken in *Govinda v. Emperor* has been over-ruled by a Full Bench decision of the Nagpur Judicial Commissioner's Court in *Amdumiyar Guljar Patel v. Emperor*.¹² Pollock A.J.C. in that case observed (p. 23):

"I agree that S. 337, Criminal P.C., is merely an enabling section that empowers a Magistrate to grant a pardon to any person supposed to be concerned in or privy to the offence and that the word 'accused' in Ss. 342 and 343 must mean a person who is accused in the case that is proceeding before the Magistrate. There was therefore nothing to prevent the administration of an oath to Shrawan and he was therefore a competent witness. The view expressed in *Govinda v. Emperor*, that in such a case it is imperative for the Magistrate to proceed against Shrawan and that his failure to do so makes the proceedings invalid, seems to me to be quite untenable. It is for the executive authorities to decide who is to be prosecuted, and under S. 204 the Magistrate

must issue a summons, if he is of opinion that there is sufficient ground for proceeding, merely against those persons against whom a police report had been sent in under S. 170. I also agree that this method of obtaining evidence is contrary to the spirit of the Code and is strongly to be deprecated. It is not however illegal, but the evidence of a witness in Shrawan's position must ordinarily be of less value than that of a person who has been granted a valid pardon and is no longer under fear of a prosecution."

For the purposes of this case, it is not necessary for us to go to the extent the observations cited take us. It is sufficient to state that, at any rate, there is no illegality in not forwarding a person, against whom there is no evidence except his own statement. There is also no illegality in not issuing a process against such a person. What weight is to be given to his evidence would depend on the circumstances of the case.

In *Emperor v. Keshav Kortikar*, the facts were that on a complaint having been made to the police, an investigation was made, and a charge-sheet was sent up to the Magistrate in which the names of five persons were shown as accused persons. Two other persons, against whom there was evidence but who were meant to be used as witnesses against the accused persons, were mentioned in the column headed: "names and addresses of accused persons not sent up for trial", and also in the list of witnesses. At the trial of the accused, these two persons were examined as witnesses for the prosecution. A contention was raised on behalf of the accused who were sent for trial that the evidence of these witnesses was inadmissible. The observations of the learned Chief Justice on which strong reliance has been placed are in the following terms (p. 180):

"...As I have said, in my opinion, the proper course for the police to have adopted was to send up as accused persons to the Magistrate all those against whom they had obtained evidence in connection with the alleged offence, and I think that the learned Magistrate, when he found that the two persons described as accused persons not sent up for trial were amongst the witnesses, and must, therefore, be available, ought to have had those two persons arrested and brought before him. The Criminal Procedure Code gives certain powers under which the evidence of an accomplice can be made available. He can be granted a conditional pardon by the Magistrate under s. 337 of the Criminal Procedure Code, or the Public Prosecutor, with the consent of the Magistrate, can withdraw the charge under s. 494 of the Criminal Procedure Code. In my opinion those powers ought to be exercised where the prosecution consider that the evidence of an accomplice is necessary, and the police have no right to take upon themselves not to charge a person against whom they have evidence because they require him as a witness. Where that improper course is adopted, the evidence of the accomplice so obtained is entitled to very little weight."

It is contended that these observations equally apply to the facts of the present case. It is further argued that though such a course when adopted might have been improper prior to the Constitution coming into force, now it amounts to an illegality inasmuch as the procedure prescribed by law is not followed. According to Mr. Jethmalani, the procedure prescribed by law is that all persons who are suspected of having committed a crime must be sent up to the Magistrate by the police and the Magistrate also must in his turn issue a process against such persons even though the police failed to perform their duty. If the prosecution wants to examine any such person as a prosecution witness, the only course available is to have a conditional pardon under s. 337, Criminal Procedure Code, granted to him or withdraw the prosecution against him under s. 494, Criminal Procedure Code. It is difficult to accept the argument of Mr. Jethmalani. In our opinion, art. 21 has not the effect of turning what was merely an impropriety or irregularity prior to the coming into force of the Constitution into an illegality after its coming into force. On the other hand, all that is provided by art. 21 is that if a person is to be deprived of his liberty, the procedure prescribed by law has to be followed. The procedure itself is in no manner changed. Apart from it, even assuming that the contention raised has any force, the observations have no application to the

facts of the present case. The argument advanced overlooks the material part of the observations: "against whom they (prosecution) had obtained evidence in connection with the alleged offence." This part of the observation clearly indicates that the obligation is to send up for trial all persons against whom the police have obtained evidence during the course of the investigation. 'Evidence' clearly would mean legally admissible evidence sufficient to justify the conclusion that the conviction of the accused could *prima facie* be reasonably obtained. The observations do not mean that each and every person who might have committed an offence or taken part in the commission of the offence has to be sent up for trial. The learned Chief Justice in considering the question as to the admissibility of the evidence of even these two persons further observed (p. 181):

"...In my opinion, however irregular was the conduct of the police in this case, in point of fact these two persons, Laukar and Limaye, included in the second column of the charge-sheet, never were, properly speaking, accused persons. They certainly were not accused persons within the meaning of s. 342 of the Criminal Procedure Code. They were never under arrest and they were never sent up before a Magistrate and no process was ever issued against them. That being so, I think there is no provision of law which makes their evidence inadmissible."

The other learned Judge also similarly observed (p. 181):

"...The section which prevents an accused being examined on oath is s. 342 of the Criminal Procedure Code. That section, however, applies clearly only to a person who is on trial before a Court at the time, and he can be so brought before the Court only after process has been issued by the Magistrate against him under s. 204 of the Criminal Procedure Code. In the present case admittedly no such process had been issued against Laukar and he was, therefore, never before the Court as an accused. The mere inclusion of his name in the charge-sheet could not make him an accused for the purposes of s. 342 of the Criminal Procedure Code... I, therefore, agree that there was no legal objection to Laukar being examined on oath as a witness."

These material observations clearly support the view taken by us and run counter to the contention raised on behalf of the appellants-accused.

The question that arose in *Ramsaran v. Emperor*, was whether the Magistrate acted properly in allowing the case to be withdrawn against the accused who was put up for trial for having committed a serious offence, and who had confessed to the commission of the crime, so as to enable the prosecution to examine him at the trial. In these circumstances of the case it was held that the Magistrate did not act properly in allowing the prosecution to withdraw the case against such accused under s. 494, Criminal Procedure Code. The learned Judge took the view that

"...in cases where the prosecution wants to rely on the evidence of a dubious witness and get a man, who on his own confession is guilty, pardoned, then, if the offence falls within certain serious classes, S. 494 is not good enough and the trial should be by a Court of Session. It would be a wrong exercise of discretion to proceed under S. 494 when the provisions of S. 337(1) are available. If it is reprehensible to evade the rigours of S. 337(1) by not prosecuting the man at all, it is much more so after he has been arraigned as an accused and the trial has commenced."

It is to be noticed that this decision is distinguishable on facts. In the case before us, Ethyl Wong had not been sent up for trial, nor was there any evidence against her in the shape of her confession duly recorded by a Magistrate under s. 164, Criminal Procedure Code.

The material facts in *Reg v. Hanmanta*, were that a number of accused were sent up to stand their trial before a Magistrate for having committed certain frauds. To two of the accused, the Magistrate granted pardon under s. 337 of the then Criminal Procedure Code, on condition of their making a full disclosure of all the circumstances within their knowledge, and then these two accused were examined as witnesses. A question arose as to the admissibility of the evidence of these two witnesses, and it was held that under the provi-

sions of the said section, as it then stood, pardon could only be granted in case of those offences which were specified in the Schedule of the Code as triable exclusively by the Court of Session. The offence of which the accused were charged was not such an offence. In these circumstances, it was held that the pardon granted was not a legal pardon, and therefore, these two accused not having been granted pardon legally, were not competent witnesses, and their evidence must, therefore, be rejected as absolutely inadmissible.

In *Queen-Empress v. Dala Jiva*, the view taken is similar to the one taken in *Hanmanta's* case, that pardon cannot be legally granted in a case which is not triable exclusively by a Court of Session.

The facts in *Paban Singh v. The Emperor* were that after the accused had been forwarded to the Magistrate for trial, the local Government granted a conditional pardon to one of the accused, and the prosecution then examined him as a witness at the trial. It was held that the only competent authority to grant pardon is one mentioned in ss. 337 and 338, Criminal Procedure Code and the local Government had no power to grant pardon. Pardon not having been granted by a competent authority was of no avail and the evidence was, therefore, inadmissible.

In *Banu Singh v. Emperor*, a number of accused were sent up for trial along with one Mohendra. The Court purporting to act under s. 494, Criminal Procedure Code sanctioned withdrawal of the prosecution against Mohendra, but omitted to record a proper order of discharge of Mohendra as required by cl. (a) of s. 494. He was then examined as a witness. A question arose as to the admissibility of his evidence as against the other accused. The view taken was that there having been no order of discharge made by the Magistrate after allowing the withdrawal of the case as required by s. 494, Mohendra still continued to be an accused, and therefore, was an incompetent witness.

It would be seen that the aforesaid decisions in *Reg v. Hanmanta*, *Queen-Empress v. Dala Jiva*, *Paban Singh v. The Emperor* and *Banu Singh v. Emperor* have no relevance to the facts of the present case.

Similarly, the decision in *Queen-Empress v. Mona Puna* has no application to the facts of the present case. But, on the other hand, in our opinion, it runs counter to the contentions raised. The facts in that case were that during the course of the police investigation into a case of house breaking and theft several persons were arrested, one of whom named Hari made a certain disclosure to the police and pointed out several houses broken into by his accomplices. Thereupon the police discharged him, and made him a witness. At the trial, he gave evidence against his accomplices, who were all convicted. A question arose as to the admissibility of the evidence of Hari, and it was held that inasmuch as the trying Magistrate did not exercise any jurisdiction over Hari, he was not an accused person within the meaning of s. 342, Criminal Procedure Code. His evidence, therefore, was admissible against his accomplices who were put on trial.

Considering these cases, the propositions that would follow are that a person becomes an accused person only when a process is issued against him by a Magistrate. It is only such an accused who is incompetent to depose at the trial against his other co-accused in absence of any conditional grant of pardon under s. 337, Criminal Procedure Code, by a competent authority, or withdrawal of the prosecution case against him under s. 494, Criminal Procedure Code and after a formal order of discharge or acquittal, having been recorded by a Magistrate in that respect. A person over whom the Magistrate does not exercise jurisdiction by issuing a process against him is a competent witness against his accomplice. There is no legal bar to the admissibility of his evidence. It is not in dispute that no process has been issued against Ethyl Wong, and the trying Magistrate has not exercised any jurisdiction over her. She was, therefore, a competent witness. For the reasons stated, in our opinion, the three fold contentions raised on behalf of the appellants-accused as regards the admissibility of the evidence of Ethyl Wong should fail.

Before we proceed to the next point, it is necessary to refer briefly to one of the contentions raised by Mr. Khandalawala that the trying Magistrate had no jurisdiction to issue process and proceed against Ethyl Wong by virtue of the provisions of s. 187A of the Sea Customs Act. Section 187A reads:

"187A. No Court shall take cognizance of any offence relating to smuggling of goods punishable under item 81 of the Schedule to section 167, except upon complaint in writing, made by the Chief Customs-Officer or any other officer of Customs not lower in rank than an Assistant Collector of Customs authorised in this behalf by the Chief Customs-Officer."

Now, in our opinion all that is prohibited under the said s. 187A, is taking cognizance of any offence relating to smuggling of goods punishable under item 81 of the Schedule to s. 167, in absence of a complaint in writing by the Customs Officer mentioned in the section. But that does not mean that when a complaint has been made by the Customs Officer, it is not open to the Magistrate before whom the complaint has been lodged, to proceed against a person against whom in his opinion there is sufficient material on record, even if his name is not mentioned as an accused in the complaint filed by the Customs Officer. To put such a construction on s. 187A, as contended by Mr. Khandalawala is, on the language of the section itself, in our opinion, not warranted.

It is next urged by Mr. Jethmalani that, at any rate, the circumstances of the case show that the Customs Officer must have granted pardon to Ethyl Wong, and by that inducement to Ethyl Wong, they have obtained her statement and persuaded her to depose in the Court. Grant of pardon by the Customs Officer was an illegality and Ethyl Wong, therefore, is not a duly pardoned accused, and therefore, her evidence is not admissible. The contention raised by Mr. Jethmalani has no foundation in the evidence on record. On the other hand, the evidence of both Ethyl Wong as well as Mishra clearly shows that no promise or inducement was held out to her, nor was any pardon granted to her by Mishra. Ethyl Wong in her evidence states:

"I knew it what I was telling the Customs might be used against me. I knew when I was being taken to the Court that I was not being taken there to be prosecuted. Because they told me that I was being taken to Court to be a witness. They never told me that I was not going to be prosecuted."

and Mishra, P.W. 76 in his evidence has deposed:

"I did not make her give false evidence in the statement, nor did I promise to her that she will retain her job and that she would not be prosecuted and will be allowed to go."

Mr. Jethmalani, however, contends that this evidence should not be accepted. The conduct on the part of Mishra clearly indicates that he must have promised Ethyl Wong that she would not be prosecuted and thus induced her to make a statement and give evidence. The circumstances to which Mr. Jethmalani drew our attention are that Mishra, after recording her statement at the Air Port, allowed her to go to her hotel; next day also he did not take any care to keep a watch on her premises to see that she did not escape; telling her that she is being taken to the Court for giving evidence; and after her examination-in-chief allowing her to go out of India. These circumstances, according to Mr. Jethmalani, clearly indicate that pardon must have been granted to her. We are unable to agree with Mr. Jethmalani that these circumstances indicate that Mishra must have granted pardon to Ethyl Wong. We see no reason to discard the evidence of Ethyl Wong and Mishra in this respect. Some argument also has been advanced by Mr. Jethmalani as regards the weight to be attached to the evidence of Ethyl Wong. We would deal with this contention when we proceed to examine the evidence of Ethyl Wong.

The next contention raised on behalf of the appellants-accused relates to the photo-stat copies of the documents seized during the course of the search of the Global Agencies office by the Hong Kong police on October 30, 1959. It is the contention of Mr. Jethmalani that the photo-stats of incriminating corres-

pondence seized from the office of the Global Agencies must be excluded from evidence, as being violative of art. 20(3) of the Constitution, inasmuch as the accused person has been compelled to testify against himself. Compulsion exercised on Sanchitlal Daga, who was the manager of accused No.1, is compulsion on accused No. 1 himself. Even assuming that compulsion, if any, exercised on Daga would amount to exercise of compulsion on accused No. 1, the question still remains whether, in the circumstances of the case, it can be said that there was any compulsion exercised on Daga at the time of the seizure of documents and if any compulsion was exercised whether the provisions of art. 20(3) have been violated. Article 20(3) is in following terms:

(3) "No person accused of an offence shall be compelled to be a witness against himself."

In order to attract the provisions of this clause, it must first be established that Daga was accused of an offence at the time the documents were seized from him, and, secondly, it must be established that he was compelled to be a witness against himself. Clause (3) of art. 20 has been construed by their Lordships of the Supreme Court in *M. P. Sharma v. Satish Chandra*¹³ and *State of Bombay v. Kathi Kalu*.¹⁴

In *Sharma's* case their Lordships observed:

"Analysing the terms in which this fundamental right has been declared in our Constitution, it may be said to consist of the following components: (1) It is a right pertaining to a person 'accused of an offence'; (2) It is a protection against 'compulsion to be a witness' and (3) It is a protection against such compulsion resulting in his giving evidence 'against himself'."

Considering the question whether the seizure of the document in a search and tendering of that document at the trial amounts to a testimonial act of a person who is put on trial, their Lordships observed in para. 18 as follows (p. 306):

"...A notice to produce is addressed to the party concerned and his production in compliance therewith constitutes a testimonial act by him within the meaning of Art. 20(3) as above explained. But a search warrant is addressed to an officer of the Government, generally a police officer. Neither the search nor the seizure are acts of the occupier of the searched premises. They are acts of another to which he is obliged to submit and are, therefore, not his testimonial acts in any sense."

In paragraph (10) of the report, it was observed (p. 304):

"...to be a witness is nothing more than 'to furnish evidence', and such evidence can be furnished through the lips or by production of a thing or of a document or in other modes."

The aforesaid observations gave rise to conflicting decisions by different High Courts. Their Lordships, therefore, reconsidered the whole question again in *State of Bombay v. Kathi Kalu*, and after elaborately considering the provisions of art. 20(3) of the Constitution, their Lordships came to the following conclusions (pp. 1816-1817):

"(1) An accused person cannot be said to have been compelled to be a witness against himself simply because he made a statement while in police custody, without anything more. In other words, the mere fact of being in police custody at the time when the statement in question was made would not, by itself, as a proposition of law, lend itself to the inference that the accused was compelled to make the statement, though that fact, in conjunction with other circumstances disclosed in evidence in a particular case, would be a relevant consideration in an enquiry whether or not the accused person had been compelled to make the impugned statement.

(2) The mere questioning of an accused person by a police officer, resulting in a voluntary statement, which may ultimately turn out to be incriminatory, is not 'compulsion'.

(3) 'To be a witness' is not equivalent to 'furnishing evidence' in its widest significance; that is to say, as including not merely making of oral or written statements but

13 [1954] A.I.R. S.C. 300.

L.R. 240.

14 [1961] A.I.R. S.C. 1808, s.c. 64 Bom.

also production of documents or giving materials which may be relevant at a trial to determine the guilt or innocence of the accused.

(4) Giving thumb impressions or impressions of foot or palm or fingers or specimen writings or showing parts of the body by way of identification are not included in the expression 'to be a witness'.

(5) 'To be a witness' means imparting knowledge in respect of relevant facts by an oral statement or a statement in writing, made or given in Court or otherwise.

(6) 'To be a witness' in its ordinary grammatical sense means giving oral testimony in Court. Case law has gone beyond this strict literal interpretation of the expression which may now bear a wider meaning, namely, bearing testimony in Court or out of Court by a person accused of an offence, orally or in writing.

(7) To bring the statement in question within the prohibition of Art. 20(3), the person accused must have stood in the character of an accused person at the time he made the statement. It is not enough that he should become an accused, any time after the statement has been made."

In the light of these principles, the facts of the present case will have to be scrutinised. The first question that arises is whether at the time of the seizure, either Sanchitlal Daga or Laxmipat were accused within the meaning of art. 20(3) of the Constitution. Now, the search was held on October 30, 1959, in Hong Kong. Nothing has been shown to us to hold that any formal accusation was made against either Laxmipat or Daga at the time the search was made. A reference was made to two applications made by the Customs Officer for issue of a search warrant of the premises of accused No. 1 in Calcutta and accused No. 3 in Bombay, presumably to show that a formal accusation was made against Laxmipat Choraria. These applications are on record. When these applications are read, it becomes clear that they do not contain any formal accusation as such against either Sanchitlal Daga or Laxmipat Choraria or any other accused, but speak of a mere suspicion of an offence having been committed by them. In our opinion, therefore, it has not been established that on the day the search was effected at Hong Kong and the documents were seized, either Laxmipat or Daga were accused persons within the meaning of art. 20(3) of the Constitution.

Turning to the next ingredient, seizure of the documents in the course of the search in Hong Kong also cannot be called a testimonial act of Daga, and therefore, it cannot be said that Daga had been a witness against himself when the documents were seized by the Hong Kong police from the office of the Global Agencies. Lastly, there is no evidence at all that any compulsion has been exercised on Daga at the time. On the other hand, the evidence of the officers concerned clearly shows that Daga had raised no protest or objection at the time the search was made and documents seized, nor was any threat given to Daga. Further, Daga has nowhere stated in his examination that there was any threat given to him or coercion used on him in the matter of seizure of the documents. In our opinion, therefore, not a single ingredient of art. 20(3) has been established in this case.

It is next contended by Mr. Jethmalani that even assuming that the documents from the Global Agencies were legally seized on October 30, 1959, they were illegally detained after the Hong Kong police had completed inspection of these documents and it was found that the contents of those documents did not disclose any offence against the colony law. Mr. Jethmalani then argues that the photo-stat copies of the documents were made after the inspection had been completed by the Hong Kong police. The copies are copies of illegally detained documents, and are therefore, inadmissible in evidence. It is not possible to accept this contention inasmuch as on the evidence on record, it has not been established that the photo-stat copies of these documents were made during the period when the documents were illegally detained. As already stated, the documents were seized on October 30, 1959. They were taken by Williams of the Hong Kong police. The evidence of Shriwastava shows that he did not know anything about the seizure of the documents prior to

October 31, 1959. He went to Hong Kong on November 1, 1959 and returned to India by December 1 or 2, 1959. The photo-stat copies and copies made otherwise were all made between the period November 1, 1958, and December 1 or 2, 1959. Nothing has been pointed out by Mr. Jethmalani from the evidence on record to show at what point of time or date the Hong Kong police had completed the inspection of the documents and were satisfied that the documents did not disclose any offence under the colony law. The only piece of evidence which was brought to our notice was the following statement of Williams in the cross-examination:

"It is correct that after inspection of the documents was completed we were satisfied that no offence against the law of the colonies was disclosed from these documents."

The statement, however, does not speak about the point of time when the inspection was completed. On the other hand, the statement of Williams which immediately follows the aforesaid statement on which Mr. Jethmalani relies indicates that the Hong Kong Police had not reached a conclusion even upto February 17, 1960, that the documents did not disclose an offence under the colony law. That statement of Williams is as follows:

"When we returned these documents to accused No. 6 on 17-2-60 we were not completely satisfied that no offence was disclosed against the law of the colony. That is why we asked him to give an undertaking to produce the documents whenever required." The statement of Williams that they were not completely satisfied even when they returned the documents on February 17, 1960, does not appear to be exactly correct as his subsequent cross-examination on the basis of his affidavit would show. That part of the cross-examination indicates that by about February 15, 1960, the Hong Kong police were satisfied that no offence under the law of the colony was disclosed by these documents. We are concerned with the period November 1, 1959, to December 1 or 2, 1959, and there is nothing on the record which would indicate that during that period there was any illegal detention of the documents. In view of our aforesaid conclusion that it has not been established that during the aforesaid period, namely, from November 1, 1959, to December 1 or 2, 1959 there was an illegal detention of the documents, and our finding that the photo-stat copies and other copies were prepared during that period, it is not necessary to deal with the academic contention raised by Mr. Jethmalani that illegal detention of the documents would amount to deprivation of the property within the meaning of art. 31(I) and would also be violative of art. 19(I)(f) of the Constitution.

It is next argued by Mr. Jethmalani that, at any rate, the production of the documents by Daga in pursuance of the undertaking given by him amounted to compulsion within the meaning of art. 20(3) of the Constitution and, therefore, the photo-stat copies of these documents are inadmissible in evidence. This argument overlooks two material facts. Daga has never stated that there was any direct or indirect compulsion either in the matter of taking an undertaking from him or his production of the documents on April 29, 1960, in pursuance of the undertaking. There is, therefore, no foundation for the argument that there was any compulsion when the original documents were again produced by Daga on April 29, 1960, in pursuance of the undertaking. Further the other material fact is that the photo-stat copies were not prepared subsequent to obtaining possession of those documents on April 29, 1960. On the other hand, the photo-stat copies were prepared between the period November 1, 1959 to December 1 or 2, 1959. As already stated, the detention of the documents during this period has not been established to be illegal. This argument of Mr. Jethmalani also must fail.

For the reasons stated above, in our opinion, the photo-stat copies and copies otherwise made of documents seized from the office of Global Agencies are admissible evidence.

[The rest of the judgment is not material to this report].

APPEAL FROM ORIGINAL CIVIL.

Before the Hon'ble Mr. H. K. Chainani, Chief Justice, and Mr. Justice Mody.

THE STATE TRADING CORPORATION OF INDIA LTD. v. IRONSIDE LIMITED.*

Bombay Court-fees Act (Bom. XXXVI of 1959), Secs. 5(1), 2(c); Sch I, Arts. 4, 7; Sch. II, Arts. 1(f)(iii), 20-23—Bombay High Court Original Side Rules. Rules 151-155—Indian Divorce Act (IV of 1869), Secs. 10, 14, 18, 19—Hindu Marriage Act (XXV of 1955), Sec. 13—Civil Procedure Code (Act V of 1908), Sec. 26; O. IV, r. 1—Whether Court-fee leviable on third party notice—Third party notice whether a plaint for purposes of Court-fees Act—Applicability of art. 7, Sch. I to Court-fees Act.

Under the Bombay Court-fees Act, 1959, Court-fee is leviable on a third party notice as an application to the Court to obtain relief specified in the third party notice.

Barclays Bank v. Tom¹, Weld & Co. v. Sher Mahomed², Assan v. Pathumma³, Venkata Chandrappa Nayanivaru v. Venkatrama Reddi⁴, Hansraj Gupta v. Official Liquidators⁵ and Farkhundali v. Potdar⁶ referred to

If the application made to the Court is to obtain relief of the nature referred to in art. 7 in Sch. I to the Bombay Court-fees Act, 1959, this Article and not sub-cl (iii) in cl. (f) of Art. 1 in Sch. II to the Act will apply.

In a suit filed by Ironside Ltd. (plaintiffs) against the State Trading Corporation of India Ltd. (defendants), the latter issued third party notice against Kajaria Traders (India) Ltd. on November 28, 1963. After serving the notice, the defendants took out a chamber summons for direction on February 5, 1964. The summons came up before Mody J. on April 9, 1964, when his Lordship directed a notice to be served on the State Government in connection with the point that the Court-fees had not been paid on the third party notice and in fact the Court-fees are payable on third party notices. The summons was thereafter heard by K. K. Desai J. who held that Court-fees were payable and directed the defendants to pay Court-fees in respect of the third party notice. In his judgment delivered on April 23, 1964, his Lordship observed as follows:—

K. K. DESAI J. The question is as to whether the above third party notice is a document as referred to in s. 5 of the Bombay Court-fees Act, 1959, and in the Schedule I thereto and liable to payment of Court-fees. The relevant parts of ss. 2(c), 5 and 6 and entries in Schedule I to the Act run as follows:

"2. In this Act, unless the context otherwise requires—

(a) ...;

(b) ...;

(c) 'Plaint' includes a written statement pleading a set off or counter claim.

5. (1) No document of any of the kinds specified as chargeable in the first or second schedule to this Act annexed shall be filed, exhibited or recorded in any Court of Justice, ... unless in respect of such document there has been paid a fee of an amount not less than that indicated by either of the said schedules as the proper fee for such document.

(2) to (5) ...

6. The amount of fee payable under this Act in the suits next hereinafter mentioned shall be computed as follows:—

(i) In suits for money (including suits for damages or compensation, or arrears of maintenance, of annuities, or of other sums payable periodically)—according to the amount claimed; ..."

In several other sub-sections of this section the first phrase is "In suits for..." The sub-sections of this section refer to all kinds of suits, such as:—suit for

*Decided, June 18/21, 1965. O.C.J. Appeal No. 80 of 1964: Suit No. 327 of 1963.

1 [1923] I.K.B. 221.

2 (1919) 21 Bom. L.R. 808.

3 (1899) I.L.R. 22 Mad. 494.

4 (1898) I.L.R. 22 Mad. 256.

5 (1932) 35 Bom. L. R. 319, P.C.

6 (1961) 63 Bom. L.R. 985, F.B.

(claiming) maintenance, suit for moveable property, suit for declaration of status, suit for declaration in respect of ownership, suit for declaration of easement or right, suit for declaration of a charge on property, suit for possession of land, suit to enforce a right of pre-emption, suit for partition, etc. The relevant parts of Items 1 to 7 in Schedule I provide:

- (1) Plaint or memorandum of appeal.
- (2) Plaint in a suit for possession.
- (3) Plaint, application or petition to set aside or modify any award. Items (5) and (6) also refer to plaint, application or petition.

Item (7) Any other plaint, application or petition (including memorandum of appeal), to obtain substantive relief capable of being valued in terms of monetary gain or prevention of monetary loss, including cases wherein application or petition is either treated as a plaint or is described as the mode of obtaining the relief as aforesaid. In column 3 the fees payable against item 7 are mentioned as follows:

"A fee on the amount of the monetary gain, or loss to be prevented, according to the scale prescribed under Article 1."

The contention on behalf of the defendants is that the third party notice *prima facie* is a notice issued by Court under its seal. It is accordingly in the nature of a writ of summons in a suit. It is not a document of the kind specified as chargeable in the first or second schedule of the Act. The contention is that it is not a plaint nor it is a written statement claiming a set-off or counter-claim, nor it is a plaint to obtain substantive relief. The contention is that it is merely a notice issued by Court. The contention is supported by relying upon Rules 151, 154 and 155 of the Rules made by the High Court. Rule 151 provides for enabling a defendant who claims contribution or indemnity or that he is entitled to any relief or remedy relating to or connected with the subject-matter of the suit, substantially the same as the relief or remedy claimed by the plaintiff against the third party or claims that any question or issue relating to or connected with the said subject-matter is substantially the same as some question or issue arising between the plaintiff and the defendant should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and the defendant and the third party or between any or either of them, to issue a notice by leave of the Court. The last part of Rule 151 runs as follows:

"...he may, by leave of the Court or a Judge, issue a notice (hereinafter called the third party notice) to that effect, sealed with the seal of the Court. Such notice shall be filed with the Prothonotary and Senior Master and a copy thereof served on such person according to the rules relating to the service of writs of summonses."

Form 13 is the form prescribed for third party notices. The contents of this form show that by the notice the claim of the defendant is intimated to the third party and he is given notice to file appearance within the time prescribed and that in default of filing appearance he would be deemed to have admitted the validity of any decree passed against the defendant and his own liability to contribute or indemnify to the extent claimed in the third party notice. Relying upon the provision that the notice requires seal of the Court and the sealed notice can be served on the third party in accordance with the rules relating to the service of writ of summonses, it is contended on behalf of the defendants that the notice is nothing but a writ issued by Court. In this connection it is pointed out that the issuance of the notice does not directly entitle the defendants to proceed against the third party to a hearing of his claim in the third party notice. Under Rule 154A summons for directions is necessary and at the hearing of the summons it is permissible for the Court *inter alia* to decide that the defendants are not entitled to proceed by way of third party notice and dismiss the third party notice on that ground alone. In such an event, no proceedings remain outstanding against the third party. It is for that reason also contended that the third party notice cannot be held to be institution of a suit. The third party notice cannot be described as a plaint.

In this connection it is necessary to remember the contents of the third party notice which I have pointed out above. Obviously the third party notice is not merely a writ issued by Court. It has been and must be prepared in the first instance by the defendants in the suit. The defendants are, having regard to the rules made in that connection, bound to make all allegations of their grounds of claims against the third party in the third party notice. The third party notice must have all the particulars as necessary in a plaint in a suit. The defendants would have to state the whole of the cause of action on the basis whereof they claim relief against the third party in the third party notice itself. At the hearing the contents of the third party notice have always in practice been treated as contents of a plaint filed against the third party. For the purposes of defence the third party has to treat the contents of the third party as contents of a plaint against them. The written statement of the third party must refer to and deal with each and every allegation contained in the third party notice on that footing. In all further proceedings at the trial of a third party notice, it would be impossible for the defendants to contend that the contents in the third party notice should not be treated as their plaint against the third party. The third party notice, accordingly, is a document which serves double purpose. When served on the third party, it serves the purpose of a writ and notifies the third party about the consequences of default in filing an appearance. At the trial of the third party proceedings, the contents of the third party notice serve the purpose of a claim-plaint brought on the record of the Court by the defendants for their claims against the third party. Having regard to that fact it is difficult to accept the contention made on behalf of the defendants that the third party notice is merely a writ issued by Court and that for that reason cannot be treated as plaint filed by the defendants for making a claim against the third party. On the contrary, it is clear, having regard to the contents of the third party notice and the Rules and the form prescribed for third party notice, that a party taking out third party notice institutes in Court a suit against the third party.

It is, however, to be observed that having regard to Rule 154, the claim made (in the plaint) in the third party notice is one which is liable to be dismissed without trial. The Court trying the summons for directions for third party proceedings is entitled to come to the conclusion that the claim made in the third party notice was such that it cannot be allowed to be proceeded with as and by way of third party proceedings and for that reason only dismiss the third party notice. Now, if the defendants are liable to pay Court-fees whilst taking out third party notice, the above provision would impose on the defendants liability to pay Court-fees without having the benefit of a trial of the claims made by way of third party notice. That is a lacuna which requires to be remedied.

In this connection it is necessary to point out that reference has been made to *Weld & Co. v. Sher Mahomed*¹ and *Karim Elahi v. Sher Ahmed*.² In the first case the question related to the necessity of obtaining leave under cl. 12 of Letters Patent when taking out a third party notice against the third party residing outside the limits of ordinary jurisdiction of this Court. It was held that the third party notice must be considered a suit within the meaning of cl. 12 of the Letters Patent and on that footing it was held that leave under cl. 12 must be obtained where the third party was residing outside the ordinary limits of jurisdiction of Court. In the next case also the Court discussed the nature of the third party proceedings and held that a third party notice must be held to be "suit" within the meaning of cl. 12 of the Letters Patent.

Accordingly, the defendants are liable to pay Court-fees in respect of the third party notice issued in this case. The Court-fees to be paid within four weeks.

The defendants appealed.

Murzbán J. Mistree and *N. P. Nathwani*, for the appellants.

F. S. Nariman, with *B. R. Zaiwalla*, for respondent No. 1.

M. S. Sanghvi, for the State of Maharashtra.

CHAIYANANI C. J., This is an appeal by the original defendants against the order made by Mr. Justice K. K. Desai directing the defendants to pay court-fees on the third party notice taken out by them against respondents No. 2. On September 5, 1959, respondents No. 2 entered into a contract with respondents No. 1, who are the original plaintiffs, for the supply of manganese ore to the plaintiffs. The contract provided that the material shall be re-routed through the State Trading Corporation of India Ltd., i.e., through the defendants. On the same day the appellants defendants entered into a contract with respondents No. 1 for the supply of manganese ore to respondents No. 1. The appellants also entered into a contract with respondents No. 2, who agreed to supply the manganese ore to the appellants. The arrangement arrived at, therefore, was that respondents No. 2 were to supply manganese ore to the appellants, who had to consign it to respondents No. 1. According to respondents No. 1, the goods supplied to them were not of the proper quality and there were also short deliveries. On September 23, 1963, respondents No. 1, therefore, filed a suit against the appellants, in which they claimed about Rs. 2,50,000 as damages from the appellants. They also claimed another sum of about Rs. 7,75,000 from the appellants. On November 27, 1963, the appellants obtained leave from the Court to issue a third party notice against respondents No. 2 and to serve it upon them. This leave was applied for and granted under rule 151 of the High Court Original Side Rules. By this notice respondents No. 2 were informed that the appellants claimed from them the same reliefs, which had been claimed from the appellants by respondents No. 1. The notice also stated:

"The defendants say that the following questions or issues relate to or are connected with the original subject matter of the above suit and are substantially the same as those arising between the plaintiffs and defendants and the same should properly be determined not only as between the plaintiffs and the defendants, but as between the plaintiffs, defendants and yourselves:

(i) Whether the said consignment of Manganese ore shipped per s.s. 'Older' in July 1960 was deficient in quantity and quality as alleged by the plaintiffs in the plaint and you thereby committed a breach of the alleged contract No. 90/1959.

(ii) Whether you committed fraud, misrepresentation and deceit as stated by the plaintiffs in the suit.

(iii) Whether the damages for the aforesaid breach of contract mentioned in (i) hereof come to the said sum of Rs. 2,49,455.49 nP. as per particulars mentioned in Ex. G to the plaint and the said further sum of Rs. 16,609/- with interest on the aforesaid sums at the rate of 6% per cent per annum from the date of the suit till judgment.

(iv) Whether you failed to ship the remaining quantity of the manganese ore by the end of November 1960 and thereby committed a breach of the said alleged contract No. 90/1959.

(v) Whether under the circumstances stated in sub-paragraph (iv) above, you are liable to return to the defendants the said sum of Rs. 5,77,128.68 nP. being the price paid in advance on behalf of the defendants to you under the contract No. 90/1959 with interest thereon at 6% per annum from the 6th day of May 1960 till payment.

(vi) Whether you are liable to pay to the defendants the costs that the defendants may have to pay to the plaintiffs in the suit and the costs incurred by the defendants in defending the plaintiffs' claims in the suit as also of the Third Party proceedings."

The notice further stated that if respondents No. 2 wished to dispute the plaintiffs' claim in the suit against the defendants or their liability to the defendants, or if they wished to be heard on the said questions or issues or on the defendants' liability to the plaintiffs or the liability of respondents No. 2 to the defendants,

then they should cause an appearance to be entered within eight days from the service of the notice. Respondents No. 2 were further informed that in default of their doing so, they would be deemed to admit the validity of any decree that might be passed against the defendants and their liability to indemnify and pay compensation to the defendants to the extent therein specified. On January 17, 1964, respondents No. 2 filed their appearance. On February 5, 1964, the appellants took out a summons for directions under rule 154 of the Original Side Rules. This summons came up for hearing before my learned brother. He directed that a notice should be served on the State Government for consideration of the point whether court-fees were payable on the third party notice. The summons was thereafter heard by Mr. Justice K. K. Desai. He came to the conclusion that the court-fees were payable and accordingly directed the appellants to pay court-fees in respect of the third party notice, which had been issued to respondents No. 2. Against that order the present appeal has been filed.

Mr. Mistree, learned counsel of the appellants, has contended that the third party notice is issued by the Court, that it bears the seal of the Court, that consequently it is only a process issued by the Court, that it is not a pleading of any party and that consequently no court-fee is payable in respect of it. In order to determine the validity of these arguments, it is necessary to consider the relevant provisions of the rules. The provisions in regard to third party procedure are contained in Chapter IX of the Original Side Rules. Sub-rule (1) of rule 151 is in the following terms:

"151. (1) Where in a suit a defendant claims as against any person not already a party to the suit (hereinafter called the third party)—

(a) that he is entitled to contribution or indemnity, or

(b) that he is entitled to any relief or remedy relating to or connected with the original subject-matter of the suit and substantially the same as some relief or remedy claimed by the plaintiff, or

(c) that any question or issue relating to or connected with the said subject-matter is substantially the same as some question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and the defendant and the third party or between any or either of them,

he may, by leave of the Court or a Judge, issue a notice (hereinafter called the third party notice) to that effect, sealed with the seal of the Court. Such notice shall be filed with the Prothonotary and Senior Master and a copy thereof served on such person according to the rules relating to the service of writs of summonses."

The third party procedure can, therefore, be adopted when the defendant claims from the third party an indemnity or contribution or some other relief connected with the original subject-matter of the suit or when a common question arises as between the plaintiff and the defendant and between the defendant and the third party, or when any question arising between the plaintiff and the defendant can properly be determined as between the plaintiff and the defendant and the third party. Before this procedure can be adopted, it is necessary to obtain leave of the Court. Sub-rule (2) of rule 151 states that the notice shall state the nature and grounds of the claims or the nature and extent of any relief or remedy claimed or the nature of the question or issue sought to be determined and that such notice shall be in Form No. 13 or No. 14 with such variations as circumstances may require. The defendant has, therefore, to state in the notice not only the nature of the claim made by him, but also the grounds on which his claim is based. He has, therefore, to give the particulars of his claim in the notice. Sub-rule (3) of rule 151 provides:

"(3) The third party shall, as from the time of the service upon him of the notice, be a party to the suit with the same rights in respect of his defence against any claim made against him and otherwise as if he had been duly sued in the ordinary way by the defendant."

After the service of a third party notice upon him, a third party, therefore, becomes a party to the suit between the plaintiff and the defendant. He is also entitled to raise all defences to the claim made against him by the defendant, which he could have urged if instead of taking out a third party notice the defendant had filed a suit against him.

Rule 152 states that in default of the third party entering an appearance, he shall be deemed to admit the validity of the decree obtained against the defendant and his own liability to contribute or indemnify, as the case may be, to the extent claimed in the third party notice. Rule 153 provides that when a third party makes a default in entering an appearance in the suit, in case the suit is tried and results in favour of the plaintiff, the Judge who tries the suit may pass such decree as the nature of the case may require, for the defendant giving the notice against the third party.

Rules 154 provides that if a third party enters an appearance, the defendant may apply to the Court for directions and the Court or Judge may (a) where the liability of the third party to the defendant giving the notice is established on the hearing of the application, pass such decree as the nature of the case may require in favour of the defendant giving the notice against the third party, or (b) if satisfied that there is a question or issue proper to be tried as between the plaintiff and the defendant and the third party to make the contribution or indemnity claimed, in whole or in part, or as to any other relief or remedy claimed in the notice by the defendant or that a question or issue stated in the notice should be determined not only as between the plaintiff and the defendant but as between the plaintiff, the defendant and the third party or any or either of them, order such question or issue to be tried in such manner, before, at or after the trial of the suit as the Court or Judge may direct, or (c) dismiss the application. Rule 155 states that the Court or a Judge upon the hearing of the application mentioned in rule 154 may, if it shall appear desirable to do so, give the third party liberty to defend the suit, either alone or jointly with the original defendant, or to appear at the trial and take such part therein as may be just, and give such directions as to the Court or Judge shall appear proper for having the question and the rights and liabilities of the parties most conveniently determined and enforced, and as to the mode and extent in or to which the third party shall be bound or made liable by the decree in the suit. The third party notice is to be issued in Form No. 13 or No. 14 with such variations as circumstances may require. The relevant part of Form No. 13 is as follows:

"Take notice that this suit has been brought by the plaintiff against the defendant...

The defendant claims to be entitled to contribution from you to the extent of...

Or to recover damages for a breach of a contract for the sale and delivery to the plaintiff of...

The defendant claims to be indemnified by you against liability in respect of the said contract, or any breach thereof, on the ground that it was made by him on your behalf and as your agent.

And take notice that, if you wish to dispute the plaintiff's claim in this suit as against the defendant or your liability to the defendant you must cause an appearance to be entered for you within eight days after service of this notice.

In default of your so appearing you will be deemed to admit the validity of any decree passed against the defendant and your own liability to contribute or indemnify to the extent herein claimed, which may be summarily enforced against you pursuant to the rules of the High Court."

Form No. 14 is to be adopted when a common question or issue is to be determined.

The object of this procedure is to avoid multiplicity of proceedings and to enable the defendant to obtain expeditiously, in the same suit in which a claim had been made against the defendant, relief to which he is entitled in respect of that claim from a third party. It saves the defendant the necessity of instituting a separate suit and eliminates the risk of conflicting decisions on any

common question or issue, which may arise between the plaintiff and the defendant and the defendant and the third party. In *Barclays Bank v. Tom*,¹ it was held that a person who has been served by a defendant with a third party notice is entitled to counterclaim against the defendant. Scrutton L.J. explained the third party proceeding in these terms (pp. 223, 224):

"...I think it is important to keep clearly in mind what the third party procedure is. A plaintiff has a claim against a defendant. The defendant thinks if he is liable he has a claim over against a third party. With that matter between the defendant and the third party the plaintiff has obviously nothing to do. He is not concerned with the question whether the defendant has a remedy against somebody else. His remedy is against the defendant. But the defendant is much interested in getting the third party bound by the result of the trial between the plaintiff and himself, for otherwise he might be at a great disadvantage if, having fought the case against the plaintiff and lost, he had then to fight the case against the third party possibly on different materials, with the risk that a different result might be arrived at. The object of the third party procedure is then in the first place to get the third party bound by the decision between the plaintiff and the defendant. In the next place it is directed to getting the question between the defendant and the third party decided as soon as possible after the decision between the plaintiff and the defendant, so that the defendant may not be in the position of having to wait a considerable time before he establishes his right of indemnity against the third party while all the time the plaintiff is enforcing his judgment against the defendant. And thirdly, it is directed to saving the extra expense which would be involved by two independent actions. With these objects in view the third party order usually provides that the third party may appear at the trial between the plaintiff and the defendant."

It will be seen that in the third party notice the defendant has to specify the relief claimed by him and the grounds on which he claims it, as he would do in a plaint, if instead of taking out a third party notice he files a suit in order to obtain the same relief. The third party notice, therefore, contains a statement of the cause of action of the defendant against the third party. It incorporates the pleading of the defendant in respect of his claim against the third party. It is to this pleading that the third party is called upon to make his reply. It is the claim made in this document which the third party has to defend and it is on the claim made in this document that the Court may pass a decree in favour of the defendant against the third party. A third party notice, therefore, serves two purposes. It is an intimation to the third party that a claim to contribution, indemnity or some other relief had been made against him by the defendant and that if he does not appear and dispute his liability, a decree may be passed against him. It also serves the purpose of a plaint. In this connection reference may be made to the decision of Marten J., as he then was, in *Weld & Co. v. Sher Mahomed*,² in which he held that third party proceedings fall within the words "suits of every description" in cl. 12 of the Letters Patent. The learned Judge observed (p. 813):

"...We have under the Bombay High Court Rules a form of procedure which is in substance a 'suit' against the third party within the letters patent. Before the third party notice has been served on him, he is a free man and no Court can pass a decree against him. As a result of that third party notice he is in peril, and may, unless he takes certain steps, have a decree passed against him. It seems to me therefore that substantially the case falls within cl. 12 of the Letters Patent, just as the case of an added defendant or of a counter-claim against a new party does, and that leave under cl. 12 is necessary."

A third party notice bears the seal of the Court. This must be so because it is a process issued by and under the authority of the Court. For the same reason it is not signed or verified by the defendant as an ordinary pleading is required to be signed and verified. But as a third party notice also incorporates the defendant's pleading in respect of his claim against the third party, the

1 [1923] I.K.B. 221.

2 (1919) 21 Bom. L.R. 808.

fact that it bears the seal of the Court or that it is not signed or verified by the defendant in the manner in which a pleading is required to be signed and verified, would not save the defendant from liability to pay Court-fee if it is otherwise payable.

Sub-section (1) of s. 5 of the Bombay Court-fees Act, 1959, provides that no document of any of the kinds specified as chargeable in the first and second schedule to this Act annexed shall be filed, exhibited or recorded in any Court of Justice, unless in respect of such document there had been paid a fee of an amount not less than that indicated in either of the said schedules as the proper fee for such document. A third party notice is filed in Court. It will, therefore, attract duty if it can be said to be a document of any of the kinds specified in the first or second schedule to the Act. The two schedules prescribe Court-fees on plaints, applications and petitions filed in Court. The Act was enacted in 1959 many years after the third party procedure had been introduced. No separate provision has been made in the Act for levy of Court-fees on third party notices. A third party notice is also not included in the definition of "plaint" given in cl. (c) in s. 2 of the Act. It has, therefore, been contended by Mr. Mistree that no Court-fee is leviable on a third party notice, as, if the Legislature intended that Court-fee should be levied on such a notice, it would have made a provision to that effect. If, however, it can be said to be a plaint, application or petition, it would be liable to Court-fee under one or other of the articles in the two schedules.

The question, therefore, arises whether a third party notice is a plaint within the meaning of the Court-fees Act. According to the Oxford dictionary, a plaint means a statement of grievances made to a Court of Law for the purpose of obtaining redress. In Jowitt's Dictionary of English Law, "plaint" is defined as a statement in writing of a cause of action. In *Assan v. Pathumma*³, Subramania Ayyar J. observed (p. 502) :

"...Plaint, in law, means (and has, since before the days of Blackstone, whose phraseology in regard to the explanation of the term has been accepted by Lexicographers, meant) nothing more than 'a private memorial tendered to a Court in which the person sets forth his cause of action; the exhibition of an action in writing.' In the absence of a distinct and direct statutory definition to the contrary we have no right to put a more restricted construction on the term."

In the same volume at p. 256 there is the report of another decision of a Division Bench of the Madras High Court, to which also the learned Judge was a party, (*Venkata Chandrappa Nayamivaru v. Venkatarama Reddi*⁴), in which it was held that a suit must commence with a plaint and a proceeding which is capable of terminating in a decree or an order having the force of a decree cannot, on that ground alone, be deemed to be a suit within the meaning of the Code, if it has not commenced with a plaint.

Even though the dictionary meaning of the word "plaint" is very wide, it has in legal phraseology come to acquire a more limited meaning and that is a statement in writing of the cause of action in a suit. Every proceeding in a Court is not commenced by a plaint. Section 10 of the Indian Divorce Act, 1869, states that any husband may present a petition to the District Court praying that his marriage may be dissolved on the ground that his wife had been guilty of adultery. The section also provides for a petition by a wife for dissolution of her marriage on certain grounds. Section 18 states that any husband or wife may present a petition praying that his or her marriage may be declared null and void. Sections 14 and 19 provide for decrees being passed in such cases. Section 13 of the Hindu Marriage Act provides for a petition being presented to the Court by either the husband or the wife for dissolution of marriage by a decree for divorce on the grounds specified in this section. These proceedings, therefore, commence with a petition, which is not called a plaint, even though the proceeding ends in a decree of the Court. The Court-fees Act

also makes separate provision for such petitions. Article 20 in Schedule II provides for a Court-fee of Rs. 37.50 on every petition under the Indian Divorce Act, except petitions under s. 44 of that Act. The same Court-fee has been prescribed by art. 21 on a petition under the Hindu Marriage Act. An additional Court-fee is payable when in addition to divorce damages are claimed. Court-fees are, therefore, levied on these documents as petitions and not as plaints. Article 4 in Schedule I refers to a plaint, application or petition which is capable of being treated as a suit. Similar phraseology is used in some other articles, such as article 23 in Schedule II. The Court-fees Act itself, therefore, makes a distinction between a plaint and an application or petition presented to a Court. It recognises that every document containing a statement of the cause of action or by which a proceeding is commenced in a Court is not a plaint.

Section 26 of the Civil Procedure Code states that every suit shall be instituted by the presentation of a plaint or in such other manner as may be prescribed. Order IV, r. 1, lays down that every suit shall be instituted by presentation of a plaint to the Court or such officer as it appoints in this behalf. In *Hansraj Gupta v. Official Liquidators*,⁵ the Privy Council held that the word "suit" in s. 3 of the Indian Limitation Act, ordinarily means a civil proceeding instituted by the presentation of a plaint. The same view has been taken by a Full Bench of this Court in *Farkhundali v. Potdar*⁶ where it is observed that the word "suit" is a term of art and ordinarily means a proceeding instituted in a Civil Court by the presentation of a plaint. It was held in that case that a proceeding under s. 54 of the Bombay Co-operative Societies Act is not a suit. These authorities, therefore, establish that a plaint is a document, by the presentation of which in a Civil Court a suit is instituted.

Sub-rule (3) of rule 151 of Original Side Rules, which I have quoted above, states that a third party shall have the same rights in respect of any claim made against him as if he had been duly sued in the ordinary way by the defendant. A third party is, therefore, given a right to defend himself as if a suit had been filed, that is, as if a plaint had been presented. The defence is to be made to the claim set out in the third party notice. By a legal fiction created by sub-r. (3) of rule 151 a third party proceeding is, therefore, treated as a suit for certain purposes. In *State of Bombay v. Pandurang Vinayak Chaphalkar*,⁷ the Supreme Court has observed that full effect must be given to a statutory fiction and that it should be carried to its logical conclusion. It has, therefore, been contended by Mr. Nariman and Mr. Sanghvi that as a third party proceeding is by legal fiction to be regarded as a suit, the third party notice must necessarily be held to be a plaint. The legal fiction has, however, been introduced in order that no prejudice may be caused to the third party by a third party notice being taken out instead of a suit being filed against him and in order to give the third party full opportunity to defend himself. He is, therefore, placed in the same position as if a suit had been filed against him. The legal fiction has, therefore, been enacted for a limited purpose. There is nothing in the rule which suggests that a third party notice must be treated as a plaint for all purposes. Rule 151 itself provides that for the purposes of enforcing his claim against a third party, the defendant may take out a third party notice. A third party proceeding is also a proceeding in the suit filed by the plaintiff against the defendant. In our opinion, therefore, a third party notice is not a plaint at least for the purposes of the Court-fees Act.

The next question to be considered is whether Court-fees would be leviable on a third party notice as an application or petition to the Court. A third party notice being a process issued by the Court, is not itself an application or petition to the Court. Before such a notice can be taken out, leave of the Court has to be applied for. After leave has been granted, the defendant is, however, not bound to proceed further or to take out a third party notice. If he

5 (1932) 35 Bom. L.R. 319, P.O.

7 [1953] S.C.R. 773, at p. 778, 55 Bom. L.R.

6 (1961) 63 Bom. L.R. 985, at p. 988, F.B. 526.

decides to take further steps in the matter, he has to move the Court to issue the notice and to seal it. Thereafter it is to be sent for service. The practice which we have been informed is followed on the Original Side is in accordance with the requirements of the rule. The practice seems to be that after the Court has granted leave to take out a third party notice, a praecipe is addressed to the Prothonotary of the High Court and along with the praecipe a draft of the third party notice is sent to him for approval and for the approved copy of the notice being sealed. It is by this praecipe or application that the Court's jurisdiction is invoked and the Court is moved to summon the defendant and adjudicate upon the claim set out in the draft third party notice between the defendant and the third party. This praecipe is, therefore, liable to Court-fee as an application made to the Court to obtain relief specified in the third party notice.

It has been urged by Mr. Sanghvi that if the relief claimed in the third party notice is capable of being valued in terms of money, the article which would be applicable is art. 7 in Schedule I. This article specifies the Court-fee payable on any plaint, application or petition, not specified in the earlier articles in this Schedule, to obtain substantive relief and which is capable of being valued in terms of monetary gain or prevention of monetary loss, including cases wherein application or petition is either treated as a plaint or is described as the mode of obtaining the relief as aforesaid. Mr. Mistree, on the other hand, has contended that the Court-fee which would be payable in such a case is that indicated against sub-cl. (iii) in cl. (f) in art. 1 in Sch. II, that is, a fixed fee of Rs. 5. Clause (f) in art. 1 in Sch. II refers to an application or petition when presented to a High Court. Sub-clauses (i) and (ii) mention certain kinds of applications or petitions with which we are not concerned. Sub-clause (iii) refers to "any other case not otherwise provided for by this Act." Mr. Mistree has argued that this sub-clause will apply in the case of every application or petition presented to a High Court, unless there is some other specific provision with regard to applications or petitions to a High Court. We have been taken through the various articles in the two Schedules. We find that Court-fees vary according to the subject matter of the plaint, application or petition and also according to the authority before which it is presented. For instance, under art. 6 in Sch. II a Court-fee of Rs. 2 is prescribed for an application for leave to appeal as a pauper, when presented to a District Court. If presented to the High Court the fee is Rs. 5. There are other articles such as arts. 1 to 7 in Sch. I, which prescribe Court-fees with reference to the subject matter, irrespective of the Court in which they are presented. No sufficient reason has been shown why sub-cl. (iii) in cl. (f) of art. 1 in Sch. II should be construed as referring only to absence of other provisions in the Act specifically in regard to applications to the High Court. If there is an article which prescribes Court-fees with reference to the subject matter of the application and if the applicability of that article is not restricted to Courts other than the High Court, it will also exclude the application of sub-cl. (iii) in cl. (f) of art. 1. Thus if the application made to Court is to obtain relief of the nature referred to in art. 7 in Sch. I, this article and not sub-cl. (iii) in cl. (f) of art. 1 in Sch. II will apply.

In the present case the reliefs, which the appellants have claimed from the third party, are all capable of being valued in terms of monetary gain or prevention of monetary loss. Consequently, Court-fees payable will be according to the scale indicated against art. 7 in Sch. I to the Act.

In our opinion, therefore, the learned Judge was right in holding that the appellants are liable to pay Court-fees in respect of the third party notice taken out by them.

Having regard to the circumstances of this case, we make no order as to costs.

The appellants are given three weeks' time to pay Court-fees.

The appellants' attorneys are allowed to withdraw Rs. 1,000 deposited by the appellants for the respondents' costs of the appeal.

It seems to us that in order that there may be no doubt in the matter, Government may consider whether the Court-fees Act should not be amended and specific provision made therein for the levy of Court-fees in respect of third party notices. If it is decided to make an amendment, provision should also be made for refund of whole or part of the Court-fees, if the claim made by the defendant against the third party is not tried on merits either owing to the original suit filed by the plaintiff being dismissed or if the third party notice is dismissed on the application for directions made under rule 154.

Before the Hon'ble Mr. H. K. Chatnani, Chief Justice, and Mr. Justice Mody.

PEARLY ANDREW FRANZ v. OFFICIAL ASSIGNEE.*

Employees' Provident Funds Act (XIX of 1952), Sec. 10(1)—Presidency-towns Insolvency Act (III of 1909), Sec. 17—Amount in Fund standing to credit of member adjudicated insolvent and not paid to him—Whether Official Assignee can claim it.

Under s. 10(1) of the Employees' Provident Funds Act, 1952, so long as an amount stands in the Fund to the credit of a member who is adjudicated insolvent and has not been paid to such member, the amount does not vest in the official assignee and he cannot lay claim to it. The immunity given by s. 10(1) of the Act will not continue after the amount has been paid to the insolvent member.

Bonjour v. Official Assignee, Madras,¹ referred to.

ONE Pearly Andrew Fraz (appellant) who was employed in M/s. Killick Nixon & Co., Ltd., Bombay, used to contribute to a Provident Fund established by the Company for the benefit of their employees. The Employees' Provident Funds Act, 1952, was made applicable to the Company in 1962 and the appellant became a member of the fund established under the scheme framed under the Act. The appellant retired from service in 1964 and a few months after he was adjudicated insolvent. The Official Assignee then addressed letters to the Regional Provident Fund Commissioner and also to the Company asking them not to pay to the appellant the amounts lying to his credit in his Provident Fund account. The appellant took out a Notice of Motion *inter alia* for a direction that the Official Assignee withdraw his aforesaid letters. The Notice of Motion was dismissed by K. K. Desai J. who observed as follows in his judgment, delivered on July 21, 1964:—

K. K. DESAI J. As regards the second relief, the debtor's contention is that a sum of Rs. 7,062.75 nP stands to his credit with the Regional Provident Fund Commissioner at Bombay. Admittedly, to this Fund, the provisions of the Employees' Provident Funds Act, 1952, and the Employees' Provident Funds Scheme enacted under that Act are applicable. The contention is that having regard to the provisions in the Act and the scheme, the Official Assignee is not entitled to make any claim in respect of the provident fund amount standing to the credit of the insolvent with the Regional Provident Fund Commissioner. In this connection, reliance is placed on s. 10 of the Employees' Provident Funds Act, the relevant part whereof provides:

"10. (1) The amount standing to the credit of any member in the Fund...shall not be liable to attachment under any decree or order of any court in respect of any debt or liability incurred by the member...and neither the official assignee appointed under the Presidency-towns Insolvency Act, 1909..., nor any receiver appointed under the Provincial Insolvency Act, 1920.... shall be entitled to, or have any claim on, any such amount.

(2) ..."

The contention is that the phrase "the official assignee shall not be entitled to, or have any claim on, any such amount" means that at no time whatsoever

*Decided, June 25, 1965. O.C.J. Appeal 1 [1956] Mad. 491.
No. 54 of 1964: Insolvency No. 47 of 1964.

the Official Assignee can make a claim on the Regional Provident Fund Commissioner for paying over or receiving the amount of Provident Fund standing to the credit of an insolvent. The further contention is that such amount cannot be recovered even if it ultimately becomes payable to the insolvent under the scheme of provident funds enacted under the Act. On behalf of the petitioning creditor, it is submitted that the only correct construction of the section is that the Official Assignee can have no claim to recover the amount of provident fund standing to the credit of the insolvent until the time when under the scheme enacted under the Act it becomes and falls to be payable to the insolvent. The amount will be subject to the provisions in the scheme for deductions by the Provident Fund Commissioner in favour of the employers as well as other parties.

In this connection, it is necessary to refer to Clause 69 of the scheme which relates to the liability of the Provident Fund Commissioner to pay over the amount of the provident fund to the person to whose credit it stands with him. It is also relevant in this connection to refer to ss. 17 and 52 of the Presidency-towns Insolvency Act which deal with the question of effect of the order of adjudication and the description of the insolvent's property divisible amongst creditors. Section 17 provides that

"On the making of an order of adjudication, the property of the insolvent wherever situate shall vest in the official assignee and shall become divisible amongst his creditors,..."

It also provides that after the order of adjudication

"...no creditor to whom the insolvent is indebted in respect of any debt provable in insolvency shall, during the pendency of the insolvency proceedings, have any remedy against the property of the insolvent in respect of the debt..."

Under s. 52(2), the property of the insolvent divisible amongst his creditors is mentioned as follows:—

"(a) all such property as may belong to or be vested in the insolvent at the commencement of the insolvency or may be acquired by or devolve on him before his discharge;"

The rest of the provisions in sub-s. (2) of s. 52 are not relevant. Having regard to the provisions in ss. 17 and 52, it is obvious that all kinds of properties belonging to the insolvent must vest in the Official Assignee. Even "after-acquired" properties must vest in the Official Assignee. The question is as to in what manner these provisions in the Presidency-towns Insolvency Act have been affected by reason of the provisions in s. 10 of the Employees' Provident Funds Act. In this connection, Clause 69 of the Provident Fund Scheme relating to circumstances in which accumulations in the Fund are payable to a member must be considered. The relevant part of this clause provides that a member may withdraw the full amount standing to his credit in the Fund on retirement from service after attaining the age of 55 years. Sub-clause (2) deals with the liability of the Provident Fund Commissioner to make payment of the Fund and the right of the member to recover the same even when the member has not attained the age of 55 and has not retired. The substance of the relevant provision in this sub-section is that a member who has resigned and/or retired prior to his age of 55 and/or has not been employed in any establishment to which the Act applies for a continuous period of not less than 6 months is entitled to withdraw the amount standing to his credit, subject, however, to the deductions which are all in detail referred to in sub-clause (3) of Clause 69. It appears to me that the true effect of the provisions in s. 10 of the Act is that in so far as certain amounts are liable to be deducted and forfeited under the Provident Funds Scheme by the Provident Fund Commissioner and in so far as the amount of the Fund is not payable to a member who becomes insolvent, the Official Assignee can have no claim of any kind against the Provident Fund Commissioner. The provision in s. 10 that the Official Assignee shall not be entitled to have any claim on any amount of pro-

vident fund does not have the effect of providing that the Fund which is under the scheme liable to be withdrawn and is payable by the Provident Fund Commissioner to an insolvent member does not vest in the Official Assignee under s. 17 and does not form part of the property divisible amongst his creditors under s. 52(2). The only effect of the provisions in s. 10 is that the right of the Provident Fund Commissioner to make deductions and other rights of third parties in respect of the Funds in his hands as provided in the scheme made under the Act are not liable to be affected by vesting of the property of the insolvent member in the Official Assignee. The contention made on behalf of the debtor must, therefore, fail.

The notice of motion is dismissed with costs.

The appellant appealed.

B. N. Shah, for the appellant.

A. G. Shah, for respondent No. 2.

CHARNANI C.J. The appellant was formerly employed in M/s Killick Nixon & Co., Ltd., Bombay. They had established a Provident Fund for the benefit of their employees. The appellant used to contribute to that fund. In 1962 the Employees' Provident Funds Act, 1952, hereinafter referred to as the Act, was made applicable to the establishment of M/s Killick Nixon & Co. Ltd. The appellant then became a member of the fund established under the scheme framed under the Act. Under sub-s. (2) of s. 15, the accumulations in the Provident Fund of his employers became liable to be transferred to the fund established under the provisions of the Act. The appellant retired from service in the beginning of 1964. On June 16, 1964, he was adjudicated insolvent.

The Official Assignee then addressed letters to the Regional Provident Fund Commissioner and also to the appellant's ex-employers asking them not to pay to the appellant the amounts lying to his credit in his Provident Fund account. The appellant then took out a Notice of Motion, in which prayer (c) was as follows:—

"(c) That the Official Assignee may be directed to withdraw his letters to the ex-employees of the Insolvent and the Provident Fund Commissioner requesting them to detain the insolvent's Provident Fund, and he may be further directed not to write any further letters in order to deprive the insolvent of his Provident Fund."

This motion was dismissed by Mr. Justice K. K. Desai. Against the order made by him the present appeal has been filed.

Sub-section (1) of s. 10 of the Employees' Provident Funds Act is in the following terms:—

"The amount standing to the credit of any member in the Fund or of any exempted employee in a provident fund shall not in any way be capable of being assigned or charged and shall not be liable to attachment under any decree or order of any court in respect of any debt or liability incurred by the member or the exempted employee, and neither the official assignee appointed under the Presidency-towns Insolvency Act, 1909, nor any receiver appointed under the Provincial Insolvency Act, 1920, shall be entitled to, or have any claim on, any such amount."

The latter part of this sub-section provides that the Official Assignee appointed under the Presidency-towns Insolvency Act, 1909, shall not be entitled to or have any claim on the amount standing to the credit of any member in the fund. The reference to the Presidency-towns Insolvency Act in this sub-section makes it clear that when the Legislature enacted this provision, it was aware of the provisions of the Presidency-towns Insolvency Act, under s. 17 of which on the making of an order of adjudication, the property of the insolvent wherever situate vests in the Official Assignee. Notwithstanding that provision the Legislature has specifically provided that the Official Assignee shall have no title to or any claim on the amount standing to the credit of the insolvent in the Provident Fund. The intention of the Legislature is, there-

fore, clear and that is that this sub-section should override the provisions of the Presidency-towns Insolvency Act. It follows that so long as the amount stands to the credit of the insolvent in the fund, that is, so long as it is lying with the Regional Provident Fund Commissioner and has not been paid to the insolvent, the amount does not vest in the Official Assignee and he cannot lay any claim to it. The immunity given by sub-s. (1) of s. 10 will, however, not continue after the amount has been paid to the insolvent, see *Bonjour v. Official Assignee, Madras*¹.

The learned Judge has referred to sub-s. (3) of s. 69, which provides for certain percentages of the employer's contribution and interest thereon being forfeited to the Fund, when a member withdraws any amount under sub-s. (2) of this section. The learned Judge was inclined to hold that sub-s. (1) of s. 10 applies only to those amounts, which are liable to be deducted and forfeited under the provisions of the Act and which not being payable to the insolvent cannot vest in the Official Assignee. With respect, it seems to us that the view taken by the learned Judge on this point is not correct. The amounts, which have to be deducted from the sum standing to the credit of a member in the Fund or which are liable to be forfeited under the provisions of the Act, are not payable to the member. As he is not entitled to them, they cannot be attached under any decree or order of any Court, in respect of any debt or liability incurred by him. No special provision in regard to such amounts was, therefore, necessary. The object underlying sub-s. (1) of s. 10 appears to be much wider. One of the purposes of a Provident Fund is to make some provision for the families of the employees. The Legislature, therefore, appears to have provided by s. 10 that the amount standing to the credit of a subscriber in the Provident Fund shall not be available to his creditors.

We, therefore, allow the appeal, set aside the order made by the learned Judge dismissing the notice of motion taken out by the appellant in so far as prayer (c) in the notice of motion is concerned and make an order in terms of prayer (c) in the notice of motion dated July 2, 1964.

The appellant should get his costs of the appeal from respondent No. 2.

Appeal allowed.

APPELLATE CIVIL.

Before the Hon'ble Mr. H. K. Chainani, Chief Justice, and Mr. Justice Kotval.

CHIRAK CHANDU KHATIK v. G. V. KSHIRSAGAR.*

Bombay Village Panchayats Act (Bom. III of 1959), Sec. 40 (1) (b)—Period of six months of absence whether to be reckoned from date of meeting at which member last present.

Under s. 40 (1) (b) of the Bombay Village Panchayats Act, 1958, the period of six months must be reckoned from the date of the meeting at which the member remained absent and not from the date of the meeting at which he was last present.

Kershaw v. Shoreditch Corporation,¹ referred to.

THE facts appear in the judgment.

A. T. Patil, with *Shrikant Shah* and *R. V. Desai*, for the petitioner.

R. W. Adik and *A. B. Nillaye*, for opponent No 3.

M. A. Rane, Assistant Government Pleader, for opponent No. 1.

CHAINANI C.J. The two petitioners and respondents Nos. 3 and 4 are members of the Village Panchayat of Akkalkuwa. On June 15, 1964, an election was held for electing the Sarpanch. There were two candidates at this election, petitioner No. 1 and respondent No. 4. Each of them received five votes. Lots

¹ [1956] Mad. 491.

*Decided, April 21/22, 1965. Special Civil Application No. 1102 of 1964 (with Special

Civil Application No. 1177 of 1964.)

1 (1906) 95 L.T. 55.

were then drawn and petitioner No. 1 was declared as duly elected. One of the persons, who had voted in favour of petitioner No. 1, was Bajubai petitioner No. 2. On June 23, 1964, respondents Nos. 3 and 4 made applications to the Collector evidently under sub-s. (5) of s. 33 of the Village Panchayats Act and requested the Collector to set aside the election of petitioner No. 1 on the ground that petitioner No. 2, who had voted in favour of petitioner No. 1, had ceased to be a member of the Panchayat on April 29, 1964, under cl. (b) in sub-s. (1) of s. 40 of the Act. On July 21, 1964, the President, Zilla Parishad, passed an order stating that as petitioner No. 2 Bajubai had remained absent for more than six consecutive months from the meetings of the Panchayat without any leave from the Panchayat, a vacancy had occurred on April 29, 1964, and that from that date petitioner No. 2 could not continue to be a member of the Village Panchayat of Akkalkuwa. This order was made under sub-s. (2) of s. 40 of the Act. In view of this order the Collector held that petitioner No. 2 was not qualified to vote at the election of the Sarpanch. He, therefore, set aside the election of petitioner No. 1 as the Sarpanch of the Panchayat and directed that a fresh election should be held. The Collector rejected the prayer made on behalf of respondent No. 4 that he should be declared to have been duly elected as the Sarpanch of the Panchayat. Against the order made by the Collector the petitioners have filed the present special civil application No. 1102 of 1964. The other application No. 1177 of 1964 has been filed by respondent No. 4, in which he has prayed that he should be declared to have been duly elected as the Sarpanch of the Panchayat at the meeting held on June 15, 1964.

The main question which arises for determination in these applications is whether petitioner No. 2 Bajubai was disqualified from continuing to be a member of the Village Panchayat under cl. (b) in sub-s. (1) of s. 40 of the Act. This sub-section provides:

"(1) Any member of a *panchayat* who, during his term of office—...

(b) absents himself for six consecutive months from the meetings of the *panchayat*, without the leave of the said *Panchayat*, shall cease to be a member and his office shall be vacant."

Sub-section (2) of this section states that any dispute as to whether a vacancy has or has not occurred under this section shall be referred for decision of the President of the Zilla Parishad, whose decision shall be final. Petitioner No. 2 attended the meeting of the Village Panchayat on October 27, 1963. She remained absent at the next meeting held on November 19, 1963. She also did not attend the subsequent five meetings held on November 28, 1963, December 29, 1963, January 31, 1964, February 29 1964 and March 31, 1964. She, however, was present at the next meeting held on April 30, 1964. It has been contended by Mr. Patil that the period of six months must be counted from November 19, 1963, the date on which she absented herself for the first time after attending the previous meeting held on October 27, 1963. Mr. Adik has, on the other hand, urged that petitioner No. 2 should be held to have been disqualified, as she did not attend any meeting of the Panchayat held during the period of six months from October 28, 1963. The disqualification under the above provisions would be incurred if a member absents himself from meetings of the Village Panchayat for six consecutive months. The absence must, therefore, be from a meeting. Until a meeting is held, no question of absence can arise. Six months of absence cannot, therefore, begin to run unless a member is absent and he cannot be absent until a meeting is held. It follows that the period of six months must be reckoned from the date of the meeting at which the member remained absent and not from the date of the meeting at which he was last present.

This view is in accordance with that taken in *Kershaw v. Shoredith Corporation*.¹ Sub-section (6) of s. 46 of the Local Government Act, 1894, provided

that if a member of a council was absent from the meetings of the council for more than six months consecutively, his office shall on the expiration of those months become vacant. It was held that the period of six months began to run from the first meeting when he was absent and not from the last meeting at which he was present.

In the case of petitioner No. 2, the period of six months therefore began on November 19, 1963, when she was absent for the first time from the meetings of the Panchayat. Six months from this date expired on May 19, 1964. Before the expiry of this period she attended the meeting held on April 30, 1964. Consequently, she had not incurred the disqualification under cl. (b) in sub-s. (1) of s. 40 of the Act. She was consequently entitled to vote at the election for the office of the Sarpanch held on June 15, 1964.

The order made by the President of the Zilla Parishad holding that petitioner No. 2 was disqualified from continuing to be a member under s. 40 of the Act and that a vacancy had consequently occurred, must therefore be set aside. We also set aside the order of the Collector, by which he has held the election of petitioner No. 1 as the Sarpanch to be invalid.

As the election of petitioner No. 1 was valid, special civil application No. 1177 does not survive. The rule in that application will be discharged.

The petitioners in application No. 1102 should get their costs from respondents Nos. 3 and 4. No order as to costs in application No. 1177.

WEALTH-TAX REFERENCE.

Before Mr. Justice Tambe and Mr. Justice V. S. Desai.

PRAMOD KUMAR JAIN

v.

THE COMMISSIONER OF WEALTH TAX, BOMBAY CITY I.*

Wealth-tax Act (XXVII of 1957), Sec. 3—Whether valuation date is date for attraction of tax.

Under s. 3 of the Wealth-tax Act, 1957, the unit of period for which the tax is levied is the unit of the financial year.

The provisions of the Act which determine the tax liability are not the provisions which existed on the date which is the date with reference to which the net wealth is to be computed, but the provisions which are applicable during the period of assessment for which the tax is levied.

R. J. Kolah, with *P. Ramaswami*, for the applicant.

G. N. Joshi, with *R. J. Joshi*, for the respondent.

V. S. DESAI J. The question, which has been referred to us under s. 27(1) of the Wealth-tax Act, 1957, at the instance of the assessee, is as follows:—

“Whether for the assessment year 1959-60 the net wealth of the assessee has rightly been charged at the rate of 1%.”

The relevant valuation date for the computation of the net wealth of the assessee for the assessment year 1959-60 was March 31, 1959. By s. 21 of the Finance Act of 1959 the Wealth-tax Act was amended altering the rate of wealth-tax in the Schedule of the Act. The amendment was made effective from April 1, 1959. The result of this amendment was that the rate of wealth-tax, which was applicable to the net wealth of the assessee, was increased from $\frac{1}{4}$ per cent. to 1 per cent. The assessee's contention was that the amendment of the Wealth-tax Act increasing the rate of tax came into operation only from April 1, 1959. The rate of tax on the date with reference to which his net

*Decided, February 17, 1965. Wealth Tax Reference No. 6 of 1962.

wealth was to be computed, i.e. March 31, 1959, was only $\frac{1}{2}$ per cent. According to the assessee, under the Wealth-tax Act, the rate of tax which is applicable is the rate of tax, which exists in the Schedule of the Wealth-tax Act on the relevant valuation date for the computation of the net wealth and, therefore, in the present case the rate that was applicable was the rate, which existed in the Schedule on March 31, 1959. Since on that date the rate was only $\frac{1}{2}$ per cent. that is the rate, which must be applied to the net wealth of the assessee as computed on the relevant valuation date, viz. March 31, 1959.

In order to appreciate this contention of the assessee, we must consider s. 3 of the Wealth-tax Act, which is the charging section. That section reads as follows:—

“Subject to the other provisions contained in this Act, there shall be charged for every financial year commencing on and from the first day of April 1957, a tax (hereinafter referred to as wealth-tax) in respect of the net wealth on the corresponding valuation date of every individual, Hindu undivided family and company at the rate or rates specified in the Schedule.”

“Assessment year” under the Act means the year for which tax is chargeable under s. 3 and, therefore, means every financial year commencing on and from April 1, 1957. “Net wealth” as defined in s. 2(m) means the amount by which the aggregate value computed in accordance with the provisions of this Act of all the assets, wherever located, belonging to the assessee on the valuation date, including assets required to be included in his net wealth as on that date under this Act, is in excess of the aggregate value of all the debts owed by the assessee on the valuation date other than certain specified kinds of debts and the amounts of certain taxes, penalties and interest. “Valuation date” in relation to any year for which an assessment is to be made under this Act means the last day of the previous year as defined in cl. (II) of s. 2 of the Income-tax Act if an assessment were to be made under that Act for that year and if there were different previous years under the Income-tax Act for different sources of income, the last day of the last of such previous years. Under s. 3, with which we are concerned and which is the charging section, wealth-tax is charged for every financial year. It is a tax on the net wealth as computed for that financial year and the rate of tax is at the rate, which is to be found in the Schedule of the Act applicable to the computed quantum of the net wealth. The dispute in the case centres on the question as to what rate is to be applied to the net wealth in the present case. Is it the rate, which existed in the Schedule to the Act on the date, which is the date for the computation of the net wealth of the assessee, or is it the rate, which is applicable to the financial year, for which the tax is to be levied on the net wealth?

It is argued on behalf of the Department that the tax being for the financial year, the rate of tax is that which is applicable to the financial year in question and it is that rate, which must be applied to the net wealth. That the net wealth is computed with reference to the date, which is anterior to the commencement of the financial year for which the wealth-tax is levied, does not mean that a tax is attracted by the net wealth at any point of time earlier than the commencement of the financial year for which the tax is levied. The valuation date specified in the Act is only for the purpose of fixing the point of time with reference to which the net wealth which will attract the tax will be determined, but it is not the date for the attraction of tax. Tax is only attracted at the commencement of the financial year and at no point of time earlier than that. The tax is again attracted or charged in accordance with the provisions of the Act, which exist at the point of time of the attraction of the tax. Net-wealth, no doubt, is computed with reference to an anterior point of time, but the computation takes place according to the provisions of the Act as they exist in the relevant financial year for which the tax is levied. The range of the net-wealth, the deductions and exclusions, which will be permissible under the Act are all according to the Act as it exists in the relevant

financial year. It is argued that s. 3 states that the tax is charged for every financial year subject to the other provisions contained in the Act. The provisions of the Act, which have to be borne in mind and considered for the purpose of charging the tax, are the provisions of the Act, which are there in the relevant financial year. The rates specified in the Schedule, which will apply to the net wealth will, therefore, be the rates, which are specified in the Schedule in the given financial year in which the tax is charged.

In our opinion, the submission, which has been advanced on behalf of the Department with regard to the interpretation of s. 3 of the Wealth-tax Act appears to be correct. Although the net wealth is required to be ascertained as on a date anterior to the commencement of the financial year for which the tax is charged, the said date is only for the purpose of fixing the point of time with reference to which the quantum of wealth which will bear the tax is to be ascertained. What that quantum will be will have to be determined according to the provisions contained in the Act at the time when the determination of the quantum would become necessary for the assessment of the tax liability for the financial year in question. The provisions of the Act, which will determine the quantum of net wealth will not be the provisions, which existed on the date which is the date with reference to which the net wealth is to be computed, but the provisions, which are applicable during the period of assessment for which the tax is levied. Under s. 3 the unit of period for which the tax is levied is the unit of the financial year. The valuation date, which is the date with reference to which the net-wealth is to be computed, is the last day of the previous year. In the present case, the valuation date was March 31, 1959, but it is possible, according to the accounting year chosen by the assessee, that it could be a date much anterior to the commencement of the financial year for which the tax is levied. For instance, where the calendar year is the accounting year of the assessee, it would be December 31, or where the assessee has any other accounting year, like the Samvat years, the valuation date may be some time in October or November of the earlier year. Net-wealth for the purposes of the Wealth-tax Act will, no doubt, have to be determined with reference to these various dates in the case of various assessees, but the determination does not take place on those dates but in the financial year in which the tax liability is attracted by the net wealth. Nor is the tax attracted by the net wealth on those particular dates. If the law changes during the interval between the valuation dates and the date when the tax is actually attracted, which is at the commencement of the financial year for which the tax is charged, the tax that will be attracted will be in accordance with the provisions of the Wealth-tax Act as it stands at the time of the attraction of the tax and not as it was on the valuation date.

In our opinion, therefore, in the present case the rate that was applicable to the net wealth of the assessee for the assessment year 1959-60 was the rate which was to be found in the schedule of the Act as it stood on April 1, 1959.

Mr. Kolah, learned counsel for the assessee, has pressed upon us a different construction of s. 3 of the Wealth-tax Act. He has argued that on the language of s. 3, the tax is charged on the net wealth at the rate or rates, which are specified in the Schedule on the corresponding valuation date, with reference to which the net wealth is computed. The learned counsel has argued that the scheme of the Wealth-tax Act is different from the Income-tax Act. Under the Income-tax Act, the charging section only brings in the chargeability of the income to tax. The charge is actually imposed by the Finance Act, which is required to be passed for the purpose of the imposition of the tax. Under the Income-tax Act, therefore, although the income of the previous year is liable to charge, the actual charging or imposition of the tax is only when the rates are declared by the Finance Act. Even after the introduction of s. 67-B of the Indian Income-tax Act, whereby in the absence of the Finance Act being passed the rates under the earlier Finance Act are made to prevail, the position is not altered because the application of the rates under the earlier Act also does

not come in unless the Finance Act is not passed on or before the first of April of the year in question and consequently there is no charge of income-tax even according to the rates of the earlier Finance Act until the first of April of the year, which is necessarily after the last date of the accounting year, in which the income liable to income-tax is earned. That is, however, not so under the Wealth-tax Act. The entire machinery has been provided in the Act itself. The rates at which the tax is to be charged are not required to be brought in by another Act, as in the case of income-tax, but they are in the Wealth-tax Act itself. The entire machinery, not only for bringing in the chargeability of the net wealth to wealth-tax but also for the charging of the tax, is contained in the Act itself.

Mr. Kolah has argued that this difference in the schemes of the two Acts has got to be borne in mind in interpreting the charging section in the Act before us. According to him, the charging section has provided that a tax will be charged on the net wealth on the corresponding valuation date at the rate to be found in the Schedule of the Act. Although this taxation is for every financial year, the tax is charged on the net wealth on the date, which is the valuation date for the net wealth. The charging being on the date of the valuation the rate at which the charge will be made must obviously be the rate, which exists on the date of charging, viz. on the date of valuation. His argument is that such a construction must be put on s. 3 because of the expression "on the corresponding valuation date" following the words "in respect of the net-wealth" occurring in the said section. Mr. Kolah argues that if the charging was not intended to take place on the net wealth on the valuation date itself, those words, viz. "on the corresponding valuation date" were thoroughly redundant and not required to be used at all. The argument of the learned counsel is that 'net wealth' as defined in the Act means net wealth as computed on the valuation date, and "valuation date" is an expression which can only be understood with reference to the year of assessment for which the tax is levied, being the last day of the previous year relevant to the assessment year. The use of the word "net-wealth", therefore, was sufficient to mean net wealth as computed on the corresponding valuation date. The expression "on the corresponding valuation date", therefore, must have connection with the words "shall be charged" and "at the rate or rates specified in the Schedule" as occurring in the section and the meaning of the section, therefore, is that the tax, which is charged under this section, is charged on the valuation date on the net wealth as computed with reference to that date, and at the rate or rates as existed in the Schedule on the date of charging. Now, the words "on the corresponding valuation date" do appear to create some difficulty but we do not think that they have been used for the purpose and object as contended by Mr. Kolah. The tax charged by the section is a tax for every financial year commencing from the first day of April 1957. The subject-matter of the tax is the net wealth as it exists at certain specific point of time referred to as the valuation date with reference to each financial year for which the tax is charged. The subject-matter of tax, therefore, which is expressed by the expression "net wealth" is not a fixed or constant amount which is determined once and for all years of taxation, but a varying amount, which is capable of being different for different years of taxation. What is intended to be taxed in each financial year is the net wealth for that year, that is, the net wealth as computed on the valuation date in relation to that year. The charging section, which is a permanent provision providing for the charging of the tax for all financial years for which the Wealth-tax Act will be on the statute book has brought out that intention by specifying that in each financial year the tax will be charged in respect of the net wealth on the corresponding valuation date. In our opinion, it is for this reason that the words "on the corresponding valuation date" have been incorporated in the section after the words "in respect of the net wealth". We do not think that it is intended by s. 3 of the Wealth-tax Act that the wealth-tax for any financial year should

be actually charged at any point of time anterior to the commencement of the said year. If we were to accept the interpretation which is canvassed before us on behalf of the assessee, it may lead to some curious results. Thus, for instance, for the first year for which the Act applied, viz. the financial year 1957-58, no wealth-tax could be charged on the net wealth of the assessee. The valuation date for the first year would, in the case of every assessee, be anterior to the first of April 1957 when the Act came into force. If Mr. Kolah's interpretation of s. 3 is accepted that the tax is actually charged on the valuation date at the rate which is to be found in the Schedule as applicable on that date, there will be no charge to tax because there was no rate in the schedule of the Wealth-tax Act, which was applicable on that date. The entire Wealth-tax Act along with its schedule and the rates specified therein came into operation only on April 1, 1957. Although, therefore, the charging section of the Wealth-tax Act says that the tax will be charged for the financial year commencing from April 1, 1957, there will actually be no wealth-tax charged. Again, if the Legislature decides that from a certain financial year onwards the wealth-tax should be abolished either completely or partially or that it should be amended so as to increase the burden or grant relief against it, the provision will not take effect in spite of the said intention of the Legislature for at least a period of one year, because if the interpretation, which Mr. Kolah seeks to put upon the section is accepted, on the valuation date itself the net wealth gets computed under the provisions of the Act as it existed at that time and the tax at the rate applicable on that date also gets attached to it. We do not think that the meaning which Mr. Kolah wants to give to the language of s. 3 is the meaning which was intended by the Legislature.

Mr. Kolah has argued that curious and anomalous results will follow from the proper construction of the section is no reason for the Court to abandon such a construction. It may be true that where the provision of the statute is so clear as to leave no doubt as to what its meaning and construction is the mere circumstance that giving the section its proper meaning and effect is likely to lead to certain anomalous or curious results would not be a consideration for the Court to reject that construction. The defect in such cases will have to be cured by the Legislature. That is, however, so, where the position is such that the meaning of what the Legislature has said is clear and unambiguous and the section leads only to one construction and to no other. That, however, is not the position in the present case. In the first place the construction, which Mr. Kolah has sought to put on s. 3 does not appear to be the true and proper construction even on the language employed in the section. Assuming that the construction such as he has put on the section is one of the possible constructions, there is, in our opinion, a much better and a more reasonable construction, which the language of s. 3 is quite capable of yielding to. There can be no doubt whatsoever that, when there are two possible constructions even when both are equally possible, though such is not the position in the present case, if one of the constructions leads to curious and anomalous results and tends to defeat what the Legislature has intended, while the other produces no such results and is quite consistent with the scheme of the Act and the manifest intention of the Legislature, it is the latter one that will have to be preferred.

In order to emphasise his arguments that the scheme under the Wealth-tax Act is different from the scheme under the Indian Income-tax Act and that the difference between the two schemes has got to be borne in mind in interpreting the charging section in the Wealth-tax Act, Mr. Kolah has invited our attention to *Commr. of Wealth-tax v. Standard Mills Co. Ltd.*¹ and *Chatturam Horilram Ltd. v. Commr. of Inc.-tax*², where the scheme of the Income-tax Act with reference to the chargeability to tax under the Act and the imposition of the tax or the attraction of the tax liability have been considered. We do not wish to make any detailed reference to those cases because we are in

agreement with Mr. Kolah that there is undoubtedly a difference in the scheme of the two Acts. The charging section of the Wealth-tax Act, however, has got to be interpreted on its own language and in view of the scheme under the Wealth-tax Act and in giving our construction and interpretation to the said section, we have properly borne in mind the difference in the schemes of the two Acts, to which Mr. Kolah has invited our attention.

In the result, therefore, our answer to the question, which has been referred to us, is in the affirmative. The assessee will pay the costs of the Department.

Answer accordingly.

EXPENDITURE-TAX REFERENCE.

Before Mr. Justice Tambe and Mr. Justice V. S. Desai.

COMMISSIONER OF EXPENDITURE-TAX, BOMBAY CITY-I

v.

LALCHAND HIRACHAND.*

Expenditure-tax Act (XXIX of 1957), Sec. 4(ii)—Asset obtained by coparcener at partial partition of joint Hindu family—Whether such asset source created by family within s. 4(ii).

What a coparcener in a joint Hindu family gets at the partition, even when the partition is partial, does not constitute a source created by the Hindu undivided family within the meaning of s. 4(ii) of the Expenditure-tax Act, 1957, before its amendment in 1959.

THE facts appear in the judgment.

G. N. Joshi, with *R. J. Joshi*, instructed by *P. G. Gokhale*, for the applicant.
S. P. Mehta, with *Y. P. Trivedi*, for the respondent.

V. S. DESAI J. The assessee is a Hindu undivided family, consisting of a father, a major son and two minor sons, as its coparceners. Prior to the accounting year in question, a partial partition took place in this joint Hindu family, whereby the shares of joint stock companies held by the family came to be divided amongst the members of the family entitled to property on partition. This partial partition was recognised by the Income-tax authorities and the father and the sons in their individual capacity were assessed to tax in respect of the income derived by them from the assets obtained by them at the partial partition. Out of the said incomes which the sons had received from the said assets, they had incurred expenditure on themselves in the amounts of Rs. 11,169, Rs. 7,582 and Rs. 17,427, respectively. In the assessment for expenditure tax of the Hindu undivided family in the assessment year 1958-59, for which the relevant account year was the year ending March 31, 1958, the Expenditure Tax Officer included in the taxable expenditure of the Hindu undivided family the above mentioned sums of expenditure incurred by the three sons out of the income of the assets obtained by them on partial partition. According to the Expenditure Tax Officer, these amounts were liable to be included in the taxable expenditure of the Hindu undivided family under s. 4(ii) of the Expenditure-tax Act, as it stood at the material time, because in his view the sources out of which the expenditures were incurred by the sons were the sources which were made or created by the Hindu undivided family within the meaning of s. 4(ii) of the Act. The view of the Expenditure Tax Officer was upheld by the Appellate Assistant Commissioner in appeal. In the second appeal, which the assessee preferred to the Appellate Tribunal, the said Tribunal disagreed with the view taken by the departmental authorities and held that the said amounts were not from sources made or created by the

*Decided February 15, 1965. Expenditure-tax Reference No. 1 of 1962.

Hindu undivided family and were, therefore, not liable to be included under s. 4(ii). It accordingly allowed the appeal and directed the deletion of the said items from the taxable expenditure of the assessee. On an application made to it by the Department under s. 25(1) of the Expenditure-tax Act, 1957, the Tribunal has drawn up a statement and referred to this Court the following question as arising out of its order:

"Whether on the facts and in the circumstances of the case, the expenditure incurred by the dependants of the family amounting to Rs. 11,169/-, Rs. 7,582/- and Rs. 17,427/- was liable to inclusion in the Expenditure-tax assessment of the assessee family having regard to the provisions of section 4(ii) of the Act before its amendment in 1959."

In our opinion, the conclusion of the Tribunal that these items were not liable to inclusion is correct and the question, therefore, must be answered in the negative. The provision under which the amounts were sought to be included by the Department is as follows:

"4. Unless otherwise provided in section 5, the following amounts shall be included in computing the expenditure of an assessee liable to tax under this Act, namely:—

(i) ...

(ii) any expenditure incurred by any dependant of the assessee for the benefit of the assessee or of any of his dependants out of any gift, donation or settlement on trust or out of any other source made or created by the assessee, whether directly or indirectly." The "assessee" under the Act, means an individual or a Hindu undivided family by whom expenditure tax or any other sum is payable under the Act. A "dependant" means where the assessee is a Hindu undivided family, every coparcener other than the *Karta* and any other member of the family, who under any law or order or decree of a Court is entitled to maintenance from the joint family property. "Expenditure" under the Act includes any sum in money or money's worth spent or disbursed by an assessee. Now, under the relevant provision with which we are concerned, the expenditure to which the said provision will apply must be an expenditure incurred by a dependant of the assessee. It must be incurred for the benefit of the assessee or any of the dependants of the assessee, and the sums out of which it must be incurred must be a gift, donation or settlement on trust or any other source which must be made or created by the assessee either directly or indirectly. In the case before us, the three persons who have incurred the expenditures are coparceners of the assessee Hindu undivided family and are, therefore, dependants within the meaning of s. 2(g) of the Act. The expenditure incurred by them can also be regarded as for the benefit of the dependants of the assessee, since they themselves are the dependants of the assessee. The only question is whether the source from which the said expenditure is made by them is a source of the kind mentioned in the last part of the provision. Now, the expenditure which the three sons have incurred is from the income of the shares which they obtained at the partial partition of the property of the Hindu undivided family. There can be no doubt whatsoever that the partition of the joint family property cannot be regarded as a gift, donation or settlement on trust made by the Hindu undivided family. What has got to be seen is whether the partial partition could be regarded as a source made or created by the Hindu undivided family. It is contended by Mr. Joshi, learned counsel, who appears for the Department, that since the Hindu undivided family is not disrupted and continues to exist, the partial partition could be regarded as an act of the Hindu undivided family creating different sources to be exclusively owned and possessed by the different coparceners of the Hindu undivided family, and therefore, sources made or created by the Hindu undivided family. Now, it must be remembered that the arrangement whereby the three sons have been given the shares possessed by the family for being owned and possessed by them separately, is not an arrangement made by way of convenience for the time being. It is as a result of an act of partial partition of the joint family property that the three sons have come to possess these shares. A partition in a

Hindu Joint family could be a partial partition with regard to some of the properties of the Hindu joint family without disrupting the joint family status of the family with regard to the rest of the properties, and without disrupting the coparcenary. The partial partition, however, is in pursuance of the right possessed by the members of the coparcenary to come to a partition under the Hindu law. What a coparcener gets on partition is not what is given to him by the joint family, but what he has a right to obtain by virtue of his birth in the family. It is not, therefore, possible to say that what a coparcener gets at the partition, even when the partition is partial, is something which is given to him by the family so as to constitute a source created by the family within the meaning of s. 4(4) of the Expenditure-tax Act. The circumstance that the joint family exists and continues with regard to the rest of the property does not have the result of what the coparceners have obtained on partial partition as something which has been given to them by the joint family. In our opinion, therefore, the expenditures incurred by the three sons in the present case cannot be considered as expenditures incurred by them out of the source made or created by the assessee Hindu undivided family.

In the result, therefore, we answer the question which is referred to us in the negative. The Department will pay the costs of the assessee.

Answer accordingly.

WEALTH-TAX REFERENCE.

Before Mr. Justice Tambe and Mr. Justice V. S. Desai.

G. S. PODDAR

v.

THE COMMISSIONER OF WEALTH-TAX, BOMBAY CITY II.*

Wealth-tax Act (XXVII of 1957), Sec. 5(1)(viii), (xii), (xiii)—Furniture in s. 5(1)(viii) whether includes what is contained in it—Household utensils whether means what is merely in shape of such utensils and not intended to be used as such—Personal use, what constitutes.

Under s. 5(1)(viii) of the Wealth-tax Act, 1957, exemption in respect of furniture does not include what is placed or contained in the article of furniture. Therefore, articles contained in show cases exhibited in drawing-rooms do not form part of the show cases as items of furniture and where they are intended to be excluded, a specific provision is made for their exclusion, e.g. in clauses (xi) and (xii) of s. 5(1) of the Act. Gold caskets although contained in a show case which is part of the drawing-room furniture, are not entitled to exemption under s. 5(1)(viii).

The expression "household utensils" in s. 5(1)(viii) of the Act means utensils which are in fact household utensils i.e. articles which are normally and commonly used by the assessee for his personal or household use and not something which is merely in the shape of household utensils but never intended to be used as such. The use must be according to the ordinary ideas, habits, customs and notions of the class of society to which the assessee belongs or according to the well established habits, customs and traditions of the family of the assessee. The mere possibility that the articles are capable of being put to a personal or household use will not be sufficient to treat them as intended for a personal or household use. The question whether the articles are intended for personal or household use has to be considered with reference to the facts and circumstances as they exist at the time when the question has to be determined.

The personal use contemplated in s. 5(1)(viii) of the Act is the use of a like nature as the use of other items mentioned in the section, namely, furniture, household utensils, wearing apparel and provisions. The use as a decoration in the drawing-room in the house, which is only calculated to give the person making the use a

*Decided, February 18, 1965. Wealth Tax Reference No. 8 of 1962.

pride of possession is not contemplated in the section. The articles which are intended to give pride of possession and not intended for sale by the assessee are provided for in the other clauses of the section, for instance, cls. (xii) and (xiii). Souvenirs or mementoes which are articles not intended for sale but are only possessed to give the possessor a pride of possession are, however, not exempted under any of the clauses of s. 5 of the Act.

THE facts are stated in the judgment.

S. P. Mehta and *Y. P. Trivedi*, for the applicant.

G. N. Joshi, instructed by *P. G. Gokhale*, for the respondent.

V. S. DESAI J. In the wealth-tax assessment of the assessee for the assessment year 1959-60, for which the relevant valuation date was March 31, 1959, the assessee claimed exemption in respect of certain gold and silver articles under s. 5(I)(viii) of the Wealth-tax Act. He was allowed exemption in respect of the silver articles, but the exemption was disallowed in respect of the gold articles which were valued at Rs. 51,600. The question which arises for consideration on this reference under s. 27(I) of the Wealth-tax Act, at the instance of the assessee, is:

"Whether on the facts and in the circumstances of the case the assessee was entitled to exemption from tax in respect of the gold articles valued at Rs. 51,600/- in terms of section 5(I)(viii) of the Act?"

The gold articles in question consist of two gold caskets weighing 225 tolas, gold tray of 70 tolas, two gold glasses weighing 42 tolas, a gold cup saucer and spoons together weighing 32 tolas, and photo-frames weighing 61 tolas. The total gold contained in these articles is 431 tolas, and its valuation at the relevant time was Rs. 51,600. The assessee was connected with business in cloth manufactured by the textile mills under the management of M/s. Tata Sons Ltd. In the year 1945, the assessee was appointed a Justice of Peace, and the occasion was celebrated by the dealers and brokers in cloth manufactured by the mills, with whose business the assessee was connected. On the occasion of celebration, these articles were presented to the assessee as souvenirs. Ever since that time the assessee kept these articles in a glass show case for display in his drawing room. Before the Wealth Tax Officer, the assessee contended that these articles were household utensils, which were put to daily use, and, therefore, entitled to exemption. The claim was rejected by the Wealth Tax Officer, who held that the household utensils for daily use, which were exempted under s. 5(I)(viii) of the Wealth-tax Act were ordinary utensils for day to day or ordinary use, and not utensils of gold which were meant for ornamental use for special occasions. Before the Appellate Assistant Commissioner, the same stand was taken by the assessee, namely, that in view of the traditions of the family, the articles in question were of normal nature and were utensils for the day to day use of the appellant-assessee. The Appellate Assistant Commissioner took the view that the exemption under the relevant provisions of the Wealth-tax Act applied only to the normal requirements of household from day to day, and not to articles which were in the form of jewellery. He, therefore, confirmed the decision of the Wealth Tax Officer, disallowing the exemption.

In the second appeal before the Appellate Tribunal, the assessee did not persist in saying that the articles were household utensils for the personal or household use of the assessee, but contended that they fell within the expression "other articles intended for the personal or household use of the assessee" contained in s. 5(I)(viii) of the Act. That claim of the assessee was negatived by the Tribunal, although the two Members of the Tribunal put their reasons for negating the claim on slightly different grounds. According to the Accountant Member, the expression "other articles intended for personal or household use of the assessee" used in the relevant provision must be

construed *ejusdem generis* with the other items which were specified in the said provision, namely, furniture, household utensils, wearing apparel and provisions, and when so construed, they must be taken to mean articles which are intended for consumption as distinguished from decoration or ornamentation. According to him, the word "use" as used in the expression "other articles intended for the personal or household use of the assessee", meant *something different from ornamentation or decoration*, and necessarily in the context, the use contemplated, whether it is personal use or household use, is such that the article itself is consumed by the use to which it is put. He pointed out that the assessee had clearly admitted that the articles were put in a glass show case which was kept in the drawing room, and they served not only the purpose of decoration, but as souvenirs, so that the assessee when he looked at them recalled happily the memory of the event that took place in 1945 when he was appointed a Justice of Peace. Having regard to the use to which the articles were put according to the assessee, the Accountant Member was of the opinion that the said use was not the personal or household use which was intended by the relevant provision. The Judicial Member was of the opinion that in order to find out whether the articles in question were intended for the personal or household use of the assessee, it was the intention of the assessee and the use to which he had actually put the articles, which were the main criteria for determining the question. Since, on the facts and in the circumstances of the case, the assessee had never intended to put the articles to a personal or household use and had used them only as articles of drawing-room decoration, the articles could not be regarded as being qualified for the exemption under the relevant provision. Since both the learned Members of the Tribunal were of the opinion that the articles were not entitled to exemption, they confirmed the decision of the departmental authorities, and dismissed the appeal of the assessee. Thereafter, at the instance of the assessee, they have drawn up the statement of the case, and referred to this Court the question which we have stated earlier.

The relevant clause under which the exemption is claimed, allows exemption in respect of:

"furniture, household utensils, wearing apparel, provisions and other articles intended for the personal or household use of the assessee."

In order to come within the exemption given by this clause, the articles in question must fall within any of the items mentioned therein. Before the departmental authorities, the exemption was claimed on the basis that they were household utensils. The two gold caskets together weighing 225 tolas can by no stretch of imagination be regarded as household utensils. Mr. Mehta, learned counsel appearing for the assessee, has contended that on the facts and on the material on record, they could be regarded as items of furniture. He points out that they are kept in the drawing room in a show case. The show-case, according to him, is undoubtedly a part of the furniture, and he suggests that the show case with its contents is also intended to be and forms part of the drawing room furniture of the assessee. We do not think that gold caskets, simply because they are put in a show case, which is part of the drawing room furniture, also become items of furniture. Nor do we think that the Legislature has intended to include in the items of furniture what is placed or contained in the articles of furniture. A reference to cls. (xii) and (xiii) of the said section will show that works of art, archaeological, scientific or art collections, books or manuscripts belonging to the assessee and not intended for sale are allowed exemption. Works of art, or books or manuscripts, scientific or art collections may be exhibited in show cases in the drawing-rooms. They would not be parts of the furniture. Similarly, under cl. (xiii), drawings, paintings, photographs, prints and any other heirloom not falling within cl. (xii) and not intended for sale, but not including jewellery, are also exempted. Several of these items may be exhibited in show cases. The articles, therefore, which are contained in the show cases exhibited in the drawing-rooms are not intended by

the Legislature as forming part of the show cases as items of furniture, and where they are intended to be excluded, a specific provision is made for their exclusion. We do not think, therefore, that the gold caskets, which by themselves are not an item of furniture, will come in for inclusion as a part of the furniture, because they are contained in a show case kept in the drawing-room. There is no doubt whatsoever, therefore, that the two gold caskets would not be entitled to exemption.

As to the rest of the articles, namely, the gold tray, two gold glasses, gold cup, saucer and spoon, and the photoframes, all of them perhaps with the exception of the photoframes, which are ornamental, have the shape of household utensils. The question, however, to be considered is whether, because the articles are in the shape of household utensils, they would necessarily be entitled to exemption under cl. 5(I)(viii) of the Act. Now, in the first place, it may be stated that the assessee before the Tribunal did not argue his case on the basis that the articles in question were household utensils. He admitted that they were not household utensils, and that they had not been put to any such use at any time. His case before the Tribunal was that they were articles other than household utensils intended for the personal use of the assessee. It seems to us that even apart from the circumstance that it was not the assessee's case before the Tribunal that they were household utensils, what is meant by the expression "household utensils" in the clause are utensils which are in fact household utensils and not something which is merely in the shape of household utensils but never intended to be used as such. It seems to us that the intention of the Legislature in prescribing the exemption under the said provision is to allow exemption in the case of articles which are of common and ordinary personal or household use of the assessee. In other words, the articles which are normally and commonly used by the assessee either for his personal or household use like the furniture, household utensils, provisions and wearing apparel, etc. are allowed exemption. The idea in allowing exemption has reference to the use and the purpose of the articles and not to the form or shape that it has. Suppose for instance the assessee were to have the gold and silver in his possession given the shape of articles of furniture as for instance chairs, tables, benches etc., it is hardly possible to contend that because the articles have the shape of articles of furniture that they must qualify themselves for exemption as furniture. It is no doubt true in the present case that the articles have the shape of household utensils, but they would not be by their very shape be qualified for exemption as household utensils if they are in fact in truth not household utensils and neither held or possessed for that purpose nor meant or intended to be used as such. On the facts which are admitted by the assessee, and are found by the Tribunal, there is no doubt whatsoever that these articles, though having a shape of household utensils, were never regarded by the assessee as household utensils, and he never intended to use them as such, nor did he ever put them to any such use. It is not possible for the articles, therefore, to claim exemption as household utensils.

It next falls to be considered whether they would claim exemption as "other articles intended for personal use of the assessee". It seems to us in the first place that the personal use which is contemplated by the expression is the use of a like nature as the use of other items mentioned in the clause, namely, furniture, household utensils, wearing apparel and provisions. The use as a decoration in the drawing-room in the house, which is only calculated to give the person making the use a pride of possession is not contemplated under this provision under which the exemption is claimed. The articles which are intended to give pride of possession and not intended for sale by the assessee are provided for in the other clauses of the section, for instance, cls. (xii) and (xiii), to which we have already referred. Mr. Mehta has contended that the articles with which we are concerned, like the articles mentioned in cls. (xii) and (xiii) are not intended for sale, but are only intended to give the assessee a pride of possession and help him to recall the happy memory of the distinction and

honour which he received years ago. Mr Mehta argues that the articles which are not intended for sale but are only possessed to give the possessor a pride of possession are intended to be excluded by the Legislature. There is no reason why the articles, with which we are concerned in the present case, should also not be granted exemption. It must, however, be remembered in the first place that no exemption has been claimed on any such ground or under any other clause of s. 5, excepting s. 5(1)(viii). Secondly, s. 5 is exhaustive of the exceptions, and the articles entitled to exemption must find their place in any of the clauses of s. 5 providing for such exemption. Of the category of articles which could be exempted on the ground that they are not intended for sale, but only give the owner a pride of possession, the exempted articles are mentioned in cls. (xii) and (xiii). It may well be asked as to why the articles of the present nature, which are souvenirs or mementoes and which stand on par with the articles mentioned in cls. (xii) and (xiii) should not have been allowed exemption. That, however, is for the Legislature to consider and not for us. What we have got to consider is whether they are actually exempted under the existing provisions, and the circumstance that we may be inclined to be of the view that they deserve exemption, will not enable us to allow exemption if the existing provisions of the statute do not allow it.

Mr. Mehta has then argued that the expression "intended for the personal or household use" should be interpreted to mean capable of being intended for personal or household use so that if the articles are such as can be put to a personal or household use if so intended by their owners they would be entitled to exemption. The articles in the present case are such, says Mr. Mehta, because it is possible that the assessee in his declining age may think of using them for taking his morning or evening tea. We think that the expression "intended for the personal or household use" would mean normally, commonly or ordinarily intended for personal or household use according to the ordinary ideas, habits, customs and notions of the class of society to which the assessee belongs or according to the well established habits, customs and traditions of the family of the assessee. The mere possibility, therefore, that the articles are capable of being put to a personal or household use would not be sufficient to treat them as intended for a personal or household use. Moreover, the question whether the articles are intended for personal or household use has got to be considered with reference to the facts and circumstances as they exist at the time when the question has to be determined. On the facts as found, at the time when the assessee came in possession of these articles he did not intend to put them to a personal or household use nor has he put them to any such use at any time thereafter so far. In the present assessment at any rate the assessee cannot get exemption for the said articles on the ground that they are intended for personal or household use. What the position will be in future assessment if the assessee starts using these articles for his personal use hereafter we need not consider at present. As things stand at present, we are of the opinion that the decision of the Tribunal is correct, and the assessee is not entitled to exemption under s. 5(1)(viii) of the Wealth-tax Act in respect of the gold articles.

Our answer, therefore, to the question which has been referred to us is in the negative. The assessee will pay the costs of the Commissioner.

Answer accordingly.

Before Mr. Justice Tambe and Mr. Justice V. S. Desai.

ABHAY L. KHATAU

v.

THE COMMISSIONER OF WEALTH-TAX, BOMBAY CITY II.*

Wealth-tax Act (XXVII of 1957), Sec. 3—Indian Income-tax Act (XI of 1922), Sec. 3—Group of trustees holding wealth as trustees—Whether such trustees can be assessed to wealth-tax.

A group of trustees can be assessed to wealth-tax under the Wealth-tax Act, 1957, in respect of the wealth held by them as trustees.

Suhashini Karuri v. Wealth-tax Officer,¹ *Commr. of Inc.-tax v. Sodra Devi*² and *Seth Benarasi Das's case*,³ referred to.

THE facts appear in the judgment.

B. A. Palkhivala, with *Payne & Co.*, for the applicant.

G. N. Joshi and *R. J. Joshi*, instructed by *P. G. Gokhale*, for the respondent.

V. S. DESAI J. The short question which arises for consideration on the present reference is whether a group of trustees can be assessed to wealth-tax under the Wealth-tax Act in respect of the wealth held by them as trustees. This question has been referred to us by the Tribunal under s. 27(1) of the Wealth-tax Act, 1957, in the form of two questions, which are as follows:

"(1) Whether the assessments under the Wealth-tax Act are valid?

(2) If the answer to the above question is in the affirmative, whether the status of the assessee is 'Individual'?"

The charging section, which is s. 3, of the Wealth-tax Act provides that

"Subject to the provisions contained in this Act, there shall be charged for every financial year ending on and from the first day of April, 1957, a tax (hereinafter referred to as the 'wealth-tax') in respect of the net wealth on the corresponding valuation date of every individual, Hindu undivided family and company at the rate or rates specified in the Schedule."

It is argued on behalf of the assessee that it is only an individual, Hindu undivided family or a company that can be taxed to wealth-tax, and neither a group of individuals or an association of persons. The assessee in the present case, it is contended, is not an individual, but a group of persons or an association of persons, and do not, therefore, fall within the ambit of s. 3. The contention raised by the assessee in the present case has been answered by the Calcutta High Court against the assessee in *Suhashini Karuri v. Wealth-tax Officer*.¹ It has been held in that case that

"Joint trustees must be taken to be a single unit in law and not as an 'association of persons' and there is nothing wrong in treating such an unit as an individual holding property and becoming assessable under section 3 of the Wealth-tax Act for purposes of wealth-tax."

The view taken in that case was that having regard to the nature of joint trusteeship, all the co-trustees together formed, as it were, a collective trustee, and the body of trustees, therefore, could be regarded as a unit for the purposes of taxation and fell within the term "individual". In taking this view the learned Judges who decided the case found support in the observations of the Supreme Court in the case of *Commr. of Inc.-tax v. Sodra Devi*.² In that case, their Lordships of the Supreme Court were concerned with the interpretation of the word "individual" in s. 16 of the Indian Income-tax Act. It was observed that the word "individual" was wide enough to include

*Decided, March 3, 1965. Wealth-tax Reference No. 3 of 1962.

1 (1961) 46 I.T.R. 953.

2 (1957) 32 I.T.R. 615.

3 (1964) Civil Appeals Nos. 124 to 129

of 1964, decided on December 8, 1964 (Supreme Court).

1 (1961) 46 I.T.R. 953.

2 (1957) 32 I.T.R. 615.

a group of persons forming a unit. In a recent decision of the Supreme Court in (*Seth Banarsi Das's case*)³ the Supreme Court after having referred to its decision in *Sodra Devi's case*, have observed again that though the word "individual" is narrower than the word "assessee", it does not mean only a human being, but is wide enough to include a group of persons forming a unit.

Mr. Palkhivala, learned counsel appearing for the assessee, has sought to argue that a comparison of s. 3 of the Indian Income-tax Act with s. 3 of the Wealth-tax Act will show that while under s. 3 of the former Act, individuals, Hindu undivided family, company, local authority and every firm and other associations of persons or partners of the firm are brought within the ambit of the charging section, only three of them, viz., individual, Hindu undivided family and company, are charged under s. 3 of the Wealth-tax Act. This would, according to the learned advocate, indicate that associations or groups of persons forming a unit, are not intended to be charged to wealth-tax. In the first place, this argument was advanced in the Calcutta case to which we have already made a reference, and has been negatived there. As pointed in that case, if having regard to the nature of the group, it could be treated as a single collective unit, the term "individual" will be wide enough to include it. Secondly, it seems to us that the mere difference in the language of s. 3 of the Indian Income-tax Act and s. 3 of the Wealth-tax Act will not be sufficient to warrant that some of the categories or items mentioned in the former Act are intended to be omitted in the latter Act. If the words retained in the latter Act are sufficiently wide in their ambit to include even those categories or items which have been additionally mentioned in the first Act, it could not be said that they were intended to be omitted simply because they have not been similarly additionally stated in the latter Act. Mr. Palkhivala has then argued that if groups or associations of persons who were capable of being treated as a unit were intended to be included in the word "individual", there was no reason whatsoever to mention a Hindu undivided family separately. His argument, therefore, is that the mention of the Hindu undivided family, which is an association of persons, implies that other associations of persons are intended to be excluded. We do not think that the argument is sustainable. Although a Hindu undivided family consists of a number of persons it is not an association of persons or a firm or a company which is created by the act of parties. It consists of all persons lineally descended from a common ancestor and includes their wives and unmarried daughters. Its fundamental principle is the tie of sapindaship arising by birth, marriage or adoption. The Hindu undivided family with all its incidents is purely a creature of Hindu law and cannot be created by act of parties. It is because of the peculiar characteristics of the institution which distinguishes it from an association of persons or a firm or a company that the taxation laws which want to treat it as a unit for taxation have mentioned it as a distinct unit. We do not, therefore, think that the argument can be advanced that the mention of the Hindu undivided family as a unit of taxation under s. 3 of the Wealth-tax Act is intended to exclude other groups or associations of persons which are capable of being treated as a unit.

In the result, therefore, our answer to both the questions, which have been referred to us, are in the affirmative. The assessee will pay the costs of the Commissioner.

Answer accordingly.

3 (1964) Civil Appeals Nos. 124 to 129 decided on December 8, 1964 (Supreme Court).

SUPREME COURT.

Present: Mr. Justice A. K. Sarkar, Mr. Justice K. Subba Rao, Mr. Justice Raghubar Dayal, Mr. Justice N. Rajagopala Ayyangar and Mr. Justice J. R. Mudholkar.

GULABCHAND CHHOTALAL PARIKH

v.

THE STATE OF GUJARAT.*

Civil Procedure Code (Act V of 1908), Sec. 11—Constitution of India. Arts. 226, 32—Decision of High Court on merits on writ petition under art. 226—Whether such decision operates as *res judicata* in subsequent suit between same parties in respect of same matter—Provisions of s. 11 whether exhaustive—Applicability of general principles of *res judicata*.

On the general principle of *res judicata*, the decision of the High Court on a writ petition under art. 226 of the Constitution of India on the merits on a matter after contest will operate as *res judicata* in a subsequent regular suit between the same parties with respect to the same matter.

The provisions of s. 11 of the Civil Procedure Code, 1908, are not exhaustive with respect to an earlier decision operating as *res judicata* between the same parties on the same matter in controversy in a subsequent regular suit and on the general principle of *res judicata*, any previous decision on a matter in controversy, decided after full contest or after affording fair opportunity to the parties to prove their case by a Court competent to decide it, will operate as *res judicata* in a subsequent regular suit. It is not necessary that the Court deciding the matter formerly be competent to decide the subsequent suit or that the former proceeding and the subsequent suit have the same subject-matter. The nature of the former proceeding is immaterial.

Decisions on matters in controversy in writ proceedings under arts. 226 or 32 of the Constitution are not precluded from operating as *res judicata* in subsequent regular suits on the same matters in controversy between the same parties.

Smt. Bimla Chopra v. Punjab State,¹ overruled.

Manahem v. Union of India,² approved.

L. Janakirama Iyer v. P. M. Nilakanta Iyer,^{3a} explained.

Hook v. Administrator-General of Bengal,⁴ *Ramachandra Rao v. Ramachandra Rao*,⁵ *Kalipada De v. Durjapada Das*,⁶ *Bhagwati v. Ram Kali*,⁷ *Sheoparsan Singh v. Ramnandan Singh*,⁸ *Raj Lakshmi Dasi v. Banamali Sen*,⁹ *Pandit M. S. M. Sharma v. Dr. Shree Krishna Sinha*,¹⁰ *Daryao v. The State of U. P.*,¹⁰ *The Amalgamated Coalfields Ltd. v. The Janapada Sabha, Chhindwara*¹¹ and *Devilal Modi v. Sales Tax Officer, Ratlam*,¹² referred to.

Quære: Whether the principles of constructive *res judicata* can be invoked by a party to the subsequent suit on the ground that a matter which might or ought to have been raised in the earlier proceeding was not so raised therein.

THE facts appear in the judgment.

S. T. Desai, with *I. N. Shroff*, for the appellant.

S. G. Patwardhan, with *R. H. Dhebar*, for the respondent.

RAGHUBAR DAYAL J. [*Sarkar, Rajagopala Ayyangar and Mudholkar JJ.*, concurring; *Subba Rao J.*, dissenting.] This appeal, by special leave, raises the question whether a decision of the High Court on merits on a certain matter

*Decided, December 14, 1964. Civil Appeal No. 670 of 1963.

1 (1963) 65 Punj. L.R. 945.

2 [1960] A.I.R. Bom. 196, s.c. 61 Bom L.R. 1388.

2a [1962] Supp. 1 S.C.R. 206.

3 (1921) L.R. 48 I.A. 187.

4 (1922) L.R. 49 I.A. 129.

5 (1929) L.R. 57 I.A. 24.

6 (1939) L.R. 66 I.A. 145.

7 (1916) L.R. 43 I.A. 91.

8 [1953] S.C.R. 154.

9 [1961] 1 S.C.R. 96.

10 [1962] 1 S.C.R. 574.

11 [1963] Supp. 1 S.C.R. 172.

12 (1964) Civil Appeal No. 294 of 1964, decided on October 7, 1964 (Supreme Court).

after contest in a writ petition under art. 226 of the Constitution operates as *res judicata* in a regular suit with respect to the same matter between the same parties.

The facts leading to the appeal are these. The appellant stood surety for a number of contractors who had taken contracts in 1947 for felling timber trees and removing timber in various forests in the erstwhile State of Baria. The contracts were taken as a result of auctions which took place under the 'Conditions of Auction Sale of Forests in the Baria State in the Samvat year 2002' corresponding to 1945-46 A.D., though in the plaint these conditions were referred to as Forest Auction Rules. On April 7, 1948, the appellant presented an application to the Baria State stating therein that certain brokers owed money to the various contractors mentioned in the application and praying that they be restrained to pay the amount due to the contractors until further orders and that those brokers and contractors be also restrained from directly removing the contractors' jungle goods stored in the godowns at Piplod, Baria and Limkheda without the permission of the State Government. It was further mentioned in the application that if those contractors would arrive at an arrangement with him and carry out the *vahivat*, he would do the needful in that behalf. On this application, it appears, the State Government issued notices to the contractors stating therein that the surety, i.e., the appellant, had moved, under cl. 8 of the Conditions of the Auction Sale of jungle goods for attachment of their goods that be lying in the godowns at Baria, Piplod and Limkheda in the State and the debts or other movable or immovable property belonging to them and for delivering the same to him and directed the contractors not to sell, mortgage, gift away or otherwise dispose of whatever movable or immovable property they had in the State without the permission of the State.

Subsequently, the State of Baria merged with the State of Bombay on June 10, 1948. Thereafter, the contractors were allowed by the Government to remove the materials on certain conditions.

The appellant presented a writ petition under art. 226 of the Constitution to the High Court of Bombay. That petition is not printed in the appeal record. It was Civil Application No. 261 of 1952. It, along with two other applications, C. As. Nos. 260 and 376 of 1952, was disposed of by a common judgment in C.A. 260 of 1952 which is exh. P. 194. The parties agree that what was alleged and what was prayed for by the appellant in his petition could be gathered from the order exh. P. 194. The reply filed by the parties in that petition is exh. P. 196 and gives the case of the opposite party with respect to the allegations of the appellant in his petition. It however appears from the order of the High Court on that writ petition that the reliefs claimed were a direction to the respondents i.e., the State of Bombay and the Mamlatdar of Baria Taluka to raise the attachment levied on Municipal Nos. 728 and 642 of Deogad Baria, the issue of a writ of *mandamus* or directions under art. 226 of the Constitution prohibiting them from selling those Municipal numbers and from proceeding with the auction sale of those properties on February 15, 1952, or on any other date. The appellant had alleged in that petition that the attached properties of the contractors were allowed to be sold by the contractors without the knowledge and consent of the appellant, that the sale was unauthorised and contrary to the terms of the attachment levied by the State and that, therefore, it had put an end to the liability of the appellants under their surety bonds.

It was urged for the appellant at the hearing of that petition that since the State allowed the contractors to sell their own properties the appellant had been discharged from his suretyship in respect of the said contractors and that the State could no longer claim to recover from him the balance due from the said contractors. The writ application was presented because, in default of the contractors to pay the balance amount due from them the Forest Officers of the Government of Bombay had moved the Revenue Officers to recover the said

amount from the appellant who was the surety as an arrear of land revenue. The revenue authorities took steps to attach the immovable properties of the appellant and that led the appellant to present that petition.

The contentions for the State of Bombay and the Mamlatdar in the writ proceedings were:

1. The petition was misconceived as not maintainable and there was no case for the issue of a writ of mandamus because the proper course for the appellant was to redress his so-called grievance by proceeding according to the ordinary law through the Municipal Courts.

2. There were no Baria State Forest Auction Rules. What the Baria State Authorities laid down were the conditions of such auction sales and the appellant's reference to those conditions as rules was not correct.

3. The contractors had to furnish a surety who also had to execute a separate and independent agreement with the State in the Form approved by it. The appellant stood surety for the contractors and executed the necessary agreements.

4. The said agreements stipulated three important conditions (i) that the surety will pay the instalment amount as stipulated; (ii) that if the instalments were not paid on due dates, he will pay interest at one pie per rupee per day and (iii) that if he fails to pay the instalment amounts and the interest, the State will be at liberty to recover the same from any of his properties and from his successors and assignees.

5. Condition No. 8 of the conditions for auction sales of forests was:

"So long as the contractor has not paid the deposit or the confirmed sale price in full into the Treasury or to the Surety, the Surety shall, at any time present an application to the Treasury Officer for the recovery of an amount required to discharge his liability in connection with the confirmed sale price or of the amount paid by him without filing a suit for the same in a civil Court. In that case the property, effects and debts of the contractor that may be within the territory of the State shall, as in the case of land revenue, be attached and auctioned at the cost and risk of the contractor and out of the sale proceeds realised at the auction, the amount due to the surety or an amount equivalent to the amount required to discharge his liability shall be paid to the Surety."

6. The appellant had not applied for attachment and sale of all the properties and outstandings of the contractors but had requested the State to see that the brokers did not pay their dues to the contractors, that the materials in the depots were not directly disposed of by the contractors and that the contractors carried on the business after settling with the petitioner.

7. The State issued the necessary injunction orders of attachment, even though the appellant's request dated April 7, was not at all consistent with the provisions of sale condition No. 8.

8. In order to obviate the complete hold up of the timber trade, a system was devised whereby the contractors were allowed to dispose of the stock of timber, if the sureties consented to its removal and the contractors guaranteed to pay the price realised to the sureties concerned.

9. According to the record, the appellant had requested the State to release the goods of certain contractors by his letters dated May 19 and 22, of 1948. This scheme adopted by the State of Baria was solely motivated in view of the inevitable delay on account of the sureties first realising the amount and then depositing the amount in the Government treasury and the appellant was aware of that slight modification in the procedure.

10. At a meeting convened by the Divisional Forest Officer, Panchmahals, Godhra, on August 1, 1948, the appellant was present and it was decided that the contractors be permitted to remove the material on payment of the price of the materials sold.

11. It was denied that as a result of the alleged action of the Forest Officers, the petitioner's security was considerably diminished and the eventual remedy of the petitioner against the contractors was very much impaired and the petitioner was discharged from his suretyship in respect of the said contracts.

The High Court dismissed the writ petition on July 22, 1952, holding that there was no substance in the contention that the petitioners had been dis-

charged from their liability as sureties. The sole basis on which the contention was raised was that the contractors were permitted by the State to sell their properties which were under attachment contrary to the terms of the attachment, in view of the sales being held without the knowledge and consent of the appellant. The High Court held that it was a wrong assumption of the appellant that the attached goods were not to be sold without his knowledge and consent. The prayer made by the appellant in his application dated April 7, 1948, did not include a prayer to the effect that the attached goods be not sold without his knowledge and consent. The High Court, therefore, held that the plea that the sales absolved the appellant from his liability as surety could not be accepted.

We are no more concerned with the other point raised by the writ petition to the effect that the revenue authorities were not entitled to recover the amount due from the appellant under the summary procedure prescribed by the Land Revenue Code. The High Court did not accept this contention.

On August 29, 1952, the appellant instituted the suit which has given rise to this appeal. It was alleged that the Baria State had its own laws and rules and regulations, that the contractors of that State were bound to act according to them, that the Baria State had rules known as Forest Auction Rules for the auction of timber of the forests and auctions were held according to those rules and that the people acted on the understanding that the auctions and the surety bonds were in pursuance of the said Rules. Auctions were held in September-October 1947. The appellant stood surety with respect to the 11 contracts mentioned in para. 2 of the plaint. The alleged rule No. 8 (condition No. 8 of the Forest Auction Conditions) was quoted in the plaint. The appellant executed all the surety bonds on the understanding that the Baria State Forest Auction Rules were the basis of the auction sales and that the surety bonds were in accordance with those rules. Due to certain reasons mentioned in para. 5 of the plaint, the appellant, on or about April 13, 1948, applied to the Baria State praying for the assets and properties of the contractors to be taken in attachment and sold and for facilities being made available to him to fulfil his liabilities under the surety-bonds. The Baria State authorities attached the assets and properties of the contractors as prayed. It may be mentioned here that in his deposition the appellant admitted the application, exh. 195, dated April 7, 1948 to be the application he had presented for the aforesaid purpose.

It was further alleged in the plaint that subsequent to the merger of the Baria State with the Bombay State on October 6, 1948, the Bombay State Forest Authorities, without asking the plaintiff or without his consent, allowed the said contractors to remove and sell their respective teak and sundry goods which were taken in attachment and thus behaving in contravention of the attachment made in his interest and put an end to his security and that according to law the plaintiff thus became discharged of liability as surety for the said contractors. Another reason for his alleged discharge from liability was alleged to be that even fresh sureties had been obtained from some contractors. It was also mentioned in the plaint that the appellant had to make a petition to the High Court in order to prevent his property from being sold and that he had been informed that the said petition had been dismissed on the ground that he could lawfully get his reliefs in the civil Court.

On the above facts the appellant prayed *inter alia*, as follows:

"1. It may be declared that I have become discharged from all liability as surety for the contractors mentioned in para. 2 of this plaint and a decree may be passed against the defendant No. 2 and defendant No. 1 herein and their servants, officers and agents, in the form of a permanent injunction prohibiting them for all times from attaching my property, selling or causing it to be sold.

2. A permanent injunction may be issued to the defendant No. 1 herein and their servants, agents and officers that these defendants, under the facts mentioned in this plaint shall not, unless in execution of a decree in their favour obtained from a proper

and authorised court, attach any property of this plaintiff and sell it in the revenue manner or cause it to be sold."

The State of Bombay contested the suit mostly repeating what they had urged in their reply affidavit filed in the proceedings on the writ application. It did not admit that the writ application filed by the plaintiff was dismissed by the High Court because another remedy was open and stated that his contentions were not upheld.

Several issues were framed. Issue No. 8A was:

"Is the suit barred by *res judicata* in view of the High Court's judgment in Civil Applications No. 260, 261 and 376 of 1952?"

The trial Court held on this issue that that judgment operated as *res judicata* in the suit. It recorded its findings on the other issues as well, but we are not concerned with those findings. It dismissed the suit.

On appeal by the appellant, the District Judge agreed with the trial Court that the suit was barred by *res judicata* in view of the judgment of the High Court on the writ petition. He accordingly dismissed the appeal. He also recorded his findings on the other points urged before him.

On second appeal, the learned Single Judge of the High Court agreed with the Courts below that the decision of the High Court on the question whether the plaintiff was absolved from liability under the surety agreement must be regarded as *res judicata* and could not be opened in the suit. He further considered the question whether in the circumstances of the case the appellant was entitled to the injunction prayed for and held that it was open to the appellant to maintain the suit for the determination of the amount due from him as that had not been considered and determined in the writ petition. He, therefore, allowed the appeal, set aside the order of the District Judge and passed a decree in favour of the appellant declaring that he was liable to pay the amount due under the surety agreement less the amount paid by the contractor and such amount as had been recovered by the State by sale of the property of the contractor attached under condition No. 8. He further ordered issue of an injunction restraining the State from enforcing the liability for the amount in excess of the amount declared to be due from the appellant.

The appellant's application for leave to file an appeal under cl. 15 of the Letters Patent of the Bombay High Court was rejected. Thereafter, the appellant filed this appeal after obtaining special leave from this Court.

Mr. Desai, for the appellant, has urged two points. The first is that a decision in a writ application under art. 226 for the issue of a writ of *mandamus* does not operate as *res judicata* in a regular suit subsequently filed for a declaration of the plaintiff's rights and for the issue of an order of injunction against the defendant. The other is that the doctrine of constructive *res judicata* cannot be applied when the dispute was first decided in a writ petition and is to be later decided in a regular suit. It has been said that it would be very dangerous to hold that the decision in the writ application operates as *res judicata* in the regular suit even if identical reliefs on identical grounds were prayed for in a writ petition, with those prayed for in the later regular suit.

The first question is really the main question for decision in this appeal as it is not a case for the application of the principle of constructive *res judicata*. It is clear from what has been stated above that the appellant prayed for the issue of a writ of *mandamus* and a writ of prohibition in the writ application on the ground that his liability as surety for the several contractors stood discharged on account of the State, without the knowledge and consent of the appellant, allowing the contractors to dispose of the goods which had been attached on the application of the appellant, an application which he could present in view of Condition 8 of the Conditions of Auction Sale. The reliefs sought in the plaint are the same and are sought on the same grounds. The High Court had to determine in the writ petition whether the appellant's liability as surety stood discharged in view of what he had alleged. The same point has to be directly and substantially decided in the suit also. The orders

to be passed if the appellant's contention is upheld would be the same as that which would have been passed if his contention had been accepted in the writ petition. In both cases, on both occasions, the Court had first to hold that his liability as a surety stood discharged, and that as a consequence of such a finding, it had, in the writ proceedings, to issue a writ of *mandamus* and a writ of prohibition as prayed for in the writ petition, directing the State of Bombay not to enforce any liability which the appellant had undertaken under the agreement executed as a surety and not to proceed with the realisation of any amount the State alleged to be due from him and in the suit to pass a decree prohibiting the defendants by a permanent injunction for all time from attaching his property, selling or causing it to be sold and also a permanent injunction to the State of Bombay restraining them from attaching and selling any property of the appellant unless a proper decree is obtained from the Court in the manner provided for the recovery of land revenue.

It is urged for the appellant that in the writ petition the contention about the appellant's liability as a surety having come to an end was based on the terms of the contract, which was based on the conditions of auction sales, between the appellant and the State of Baria while in the present suit the contention with respect to the cession of his liability as a surety was based on the auction rules. The distinction sought to be made has no substance. It is denied in the reply affidavit filed on behalf of the respondent in the writ petition that there were any Baria State Forest Auction Rules. We have not been referred to any rules. In fact, when we asked for the rules, we were provided by learned counsel for the appellant with a booklet by the name 'Conditions for the Auction Sale of Forests'. Further, the order of the High Court on the writ petition mentions in the early part of the order:

"It would appear that the Baria State had auctioned the teak wood trees.... on the terms and conditions contained in the said Forest Auction Rules."

It may be said that these conditions for the auction sale of forests have been referred to sometimes as rules, probably in view of their binding nature.

It cannot, therefore, be disputed that if the decision which had been given in a writ petition had been given in a regular suit that decision would have operated as *res judicata* in the later suit. The question which arises for consideration is whether such a decision in a writ petition can also bar a later suit on account of its operating as *res judicata*.

Before we deal with the question, we may dispose of the short points urged for the appellant. It is urged that if a decision in a writ application on merits be held to operate as *res judicata* in a regular suit, the provisions of O. II, r. 2, Civil Procedure Code would also be applicable to the institution of the subsequent suit with respect to such part of the cause of action for which no relief was sought in the writ petition. The contention is not sound as the provisions of r. 2, O. II apply only to suit. Sub-rule (1) requires that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court. Sub-rule (2) then provides that where a plaintiff omits to sue in respect of or intentionally relinquishes any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished. By its very language, these provisions do not apply to the contents of a writ petition and consequently do not apply to the contents of a subsequent suit. Such a view was indicated by this Court in *Devendra Pratap Narain Rai Sharma v. State of Uttar Pradesh*¹ when it was said (p. 324):

"...The bar of O. 2, r. 2 of the Civil Procedure Code on which the High Court apparently relied may not apply to a petition for a high prerogative writ under Art. 226 of the Constitution, but the High Court having disallowed the claim of the appellant

for salary prior to the date of the suit, we do not think that we would be justified in interfering with the exercise of its discretion by the High Court."

The contention that a decision on a writ petition even on merits should not operate as *res judicata* as it is discretionary for the Court to pass any order it considers fit on a writ petition and not to decide it after considering all the points urged by the parties, was negatived in *Daryao v. The State of U. P.*² With regard to the point that the issue of a writ by a High Court was discretionary as it may refuse to exercise its jurisdiction under art. 226 as, for instance, when the party applying for the writ was guilty of laches but the Supreme Court could not refuse to issue the appropriate writ once it was shown that a fundamental right had been infringed, it was said (p. 589) :

"...and that may be said to constitute a difference in the right conferred on a citizen to move the High Court under Art. 226 as distinct from the right conferred on him to move this Court. This difference must inevitably mean that if the High Court has refused to exercise its discretion on the ground of laches or on the ground that the party has an efficacious alternative remedy available to him then of course the decision of the High Court cannot generally be pleaded in support of the bar of *res judicata*. If, however, the matter has been considered on the merits and the High Court has dismissed the petition for a writ on the ground that no fundamental right is proved or its breach is either not established or is shown to be constitutionally justified there is no reason why the said decision should not be treated as a bar against the competence of a subsequent petition filed by the same party on the same facts and for the same reliefs under Art. 32."

In this connection, reference may be made to what was said, about the contention that a previous judgment was not to operate as *res judicata* against a party as it was based on certain statements recorded before that party was impleaded, in *Krishna Behari Roy v. Brojeswari Chowdranee*³ :

"It was suggested by Mr. Cave that the former judgment ought not to be binding, because certain witnesses having been examined before the present Appellant intervened in the suit, he was refused the opportunity of cross-examining them. Their Lordships think that such an objection is no answer to the defence arising from the former judgment. If there had been any miscarriage of that kind, the matter was one for appeal in that suit. The objection does not appear to have been raised in the appeals which were successively made in that suit to the Civil Judge and to the High Court; but whether it was so raised or not, their Lordships think that that cannot affect the operation of the final judgment, which must be taken to have been rightly given."

Another reason urged in support of the contention is that the petitioner in a writ petition had no right to apply for the issue of the appropriate writ and it is a matter of discretion for the High Court to entertain any application or to grant it and that a decision in one proceeding can operate as *res judicata* in a subsequent proceeding only when the party initiating the first proceeding had a right to initiate both the proceedings when the nature of both the proceedings be the same. This is the same contention as the earlier one, but in a different form and does not merit further consideration.

It is further submitted for the appellant that a writ of *mandamus*, according to its nature, is to be issued mainly to compel the performance by a public servant of his duty of a public nature, while in a suit the plaintiff prays for the enforcement of his personal rights. The declaration of a personal right is not an essential characteristic in the issue of a writ of *mandamus*. The difference in the nature of the two proceedings is immaterial if the matter decided *inter partes* in one proceeding is the same which is to be determined in the subsequent proceedings and the parties to the suit were also parties to the writ petition.

It has also been contended, and support is sought from the case reported as *L. Janakirama Iyer v. P. M. Nilakanta Iyer*,⁴ that the general principles of

2 [1962] 1 S.C.R. 574.

3 (1875) L.R. 2 I.A. 283, at p. 286.

4 [1962] Supp. 1 S.C.R. 206.

res judicata are not to be applied in considering whether a decision in a previous suit bars a later suit on the ground of *res judicata*.

On the other hand, it is contended for the respondent that the doctrine of *res judicata* is not confined to the provisions of s. 11, Civil Procedure Code, but is of general application on grounds of public policy, that the fact that the proceedings on a writ petition are conducted summarily is no reason to reduce the value of the decision arrived at in those proceedings especially when a solemn decision is given after affording an opportunity to the parties to put before the Court all the relevant matters and after fully considering the merits of the matter in controversy and that it would be really dangerous if it be held that a decision so arrived at in proceedings in a writ petition does not bar a subsequent suit for the decision of the same matter in controversy. It is pertinently pointed out that if the writ application presented by the appellant had been allowed by the High Court on a finding of fact that the liability of the appellant as a surety stood discharged and a writ of prohibition had been issued against the State as prayed for by the appellant in the writ proceedings, the State could not have sued for a declaration that these orders of the High Court were bad and that a decree be passed in its favour declaring that the appellant's liability as the surety still continued and that the State was free to take any action open to it under law for the recovery of the amount due from him.

It is not necessary to consider in any detail whether all orders made on a writ petition would bar a subsequent suit. We would limit the consideration of the contentions raised before us to two main points: whether s. 11, Civil Procedure Code, is exhaustive with respect to the application of the principle of *res judicata* in a suit and whether in a subsequent suit general principles of *res judicata* can bar the consideration of matters directly in issue and identical with those which had been earlier and after full contest, decided on merits by a competent Court in any other proceeding including proceedings on a writ petition.

Before discussing the law of *res judicata* as laid down in the Code of Civil Procedure, we may refer to the opinion of the Judges expressed in 1776 in *The Duchess of Kingston's Case*⁵ to which reference has been invariably made in most of the cases to be considered by us. It was said in that case (p. 645):

"From the variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true: *first*, that the judgment of a court of concurrent jurisdiction, directly upon the point, is as a plea, a bar, or as evidence, conclusive, between the same parties, upon the same matter, directly in question in another court; *secondly*, that the judgment of a court of exclusive jurisdiction, directly upon the point, is, in like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another court, for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment."

It is to be noticed that the opinion does not take into account whether the earlier judgment was in a suit or any other proceeding and whether it was used as *res judicata* in another suit or proceeding. The emphasis is that the judgment be of a Court and that it is relied upon as *res judicata* in another Court. Of course, the essential conditions that the judgment be directly upon the same point which is for determination in the subsequent suit and be between the same parties are also to be satisfied. It is obvious that the judgment of a Court of exclusive jurisdiction is to be treated as *res judicata* upon the same matter in another Court which will not be a Court having jurisdiction over that matter.

It would be helpful to consider how the various Codes of Civil Procedure have dealt with the question of the second suit being barred on account of an earlier decision by a Court. The first Code of Civil Procedure was Act VIII

of 1859. Its s. 1 gave jurisdiction to the civil Courts over all suits of a civil nature with the exception of those of which cognizance was barred by any Act of Parliament or by any Regulation of the Codes of Bengal, Madras and Bombay or by any Act of the Governor-General of India in Council. Since then civil Courts had jurisdiction to try all suits of a civil nature except those whose cognizance was barred by any enactment in force. Section 2 provided that the civil Courts would not take cognizance of any suit brought on a cause of action which had been heard and determined by a Court of competent jurisdiction in a former suit between the same parties or between parties under whom they claimed. The bar to the second suit was based on the identity of its cause of action with that of the earlier suit which had been heard and determined by a Court of competent jurisdiction between the same parties.

The language of s. 2 of the Code of 1859 seems to be in pursuance of the principle recognised in common law that a cause of action on which a decree has been based merges in the decree and ceases to be a cause of action for any future suit. Parke B. said in *King v. Hoare*⁶ at p. 210 of the English Reports:

"If there be a breach of contract, or wrong done, or any other cause of action by one against another, and judgment be recovered in a court of record, the judgment is a bar to the original cause of action, because it is thereby reduced to a certainty, and the object of the suit attained, so far as it can be at that stage; and it would be useless and vexatious to subject the defendant to another suit for the purpose of obtaining the same result. Hence the legal maxim, 'transit in rem judicatam',—the cause of action is changed into matter of record, which is of a higher nature, and the inferior remedy is merged in the higher. This appears to be equally true where there is but one cause of action, whether it be against a single person or many. The judgment of a court of record changes the nature of that cause of action, and prevents its being the subject matter of another suit, and the cause of action, being single, cannot afterwards be divided into two."

This principle had the approval of the House of Lords in *Kendall v. Hamilton*.⁷ It may be noticed that, in special cases, this principle is applied when even parties to the subsequent suit are not the same who were parties in the first suit. The finality of the judgment is based on the fact that the cause of action had merged in a decree and, therefore, no other action can be based on the same cause of action.

In *Khugowlee Sing v. Hossein Bux Khan*⁸ the Privy Council, after quoting the opinion in *Duchess of Kingston's* case, said:

"There is nothing technical or peculiar to the law of England in the rule as so stated. It was recognised by the civil law, and it is perfectly consistent with the second section of the Code of Procedure under which this case was tried..."

In *Soorjomonee Dayee v. Suddamund Mohapatter*⁹ the Privy Council held that the term 'cause of action' in s. 2 of Act VIII of 1859 be construed with reference rather to the substance than to the form of action, and that even if such an interpretation of the expression be not correct, the provisions of s. 2 of the Code would by no means prevent the operation of the general law relating to *res judicata* and observed (p. 218):

"...This law has been laid down by a series of cases in this country with which the profession is familiar, and has probably never been better laid down than in a case which was referred to in the 3rd volume of Atkyns (*Gregory v. Molesworth*), in which Lord Hardwicke held that where a question was necessarily decided in effect though not in express terms between parties to the suit, they could not raise the same question as between themselves in any other suit in any other form; and that decision has been followed by a long course of decisions, the greater part of which will be found noticed in the very able notes of Mr. Smith to the case of the *Duchess of Kingston*."

In *Krishna Behari Roy's* case the Privy Council again stated that the expres-

⁶ (1844) 153 E.R. Exch. 206. 13 M. & W.
494.

⁷ (1879) 4 App. Cas. 504.

⁸ (1871) 7 Beng. L.R. 673, 678.

⁹ (1872-73) L.R. I.A. Supp. 212.

sion 'cause of action' in s. 2 of Act VIII of 1859 could not be taken in its literal and most restricted sense, and observed (p. 285) :

"...But however that may be, by the general law where a material issue has been tried and determined between the same parties in a proper suit, and in a competent Court, as to the status of one of them in relation to the other, it cannot, in their opinion, be again tried in another suit between them."

It appears that s. 13 of the Code of Civil Procedure of 1877 was enacted in view of what was said about the general law of *res judicata* in *Krishna Behari Roy's* case. That section reads :

"No Court shall try any suit or issue in which the matter directly and substantially in issue has been heard and finally decided by a Court of competent jurisdiction, in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title."

In *Misir Raghobardial v. Rajah Sheo Baksh Singh*¹⁰ the Privy Council had to construe s. 13 of the 1877 Code (Act X of 1877). It referred to s. 2 of Act VIII of 1859 and then observed (p. 202) :

"...It is clear that this section would not have applied to the present case, the causes of action in the two suits—the non-payment of interest in one and the non-payment of principal in the other—being different. In fact, when the first suit was brought the cause of action in the second had not arisen. But independently of this provision in the *Code of Procedure*, the Courts in India have adopted the rule laid down in the *Duchess of Kingston's* case, and have applied it in a great number of cases. It was recognised as the law in India by this Board in *Khugowlee Sing v. Hossein Bux Khan*..."

The expression 'Court of competent jurisdiction' was construed to mean 'a Court which had jurisdiction over the matter in the subsequent suit in which the decision was used as conclusive' or in other words, 'a Court of concurrent jurisdiction'. In considering this matter, the Privy Council referred to the fact that in this country there were Courts of various grades with different pecuniary limits of jurisdiction, that a suit had to be instituted in the Court of the lowest grade competent to try it and that it would be improper if a judgment of an inferior Court was to operate as *res judicata* in a suit in a superior Court, and observed (p. 203) :

"...By taking concurrent jurisdiction to mean concurrent as regards the pecuniary limit as well as the subject matter, this evil or inconvenience is avoided; and although it may be desirable to put an end to litigation, the inefficiency of many of the Indian Courts makes it advisable not to be too stringent in preventing a litigant from proving the truth of his case. It appears to their Lordships that if this case had arisen before the passing of Act X of 1877, the High Courts in India would have rightly held that the decision of the Extra Assistant Commissioner in the first suit was not conclusive as to the amount of the principal sum due on the bond,"

and, after quoting s. 13, said (p. 204) :

"The intention seems to have been to embody in the *Code of Procedure*, by sects. 12 and 13, the law then in force in India, instead of the imperfect provision in sect. 2 of Act VIII of 1859. And, as the words of section do not clearly shew an intention to alter the law, their Lordships do not think it right to put a construction upon them which would cause an alteration."

This shows that the general law of *res judicata* was applied to suits in this country despite a specific provision about it in s. 2 of Act VIII of 1859.

The scope of the bar was extended by the Code of Civil Procedure, 1882 (Act XIV of 1882). Its s. 13 dealt with *res judicata*.

Section 11 of the present Code of Civil Procedure (Act V of 1908) deals with *res judicata* and is in these terms :

"No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the

same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."

The above-quoted main part of s. 11 is identically the same as the corresponding part of s. 13 of the Code of 1882. Section 11, by its terms, can be applicable only to a subsequent suit when the same matter in controversy had been heard and decided in an earlier suit by a Court competent to try the subsequent suit. There is nothing, however, in its language to exclude the application of the general principles of *res judicata* to suits.

The general principle of *res judicata* has been applied to suits even though the decision on the same matter in controversy had been previously given by a competent Court in proceedings which were not suits under the Code of Civil Procedure. The case law on the subject will be discussed later. It is urged that there seems to be no good principle behind applying the general principles of *res judicata* to suits in circumstances which do not bring the previous decision within the language of s. 11, and that the Legislature's restricting the application of the general principles of *res judicata* to the circumstances mentioned in s. 11 must be deemed to indicate that the general principle of *res judicata* be not applied to bar a subsequent suit if the earlier decision of the same controversy between the same parties had been arrived at in proceedings other than suits and in which the entire procedure provided for the decision of the dispute in a regular suit might not have been followed. It appears to us that the reason for the specific provisions of s. 11 is not that the Legislature intended to bar the application of the general principles of *res judicata* to suits when the previous decision is arrived at in proceedings other than suits. The Legislature was providing in the Code of Civil Procedure for the trial of suits over which the civil Court was given jurisdiction under the provisions of the Code. The preamble of the Code of 1908 reads:

"WHEREAS it is expedient to consolidate and amend the laws relating to the procedure of the Courts of Civil Judicature; It is hereby enacted as follows:—"

The Code was dealing with procedure of the civil Courts only and had, therefore, not to consider what would be the effect on the trial of suits in view of the provisions of other enactments or of general principles of *res judicata* or of any other kind. It had to restrict its provision about *res judicata* to the effect of decisions in a civil suit on a subsequent civil suit and, therefore, enacted s. 11 in the form in which we find it. It made one of the conditions for the application of a previous decision to operate as *res judicata* to be that the previous decision is made not only by a Court competent to make it but by a Court which be competent to try the subsequent suit. This condition must have been considered necessary in view of the observations of the Privy Council in *Misir Raghobardial's* case and on account of the hierarchy of Courts under the various Acts constituting Courts of civil judicature and it could have been felt that a decision by a Court which is not competent to decide the subsequent suit be not treated of a binding nature. Such an exceptional procedure seems to have been provided as a matter of precaution as the Court not competent to try the subsequent suit must necessarily be a Court of inferior jurisdiction and, therefore, more liable to go wrong. Whatever the reason may be, the provisions of s. 11 will govern a previous decision in a suit barring a subsequent suit with respect to the same matter in controversy and general principle as of *res judicata* in such particular circumstances will neither be available to bar a subsequent suit nor will be needed. It is in such context that the remarks of this Court in *Janakirama Iyer's* case at p. 224 are to be considered. In that case, the decision in a previous suit could not operate as *res judicata* in accordance with the provisions of s. 11 of the Code, because the parties in the two suits could not be said to be the same parties or parties who claimed through one another. It was then said:

"Where s. 11 is thus inapplicable it would not be permissible to rely upon the general

doctrine of *res judicata*. We are dealing with a suit and the only ground on which *res judicata* can be urged against such a suit can be the provisions of s. 11 and no other." The observations are to be read in the context in which they are made, the context being that the question of *res judicata* was being considered in connection with the decision in a previous suit and the parties in the two suits being not the same. In fact, general principles of *res judicata* also require that the earlier decision be between the same parties. A decision not *inter partes* cannot, even on general principles of *res judicata*, operate as *res judicata* in a subsequent suit.

We may now refer to some of the decided cases having a bearing on the applicability of the general principles of *res judicata* to suits, when the previous decision is not in a suit but in other proceedings.

In *Hook v. Administrator-General of Bengal*¹¹ the question was whether a previous order in an administration suit could operate as *res judicata* with respect to matters which had been decided in the subsequent administration suit instituted for decision of certain matters left open in the previous suit. It was said (p. 193) :

"...The question as to the perpetuity had been definitely and properly before him on the former hearing, and was, in fact, decided without any reservation, as is made plain by the terms of the judgment itself, which show that the determination of the dispute as to the perpetuity was the foundation of the whole judgment... It is not, and indeed it cannot be, disputed that, if that be the case, the matter has been finally settled between the parties, for the mere fact that the decision was given in an administration suit does not affect its finality: see *Peareth v. Marriott*.^{12a} The appellate Court, however, took a different view, and regarding the question as still open decided it against the appellant, but the error in their judgment is due to the fact that they regarded the question as completely governed by s. 11 of the Code of Civil Procedure," and then reference was made to what has been said in *Ram Kirpal Shukul v. Mussamat Rup Kuari*¹² :

"...The binding force of such a judgment depends not upon sect. 13, Act X of 1877, but upon general principles of law. If it were not binding there would be no end to litigation."

In *Ramachandra Rao v. Ramachandra Rao*¹³ the question arose about the decision about the title to compensation under proceedings in Land Acquisition operating as *res judicata* in a subsequent suit with respect to the rights of the parties. It was said (p. 136) :

"...When once the award as to the amount has become final, all questions as to fixing of compensation are then at an end; the duty of the Collector in case of dispute as to the relative rights of the persons together entitled to the money is to place the money under the control of the Court, and the parties then can proceed to litigate in the ordinary way to determine what their right and title to the property may be. That is exactly what occurred in the present case. How the proceedings were commenced is a matter that is not material provided that they were instituted in the manner that gave the Court jurisdiction, for they ended in a decree made by the High Court and appealable to this Board."

The Court then referred to what was said in *Badar Bee v. Habib Merican Noordin*¹⁴ and in *Hook's* case and said that the principle which prevents the same case being twice litigated is of general application, and is not limited by the specific words of the Code in this respect.

In *Kalipada De v. Dwijapada Das*¹⁵ the Privy Council held that a decision in contentious proceedings under the Probate and Administration Act, 1881, was binding in a subsequent suit upon the parties to the earlier suit, including a party whose name had been omitted from the formal order made and reite-

11 (1921) L.R. 48 I.A. 187.

11a (1882) 22 Ch. D. 182.

12 (1883) L.R. 11 I.A. 37, 41.

13 (1922) L.R. 40 I.A. 129.

14 [1909] A.C. 615, at p. 623.

15 (1929) L.R. 57 I.A. 24.

rated that the terms of s. 11 were not to be regarded as exhaustive in regard to what decisions could operate as *res judicata*.

In *Bhagwati v. Ram Koli*¹⁶ a decision about title in Land Acquisition Act proceedings was held to be *res judicata* in a subsequent suit about the title between the same parties.

These decisions of the Privy Council well lay down that the provisions of s. 11, Civil Procedure Code, are not exhaustive with respect to an earlier decision in a proceeding operating as *res judicata* in a subsequent suit with respect to the same matter *inter partes*, and do not preclude the application to regular suits of the general principles of *res judicata* based on public policy and applied from ancient times.

In *Sheoparsan Singh v. Ramnandan Singh*¹⁷ it was said:

"...But in view of the arguments addressed to them their Lordships desire to emphasize that the rule of *res judicata*, while founded on ancient precedent, is dictated by a wisdom which is for all time. 'It hath been well said,' declared Lord Coke, 'interest reipublicae ut sit finis litium, otherwise great oppression might be done under colour and pretence of law': 6 Coke, 9a. Though the rule of the Code may be traced to an English source, it embodies a doctrine in no way opposed to the spirit of the law as expounded by the Hindu commentators. Vijnanesvara and Nilakantha include the plea of a former judgment among those allowed by law, each citing for this purpose the text of Katyayana, who describes the plea thus: 'If a person though defeated at law sue again he should be answered, 'You were defeated formerly.' This is called the plea of former judgment.' [See the *Mitakshara* (Vyavahara), bk. II, ch. i., edited by J. R. Gharpure, p. 14, and the *Mayuka*, ch. i., s. 1, p. 11 of Mandlik's edition]. And so the application of the rule by the Courts in India should be influenced by no technical considerations of form, but by matter of substance within the limits allowed by law."

This Court had to consider the question of the applicability of the general principles of *res judicata* in several cases and has repeatedly held that this principle is not based on a rule of technicality but is based on high public policy to bring about an end to litigation by giving finality to judgments *inter partes* and to save a litigant from harassment a second time. The principles laid down by the Privy Council have been generally accepted. In *Raj Lakshmi Dasi v. Banamali Sen*¹⁸ this Court approved of what was said by the Privy Council in *Hook's case*; *Ramachandra Rao's case* and *Mst. Bhagwati's case* and said (p. 166):

"...and in these circumstances it has to be held that the question of title to the four anna share was necessarily and substantially involved in the land acquisition proceedings and was finally decided by a court having jurisdiction to try it and that decision thus operates as *res judicata*..."

In *Pandit M. S. M. Sharma v. Dr. Shree Krishna Sinha*¹⁹ the question arose for the first time about applying the principle of *res judicata* in writ applications under art. 32 of the Constitution and this Court said (p. 103):

"...This Court has laid it down in the case of *Raj Lakshmi Dasi v. Banamali Sen* that the principle underlying *res judicata* is applicable in respect of a question which has been raised and decided after full contest, even though the first Tribunal which decided the matter may have no jurisdiction to try the subsequent suit and even though the subject-matter of the dispute was not exactly the same in the two proceedings. In that case the rule of *res judicata* was applied to litigation in land acquisition proceedings. In that case the general principles of law bearing on the rule of *res judicata*, and not the provisions of s. 11 of the Code of Civil Procedure, were applied to the case. The rule of *res judicata* is meant to give finality to a decision arrived at after due contest and after hearing the parties interested in the controversy."

This case made the decision in a former petition under art. 32 of the Constitution *res judicata* in the subsequent petition under the same article with respect to the same matter.

16 (1939) L.R. 66 I.A. 145.

17 (1916) L.R. 43 I.A. 91, at p. 98.

18 [1953] S.C.R. 154.

19 [1961] 1 S.C.R. 96.

In *Daryao's* case this Court had again dealt with the question of the applicability of the principle of *res judicata* in writ proceedings. The matter was gone through very exhaustively and the final conclusions are to be found at p. 592. We may summarise them thus:

1. If a petition under art. 226 is considered on the merits as a contested matter and is dismissed, the decision would continue to bind the parties unless it is otherwise modified or reversed by appeal or other appropriate proceedings permissible under the Constitution.

2. It would not be open to a party to ignore the said judgment and move this Court under art. 32 by an original petition made on the same facts and for obtaining the same or similar orders or writs.

3. If the petition under art. 226 in a High Court is dismissed not on the merits but because of the laches of the party applying for the writ or because it is held that the party had an alternative remedy available to it, the dismissal of the writ petition would not constitute a bar to a subsequent petition under art. 32.

4. Such a dismissal may however constitute a bar to a subsequent application under art. 32 where and if the facts thus found by the High Court be themselves relevant even under art. 32.

5. If a writ petition is dismissed *in limine* and an order is pronounced in that behalf, whether or not the dismissal would constitute a bar would depend on the nature of the order. If the order is on the merits, it would be a bar.

6. If the petition is dismissed *in limine* without a speaking order, such dismissal cannot be treated as creating a bar of *res judicata*.

7. If the petition is dismissed as withdrawn, it cannot be a bar to a subsequent petition under art. 32 because, in such a case, there had been no decision on the merits by the Court.

In arriving at the above quoted conclusions the Court made certain observations which are helpful in determining the question in this case about the decision on a writ petition operating as *res judicata* in a subsequent regular suit. The basis for the rule is described thus (p. 582):

"But, is the rule of *res judicata* merely a technical rule or is it based on high public policy? If the rule of *res judicata* itself embodies a principle of public policy which in turn is an essential part of the rule of law then the objection that the rule cannot be invoked where fundamental rights are in question may lose much of its validity. Now, the rule of *res judicata* as indicated in s. 11 of the Code of Civil Procedure has no doubt some technical aspects, for instance the rule of constructive *res judicata* may be said to be technical; but the basis on which the said rule rests is founded on considerations of public policy. It is in the interest of the public at large that a finality should attach to the binding decisions pronounced by Courts of competent jurisdiction, and it is also in the public interest that individuals should not be vexed twice over with the same kind of litigation."

Again, it was said (p. 584):

"...The binding character of judgments pronounced by courts of competent jurisdiction is itself an essential part of the rule of law, and the rule of law obviously is the basis of the administration of justice on which the Constitution lays so much emphasis." Limitations to the applicability of this general rule of *res judicata* are indicated at p. 585:

"...It is true that the general rule can be invoked only in cases where a dispute between the parties has been referred to a court of competent jurisdiction, there has been a contest between the parties before the court, a fair opportunity has been given to both of them to prove their case, and at the end the court has pronounced its judgment or decision. Such a decision pronounced by a court of competent jurisdiction is binding between the parties unless it is modified or reversed by adopting a procedure prescribed by the Constitution. In our opinion, therefore, the plea that the general rule of *res judicata* should not be allowed to be invoked cannot be sustained."

The Court also said earlier at p. 585:

"...In other words, an original petition for a writ under Art. 32 cannot take the

place of an appeal against the order passed by the High Court in the petition filed before it under Art. 226."

It can be said with equal force that a regular suit for the determination of the matter which had been decided on merits by the High Court or this Court on a writ petition cannot be given the status of a *de facto* appeal against the order of the High Court or of this Court. A solemn declaration and order by the Court in its extraordinary jurisdiction is not to be set at nought by a Court of ordinary jurisdiction whose decisions are subject to the appellate or revisional jurisdiction of that Court.

The contention that the remedies available to the petitioners to move the High Court under art. 226 and this Court under art. 32 are alternate remedies and so the adoption of one remedy cannot bar the adoption of the other, which was urged in the aforesaid case, was negatived, and it was observed (p. 591):

"...In such a case the point to consider always would be what is the nature of the decision pronounced by a Court of competent jurisdiction and what is its effect. Thus considered there can be no doubt that if a writ petition filed by a party has been dismissed on the merits by the High Court the judgment thus pronounced is binding between the parties and it cannot be circumvented or by-passed by his taking recourse to Art. 32 of the Constitution. Therefore, we are not satisfied that the ground of alternative remedies is well founded."

In *The Amalgamated Coalfield Ltd. v. The Janapada Sabha, Chhindawara*²⁰ this Court reiterated that the general principle of *res judicata* applied to writ petitions filed under arts. 226 or 32 and expressed the opinion that constructive *res judicata* which is a special and artificial form of *res judicata* enacted by s. 11, Civil Procedure Code, should not generally be applied to writ petitions filed under arts. 226 or 32 of the Constitution and that it would be reluctant to apply this principle to the appeals under decision because they dealt with cases where the impugned tax liability were for different years.

In the later case of *Devital Modi v. Sales Tax Officer, Ratlam*²¹ this Court has held that the principle of constructive *res judicata* also applies in writ proceedings when the decision of a former writ petition was on merits. It was said:

"This rule postulates that if a plea could have been taken by a party in a proceeding between him and his opponent, he would not be permitted to take that plea against the same party in a subsequent proceeding which is based on the same cause of action; but basically, even this view is founded on the same considerations of public policy, because if the doctrine of constructive *res judicata* is not applied to writ proceedings, it would be open to the party to take one proceeding after another and urge new grounds every time; and that, plainly, is inconsistent with considerations of public policy to which we have just referred."

The Court further observed:

"As we have already mentioned, though a Court dealing with the questions of infringement of fundamental rights must consistently endeavour to sustain the said rights and should strike down their unconstitutional invasion, it would not be right to ignore the principle of *res judicata* altogether in dealing with writ petitions filed by citizens alleging the contravention of their fundamental rights. Considerations of public policy cannot be ignored in such cases, and the basic doctrine that judgments pronounced by this Court are binding and must be regarded as final between the parties in respect of matters covered by them, must receive due consideration."

These remarks can apply with greater force when in a regular suit a party desires to obtain an order which may be at variance with the orders pronounced by the High Court in a writ petition on matters not concerning fundamental rights under the Constitution.

The appellant relies on the case reported as *Smt. Bimla Chopra v. Punjab State*²² in support of its contention that a decision on a writ petition cannot

20 [1963] Supp. 1 S.C.R. 172.

21 (1964) Civil Appeal No. 294 of 1964,

decided on October 7, 1964 (Supreme Court).

22 (1963) 65 Punj. L.R. 945.

operate as *res judicata* on the points in dispute between the parties in the civil suit. The decision was based on two grounds: (1) that the jurisdiction of the High Court under art. 226 and of the Supreme Court under art. 32 is almost co-extensive, while the jurisdiction of the High Court under art. 226 and of the civil Court in a regular civil suit cannot be said to be almost co-extensive and (2) that the High Court in disposing of writs is not required to go into the detailed examination of facts while in regular civil suits facts can be examined meticulously. It was further held that the plaintiff can take such grounds in the civil suit which he could take in a writ petition. A decision of the Court in a writ petition can be *res judicata* only with respect to the matters which have been decided on merits by the High Court or by this Court. Courts do not usually enter into disputed questions of fact but there is no bar to their doing so if they feel disposed to enter into such facts and arrive at a conclusion with respect to them. We do not see why all the grounds which can be urged in support of or against a matter raised for decision in a writ petition cannot be urged in the proceedings on it. It is true that the jurisdiction of the civil Court and the High Court or this Court cannot be said to be co-extensive, but it is plain that the civil Court, in the exercise of its jurisdiction, is subject to the appellate or revisional jurisdiction of the High Court and this Court. We do not consider the reasons for holding that a decision in a writ petition cannot operate as *res judicata* in a subsequent regular suit to be sound and are of opinion that the Punjab case has been wrongly decided.

On the other hand, the Bombay High Court has held in *Manahem v. Union of India*²³ that a decision on merits in a writ petition would operate as *res judicata* in a subsequent suit.

As a result of the above discussion, we are of opinion that the provisions of s. 11, Civil Procedure Code, are not exhaustive with respect to an earlier decision operating as *res judicata* between the same parties on the same matter in controversy in a subsequent regular suit and that on the general principle of *res judicata*, any previous decision on a matter in controversy, decided after full contest or after affording fair opportunity to the parties to prove their case by a Court competent to decide it, will operate as *res judicata* in a subsequent regular suit. It is not necessary that the Court deciding the matter formerly be competent to decide the subsequent suit or that the former proceeding and the subsequent suit have the same subject matter. The nature of the former proceeding is immaterial.

We do not see any good reason to preclude such decisions on matters in controversy in writ proceedings under arts. 226 or 32 of the Constitution from operating as *res judicata* in subsequent regular suits on the same matters in controversy between the same parties and thus to give limited effect to the principle of the finality of decisions after full contest. We, therefore, hold that, on the general principle of *res judicata*, the decision of the High Court on a writ petition under art. 226 on the merits on a matter after contest will operate as *res judicata* in a subsequent regular suit between the same parties with respect to the same matter.

We may make it clear that it was not necessary, and we have not considered, whether the principles of constructive *res judicata* can be invoked by a party to the subsequent suit on the ground that a matter which might or ought to have been raised in the earlier proceeding was not so raised therein.

We, therefore, dismiss this appeal with costs.

SUBBA RAO J. I have perused the judgment prepared by my learned brother Raghubar Dayal J. I regret my inability to agree. I shall briefly give my reasons.

Raghubar Dayal J. has stated the facts fully in his judgment. I need not restate them. The few facts relevant to the question raised are these: The

appellant filed a petition in the Bombay High Court under art. 226 of the Constitution raising the question that he was discharged as surety, and the High Court negatived his contention. In the suit from which the present appeal arises he again raises the plea that he was discharged as surety: in other words, he seeks to re-open in the present suit the finding given by the High Court in the writ petition. The question is whether the appellant is barred by *res judicata* to raise the said question in the suit.

Section 11 of the Code of Civil Procedure deals with the doctrine of *res judicata* in the context of a suit. It says, *inter alia*, that no Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit. To invoke this doctrine, the section lays down many conditions. The most essential condition is that the matter in question should have been directly and substantially in issue in a former suit. The expression "suit" has not been defined in the Code, but s. 26 thereof says that every suit shall be instituted by the presentation of a plaint or in such other manner as may be prescribed. It is not argued that an application under art. 226 of the Constitution is a suit within the meaning of s. 26 or s. 11 of the Code. It follows, and indeed it is not disputed, that s. 11 of the Code does not bar the appellant from raising the question of the discharge of his suretyship again in the present suit.

But it is said that under the general principles of *res judicata* the Court would be barred to try his suit on the said issue. When the Code of Civil Procedure enacted s. 11 prescribing precisely when an earlier decision would be *res judicata* in a suit, it is not open to invoke the general principles of *res judicata* in the context of a subsequent suit, though the conditions laid down in the section were not satisfied, for otherwise the section would become nugatory: it would also introduce anomalies. A decision in a previous suit would not be *res judicata* in a subsequent suit unless the stringent conditions laid down in s. 11 of the Code were satisfied; whereas a decision in a proceeding which was not a suit would be *res judicata* whether or not the said conditions were complied with. If the fundamental requisites of *res judicata* were satisfied, a decision, if it fell under s. 11 of the Code, would be *res judicata* in a subsequent suit; and even if it did not fall thereunder, it would equally be *res judicata*. That could not have been the intention of the Legislature.

The cases cited at the Bar do not compel me to accept the construction which would lead to that result. The decisions of the Judicial Committee in *Ramachandra Rao v. Ramachandra Rao*¹ and *Bhagwati v. Ram Kali*² and of this Court in *Raj Lakshmi Dasi v. Banamali Sen*³ may be explained on the ground that the proceeding under s. 18 of the Land Acquisition Act in the District Court wherein the title of the claimants would be put in the issue were in substance a suit. The decisions of this Court in *Pandit M. S. M. Sharma v. Dr. Shree Krishna Sinha*,⁴ *Daryao v. The State of U. P.*,⁵ *The Amalgamated Coal Fields Ltd. v. Janapada Sabha, Chhindwara*⁶ and *Devilal Modi v. Sales Tax Officer, Ratlam*⁷ can be distinguished on the footing that the question of *res judicata* arose in an application either under art. 226 or 32 of the Constitution and not in a suit. On the other hand, in *L. Janakirama Iyer v. P. M. Nilakanta Iyer*⁸ this Court definitely ruled (p. 224):

"...Where s. 11 is thus inapplicable it would not be permissible to rely upon the general doctrine of *res judicata*. We are dealing with a suit and the only ground on which *res judicata* can be urged against such a suit can be the provisions of s. 11 and no other."

These observations, in my view, correctly represent the law on the subject. This view, while it does not make s. 11 of the Code of Civil Procedure an unnecessary

1 (1922) L.R. 49 I.A. 129.

2 (1939) L.R. 66 I.A. 145.

3 [1953] S.C.R. 154.

4 [1961] 1 S.C.R. 98.

5 [1962] 1 S.C.R. 574.

6 [1963] Supp. 1 S.C.R. 172.

7 (1964) Civil Appeal No. 294 of 1964, decided on October 7, 1964 (Supreme Court).

8 [1962] Supp. 1 S.C.R. 206.

provision, does not also lead to any practical difficulties, for the decision of a High Court on a question of law will be binding as an authority on subordinate Courts and its decision on a question of fact will rarely be differed from by the said Courts.

I would, therefore, hold that the decision given by the High Court in the writ petition would not preclude the Court from deciding the same question on merits in the present suit. The order of the High Court is set aside and the appeal is remanded to the High Court for disposal on merits in accordance with law. Costs will abide the result.

ORDER

In accordance with the majority judgment, the appeal is dismissed with costs.

Appeal dismissed

APPELLATE CIVIL.

Before Mr. Justice Patel and Mr. Justice Bal.

KRISHNAJI DATTATRAYA BAPAT *v.* DR. SHANKAR
RAMCHANDRA ABHYANKAR.*

Bombay Rents, Hotel and Lodging House Rates Control Act (Bom. LVII of 1947), Sec. 13(1) (1)—“Suitable residence”, what is—Circumstances of tenant whether to be considered by Court in deciding suitability of other accommodation.

Under s. 13(1)(1) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, “suitable residence” cannot be only for one purpose; it must be suitable for the tenant’s reasonable needs. Therefore, in order to decide suitability of residence for the tenant, the Court has to consider the needs of the tenant and his family and consider whether or not the other accommodation that has been acquired by the tenant is suitable for his needs.

ONE Dr. Shankar Ramchandra Abhyankar (respondent No. 1) was the owner of a house bearing No. 279/8, Narayan Path, Poona. The house had a ground floor and three floors above it. Krishnaji (petitioner) became a tenant of a block on the first floor consisting of four rooms. Respondent No. 1 has got his dispensary on the ground floor and is in occupation of the second and third floors. The petitioner was a teacher in one of the schools conducted by the Deccan Education Society of Poona, and in the year 1958 he was transferred to Wai as Superintendent of a school conducted by the same Society. The transfer was “admittedly for a period of three years.” On transfer, he acquired some accommodation at Wai, but his son continued to stay in the suit premises as he was studying for accountancy. Because of his transfer, respondent No. 1 filed suit No. 3433 of 1958 in the Small Causes Court at Poona for possession, contending that the premises were required by him bona fide for his personal use and that, in any event, the petitioner had acquired suitable accommodation at Wai. Reliefs were claimed under s. 13(1), cls. (g) and (l). The petitioner defended the suit on the ground that it was untrue that respondent No. 1 required the block for his bona fide personal occupation and that he himself had acquired suitable accommodation at Wai. He contended that his son was required to continue his stay in Poona for his education and respondent No. 1 was, therefore, not entitled to relief under either clause. The trial Court found against respondent No. 1 on the first ground. As to the second, it found that the petitioner’s son had continued to stay in Poona for his education in accountancy and gave only a part of the premises to respondent No. 1, retaining two rooms in his possession. Both the parties being displeased with the decree filed appeals to the District Court at Poona. The appeal by the petitioner was

*Decided, June 14, 1965. Special Civil Application No. 371 of 1965.

No. 245 of 1959 and that by respondent No. 1 was No. 295 of 1959. The appellate Judge confirmed the judgment of the trial Court. The petitioner then filed an application in the High Court, being Civil Revisional Application No. 1302 of 1960, challenging the orders of the Courts below. The Revisional Application was heard by Mr. Justice K. K. Desai on February 2, 1965. His Lordship held that the contentions raised on behalf of the petitioner did not fall within the ambit of s. 115 of the Civil Procedure Code, and, therefore, he had no power to interfere with the orders made by the Courts below. After the Revisional Application failed, the present Application was filed under arts. 226 and 227 of the Constitution for challenging the orders made by the Courts below.

M. V. Paranjpe and *Y. S. Chitale*, for the petitioner.

D. G. Karmarkar and *K. J. Abhyankar*, for respondent No. 1.

PATEL J. [His Lordship after setting out the facts and considering a point not material to this report, proceeded.] The respondent relied for relief in the present case on s. 13(1), cl. (1) of the Bombay Rent Act. So far as relevant, the section reads:

"Notwithstanding anything contained in this Act (but subject to the provisions of section 15), a landlord shall be entitled to recover possession of any premises if the Court is satisfied—

(1) that the tenant after coming into operation of this Act has built, acquired vacant possession of or been allotted a suitable residence."

The question is whether the petitioner had acquired vacant possession of a suitable residence. If he had, then the landlord is entitled to possession of the premises; but if he had not, then the landlord would not be entitled to possession of the premises.

Mr. Paranjpe contends that the Courts below have not considered the question as to what the phrase "acquired vacant possession of a suitable residence" means, and, secondly, that the Court had no jurisdiction to award half the premises to the landlord, in any event. So far as the second contention is concerned, the finding on the first point being against him, it is in his favour, and it is impossible in the present application to interfere with that part of the order if that finding is to be retained.

What "suitable residence" means has not been defined in the Act itself. The words must be given their natural meaning, and the Court would not be entitled to impose limitation on their meaning. The section requires that the tenant must acquire "suitable residence." He should acquire residence, and it must be suitable. Suitability cannot be only for one purpose. It must be suitability for his reasonable needs. In order, therefore, to decide suitability of the residence for the tenant, the Court has to consider the needs of the tenant and his family and consider whether or not the other accommodation that has been acquired by the tenant is suitable for his needs.

In the present case, the petitioner was a teacher in a secondary school of a private educational society. His salary, therefore, must necessarily be very limited. He was transferred to Wai as Superintendent of a school at that place. But there is nothing to show that his salary had increased considerably. His son who was dependent upon him was at the time studying accountancy. Again, there is nothing to show that there was any institution of accountancy in Wai which he could join and where he could pursue his studies. Again, there is nothing to show that he could have conveniently stayed at Wai and prosecuted his studies in Poona. The finding of both the Courts is that the petitioner's son continued to stay in the premises and pursue his studies, in Poona. The question is, merely because he acquired some premises at Wai, can it be said that he had acquired suitable residence at another place and, therefore, the landlord was entitled to possession? The appellate Court in its judgment observes that the suitability of a place is inherent in itself and does not depend upon surrounding circumstances. It is difficult to appreciate what is intended to be

conveyed by this observation. The learned Judge probably meant to say that as soon as a residential place was acquired by the tenant, the Court must for that very reason hold that "suitable residence" has been acquired. The words used in the statute are not "has acquired a residence", but they are "has acquired suitable residence", the emphasis being on the word "suitable". It is wrong, therefore, to hold that circumstances of the tenant have not to be considered while applying this clause.

Having regard to the facts found in the case and the facts apparent on the record, it is impossible to say that the petitioner had acquired an alternative suitable residence for his purposes. If his son was required to stay in Poona for prosecuting his studies, it must mean that the accommodation at Wai was not suitable for all his purposes, though it may be suitable only for the purpose of his service. The lower Court was, therefore, wrong in holding that the petitioner had acquired suitable residence merely on the basis that he had acquired some place to reside at Wai. In view of this, the petitioner is entitled to succeed.

[The rest of the judgment is not material to this report].

Suit dismissed.

Before Mr. Justice K. K. Desai and Mr. Justice Palekar.

**RUKMANIBAI KHIMJI COOVERJI v. SHIVNARAYAN
RAM ASHRE.***

Bombay Rents, Hotel and Lodging House Rates Control Act (Bom. LVII of 1947), Secs. 5(10), 11—Standard rent in connection with premises first let after September 1, 1940, how to be ascertained—Whether open to Court to consider circumstance of landlord having acquired land at much smaller price at anterior date than date of first letting.

Under the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, in connection with premises first let after September 1, 1940, the standard rent should be ascertained as regards the land involved by determining fair return on the basis of the market value of the land at the time of the first letting. Even so, it would be open to the Court to consider the circumstance of the landlord having become owner of the land for a much smaller price at anterior date than the date of first letting and as to how the amount of standard rent should be affected because of that circumstance. Therefore before fixing the amount of standard rent the Court is bound to consider all the relevant circumstances of the case.

Patel Jotram v. Sheth Anandji Kalyanji Padhi,¹ commented upon.

Jamaloddin Jainoddin Musalman v. Budhesing Amarsing Rajput,² explained.

Saipansaheb Dawoodsaheb v. Larman,³ *Vejbai Khetsee v. Dr. Sushilabai Vasantrao Bagwe*,⁴ *Bhagvandas Lilaram v. Dadanbhai Vishindas*,⁵ *Harilal v. Jain Co-op. Housing Soc.*⁶ and *The State of West Bengal v. Bela Banerjee*,⁷ referred to.

THE facts appear in the judgment.

In C. R. A. No. 1444 of 1960:

D. R. Dhanuka, for the applicants.

G. N. Vaidya, with *K. P. Gala*, for the opponent.

*Decided, March 22/23, 1965. Civil Revision Application No. 1444 of 1960 (with Civil Revision Applications Nos. 1445 to 1453 of 1960; 968, 969, 991 & 1575 of 1961 and 288-290 of 1963).

¹ (1958) Civil Revision Applications Nos. 1366 to 1372 of 1957, decided by Chagla C.J. on August 4, 1958 (Unrep.).

² (1955) Civil Revision Applications Nos. 1248 and 1249 of 1953, decided by J. C. Shah

J., on August 10, 1955 (Unrep.).

³ (1955) 57 Bom. L.R. 413.

⁴ (1958) Civil Revision Application No. 1376 of 1957, decided by Chagla C.J., on August 5, 1958 (Unrep.).

⁵ (1958) Civil Revision Applications Nos. 811 and 812 of 1957, decided by Chagla C.J., on July 2, 1958 (Unrep.).

⁶ (1957) 59 Bom. L.R. 217.

⁷ [1954] 8 C.R. 558.

Soli Sorabji, with *Chinoy* and *R. B. Kotwal*, *R. Kotwal*, *V. V. Albal* and *C. P. Patel*, allowed to argue the Law Point.

In *C. R. As. Nos. 1445 to 1453 of 1960*:

D. R. Dhamuka, for the applicants.

K. P. Gala, for the opponent.

In *C. R. As. Nos. 968 and 969 of 1961*:

D. P. Hegde and *Hemendra P. Patel*, for the applicants.

S. R. Chitnis, for the opponent.

In *C. R. As. Nos. 991 and 1575 of 1961*:

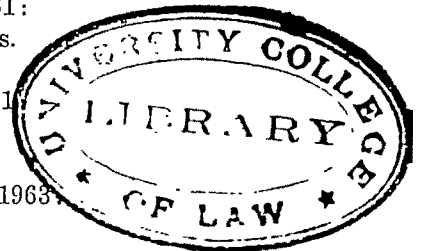
M. R. Kotwal and *S. R. Chitnis*, for the applicant.

D. P. Hegde, for opponent No. 1.

In *C. R. As. Nos. 288, 289 and 290 of 1963*:

L. V. Deshpande, for applicants.

C. P. Patel, for the opponent.



K. K. DESAI J. In these revisional applications and also in several other revisional applications on the file of this Court, the question of considerable interest under the provisions of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (hereinafter referred to as "the Act"), that has arisen is—whether in connection with premises first let after September 1, 1940, the standard rent should be ascertained as regards the land involved by determining fair return on the basis (i) of the market value of the land at the time of the first letting, or (ii) of the price paid and/or investments made at the time of purchase of the land at anterior date. On behalf of the landlady, petitioner No. 1 in the present revisional applications, it is contended that the basis should be the market value of the land at the time of the first letting after September 1, 1940. On behalf of the respondents-tenants, it is contended that the basis must be the price paid and/or investments made for the purchase of the land at anterior date.

In these revisional applications, the question has arisen under the following circumstances:—Petitioner No. 1 is the owner of two buildings called Khimji Cooverji Chawls situate at Carter Road, Mulund. The land on which these two buildings were constructed was purchased by the husband of petitioner No. 1, Khimji Cooverji, under a deed of sale dated November 18, 1946. The land consisted of 2000 square yards. 1813 square yards of this land were used up in putting up the total construction of the above two buildings. The rest of the area had to be kept unbuilt upon because of the municipal regulations requiring that certain proportion of the land should be kept open to the sky. Thus, 187 square yards remained unbuilt upon. The first building was constructed and completed in 1949. The second building was constructed and completed in 1951-52. Soon after the completion of construction, the tenements in each building were let out to the tenants. In the first building, there are 18 tenements in all. One tenement is occupied by the owner herself. In the second building, there are 17 tenements. Tenements in these buildings are let out to tenants at monthly rents varying between Rs. 29 to Rs. 70 per month. Twelve tenants in each of the buildings commenced proceedings in the Court of Civil Judge, Junior, Division, Thana, for determination of standard rent of the premises and/or tenements in their occupation. As regards the ascertainment of the fair return on the value of the land on which these buildings were constructed, on behalf of the tenants, the contention before us is that the value should be fixed on the footing of the price paid for the purchase of the land under the deed of sale dated November 18, 1946. On behalf of petitioner No. 1 landlady, the contention before us is that the value of the land in connection with ascertainment of the standard rent ought to be fixed as at the date of the first letting of the tenements in these buildings. In connection with the first building, the construction whereof was completed in 1949, the value

should be ascertained on the basis of the market value of the land in 1949. As regards the second building, the value should be ascertained on the basis of the market value thereof on the date of the first letting in 1950-51.

These rival contentions, were also made before the Civil Judge, Junior Division, in the applications of the tenants. The learned Judge accepted the evidence of Architect Ghanekar tendered on behalf of the landlady that the value of the land in 1949 at the date of the first letting and/or completion of construction of one of the buildings was Rs. 10 per square yard. Having accepted the contentions made on behalf of the landlady, he arrived at the fair return in connection with the value of the land on the basis of Rs. 10 per square yard. In Civil Revision Applications filed before him by the tenants, the District Judge, Thana, accepted the contentions made on behalf of the tenants. In that connection, he referred to the decision in *Patel Joitram v. Sheth Anandji Kalyanji Padhi*¹. Following the ratio of the judgment of Chagla C.J. he held that in ascertaining standard rent the value of the land to be considered was the price paid and/or investment made under the deed of sale dated November 18, 1946. He also further held that for the period of the time taken in putting up the above two buildings after the date of the deed of sale, the landlady was entitled to a return of 6 per cent. on the investment. He, therefore, fixed fair return at 6 per cent. on the value of the land, at Rs. 5 per square yard being the price in the deed of sale dated November 18, 1946. He also considered the value of the cost of construction and fixed the usual return of 8.2/3 per cent. on the cost of construction and thus determined the standard rent of the premises.

On behalf of the landlady, it is contended with some emphasis that having regard to the provisions in the Act, in the ascertainment of the fair return on the value of the land involved, the basis ought to be the value as at the date of the first letting after September 1, 1940. Reliance is placed in that connection on the provisions in ss. 5(10) and 11 as also ss. 13(1) (*hh*), 13(1) (*i*), 13(1) (*ii*) and 13A and also certain other provisions of the Act. Section 5(10) defines "standard rent" to mean—

- "(a) ...rent...fixed by the Court and the Controller...; or
- (b) where the standard rent is not so fixed—subject to the provisions of section 11,
- (i) the rent at which the premises were let on the first day of September 1940, or
- (ii) where they were not let on the first day of September 1940, the rent at which they were last let before that day, or
- (iii) where they were first let after the first day of September 1940, the rent at which they were first let, or
- (iv) in any of the cases specified in section 11, the rent fixed by the Court;"

The relevant part of s. 11 provides:

"11. (1) Subject to the provisions of section 11A in any of the following cases the Court may, ..., fix the standard rent at such amount as, having regard to the provisions of this Act and the circumstances of the case, the Court deems just—

- (a) where any premises are first let after the first day of September 1940, and the rent at which they are so let is in the opinion of the Court excessive; or
- (b); or
- (c) ...; or
- (d) where any premises have been or are let rent-free or at a nominal rent or for some consideration in addition to rent; or
- (e) where there is any dispute between the landlord and the tenant regarding the amount of standard rent.
- (2)
- (3);"

Having regard to the above provisions in ss. 5(10) and 11, it is not in dispute between the parties that in cases where premises are first let after September

¹ (1958) Civil Revision Applications Nos. on August 4, 1958 (Unrep.).
1366 to 1372 of 1957, decided by Chagla C.J.,

1, 1940, in proceedings for fixation of standard rent, Court should have regard to (i) the provisions of the Act, (ii) the circumstances of the case and (iii) the amount fixed should be just. The main contention on behalf of the tenants is that the provisions of the Act show that "the Legislature wanted to disallow any increase in value of the lands and/or rents as existing in 1941". The submission is that the value and/or prices prevalent in 1941 are the standard prices, on the basis whereof, the standard rents are liable to be fixed in respect of all the properties. According to this submission, in connection with ascertainment of standard rent, it is not permissible under the Act to consider any unearned increment and/or rise in value of the lands after 1941. This being the policy of the Act, the basis for fair return on the value of lands in determining standard rent must be the value thereof at the date of purchase. The value must be on the footing of investments made at the date of purchase.

Reliance has been placed in this connection on the Statement of Objects and Reasons mentioned in the Legislature on the occasion of introduction of the Bill which ultimately became the above Act. Reliance also has been placed on the provisions in sub-cl. (i) and (ii) of clause (b) in the definition of "standard rent" in sub-s. (10) of s. 5 of the Act and also on the provisions in the Act preventing ejection of tenants who pay standard rents regularly and the other provisions fixing the basis of permitted increases in the standard rent. Reliance has also been placed on the observations of Chagla C. J. in *Patel Joitram v. Sheth Anandji Kalyanji Padhi* and of J. C. Shah J. made in *Jama-loddin Jainoddi Musalman v. Budhesing Amarsing Rajput*². In the Statement of Objects and Reasons, it is, *inter alia*, stated:

"The latter Act (the Bombay Rents, Hotel Rates and Lodging House Rates (Control) Act, 1944), which was intended to check an inflationary rise in rents and hotel and lodging house rates in areas in which, owing to war conditions, there was an acute scarcity of accommodation, will lapse in April 1948 unless re-enacted before then. The conditions which led to the enactment of these measures continue in an even more aggravated form and it is, therefore, essential that effective control should be continued until sufficient progress has been made with building operations to provide adequate and suitable accommodation for the largely increased populations of the areas concerned..."

Now, it is, therefore, true that the reason why the Act of 1947 was enacted was that in spite of the previous Act of 1944, inflationary rise in rents due to war conditions and acute scarcity of accommodation had continued to exist. In fact, these conditions had become more aggravated in form. The purpose of the Act was to have effective control until sufficient progress had been made with building operations to provide adequate and suitable accommodation. In coming to final decision in this case, we will have, therefore, to bear in mind the above reasons why the Act of 1947 was put on the statute book. It is also true that the provisions in sub-cl. (i) and (ii) of cl. (b) of the definition of "standard rent" contained in s. 5(10) of the Act clearly indicate that as regards previously existing buildings and structures and also as regards the land previously let out for residence, education, business, trade or storage purposes, it was provided that the standard rent was the rent that was being charged on September 1, 1940. If on that date the premises were not let, the standard rent was the rent that was charged last before September 1, 1940. Undoubtedly, therefore, as regards the buildings already let and therefore already constructed and existing prior to September 1, 1940, and even lands already let prior to that date, there was clear provision in the Act that the standard rent was ordinarily the rent already previously charged as on September 1, 1940. It is also clear that the Act is made for the purpose of protection of the tenants who were not liable to be ejected if they paid standard rent and observed other terms and conditions of the tenancy. The ordinary right of ejection was materially affected in the manner provided in ss. 12 and 13 of the Act. It is also true that the basis for permitted increases generally related to actual expenses in-

² (1955) Civil Revision Applications Nos. J., on August 10, 1955 (Unrep.).
1248 and 1249 of 1953, decided by J.C. Shah

curred and/or investments made. In *Patel Joitram v. Sheth Anandji Kalyanji Padhi*, in connection with the question of standard rent in respect of new structures constructed by the landlord in 1946 on the lands purchased in 1929, Chagla C.J. observed that

"The object of the Legislature in enacting the Rent Act was, apart from giving security of tenure to the tenant, to peg down rents as they were prevailing on the 1st September 1940. The view that the Legislature took was that at relevant date rents were normal, but after that date there was inflation and rents were inflated and landlords started charging excessive and unfair rents."

After making the above observation, the learned Chief Justice observed:

"It was also the intention of the Legislature that the landlord should not benefit by any increase in the value of the land brought about by war conditions after 1941". Now, it is this observation that is questioned before us on behalf of petitioner No. 1, the landlady. The contention that is made is that the above observation is not justified, having regard to the relevant provisions in the Act. We propose to discuss this question after noticing the further observations made by the learned Chief Justice in the above Civil Revision Applications and also the observations of J. C. Shah J. in the Civil Revision Applications mentioned above.

The ratio of the decision of Chagla C.J. in the above Civil Revision Applications may be stated as follows:—The lower Court was not justified in fixing the standard rent of the premises on the basis of investment made by the landlord in purchasing the lands in 1928. To fix the standard rent on that basis would not be fair and just, because the value of the land had gone up, the value of rupee had gone down, the cost of living had gone up and the intention of the Legislature was not to deprive the landlord of the capital appreciation of his land between 1929 and 1941. The learned Chief Justice, however, found that the value of the land should be fixed on the basis of the market value thereof in 1941, after which date, the Legislature intended to disallow increase in value. As regards the 5 years' period between 1941 and 1946, when the landlord put up the new construction, the Court found that for the locked up capital, (i.e. the value of the land as in 1941), the landlord should be entitled to a fair return, i.e. interest at 6 per cent. per annum. In this very connection, it was observed that in fixing the standard rent, even after arriving at the value of the land on the basis of market value in 1941, the Court was bound to consider "the rents charged to and paid by the tenants in a very neighbouring locality as one important circumstance." In fact, the learned Chief Justice refused to interfere with the findings made by the lower Court because he found that the standard rent that was fixed by the lower Court could not be described as excessive.

In *Jamaloddin Jainoddin v. Budhesing Amarsing*, J. C. Shah J. observed:

"Now the Bombay Rents, Hotel and Lodging House Rates Control Act, LVII of 1947, was passed by the Legislature with a view to peg down rents at the pre-war rates and with a view to prevent landlords from profiteering....The Act having been passed to prevent increase of rent above the pre-war level in respect of properties which were let out before the 2nd World War, it is implicit in the provisions of the Act that the landlord is not entitled to return on the unearned increment in the value of his property. He cannot, therefore, claim an economic return on the present market value of his property."

The learned Judge also referred to the previous decision of this Court in the case of *Saipansahab Dawoodsaheb v. Laxman*³. In that case, this Court decided that "in fixing the standard rent the correct approach should be, what is the net return which a landlord should be reasonably allowed on his investment". Having regard to that decision, the learned Judge found that in ascertaining the amount of the standard rent, the "important test to determine what must be regarded as 'just' is what reasonable return to the landlord on his investment may be."

Relying on the observations in the above Civil Revision Applications, on behalf of the tenants, it is contended that the result of the provisions in the Act is that in connection with ascertainment of standard rent, the value of the land on which building construction has been put up at a later date must be ascertained on the footing of its market value in 1941. They, however, concede that in connection with lands purchased subsequently, the basis should be the investment price paid by the purchaser at the date of completion of sale. The contention is that the reasons for this are more specifically those which are mentioned in the above two judgments, i.e. in the observations which we have already referred to.

In connection with the above submission, it is to be borne in mind that in his judgment J. C. Shah J. has observed that "the landlord is not entitled to return on the unearned increment in the value of his property", and restricted the same by using the following phrase, viz., "The Act having been passed to prevent increase of rent above the pre-war level *in respect of properties which were let out before the 2nd World War*" (the italics are ours). The learned Judge was, it may be stated, conscious of the fact that the Legislature had not made any provision to the effect that the landlord was not entitled to return on the unearned increment in the value of his property in connection with properties that were let out for the first time after September 1, 1940. We would be justified also in observing that the learned Judge was conscious that as regards the properties which were let out for the first time after September 1, 1940, the Act had not provided that the landlord should not benefit by increase in the value after September 1, 1940, or 1941. Though Chagla C.J. observed that the intention of the Legislature was that the landlord should not benefit by any increase in the value of the land brought about by war conditions after 1941, in those very Civil Revision Applications, in connection with lands purchased subsequent to 1941, the learned Chief Justice recited that his attention had been drawn to various decisions of this Court and that in all those cases this Court had laid down that the Court must allow the landlord a fair return on the actual price that he paid for the lands.

It is to be noticed that in those cases, obviously, the lands were purchased much subsequent to September 1, 1940. The price paid and/or investment made were not on the basis of the market value of the land as on September 1, 1940, or in 1941. The purchasers and/or the investors had paid prices which were market values and higher prices at the dates of purchases subsequent to September 1, 1940. The market values had no relation whatsoever with the prices prevalent in 1940-41. Even so, this Court had decided that in arriving at standard rent in connection with the constructions put up on these subsequently purchased lands, the values of the lands, must be ascertained not on the footing of the values prevailing in 1940-41, but the prices paid and/or factual investments made. The learned Chief Justice himself on the day next to the date of decision in *Patel Joitram v. Sheth Anandji Kalyanji Padhi* i.e. on August 5, 1958, dealt with *Vejbai Khetsee v. Dr. Sushilabai Vasantrao Bagwe*.⁴ In those applications the land was purchased in 1944, three years after the relevant date mentioned in connection with standard rent in s. 5(10) of the Act. The construction was put up in 1951. In arriving at the standard rent of the premises, the lower Court had fixed the return on the land on the basis of value thereof in 1951. On behalf of the tenants, it was contended before the learned Chief Justice that the lower Court ought to have fixed the standard rent on the basis of the value of the land as prevalent in any event in 1944, if not in 1941. The learned Chief Justice did not accept the contention and refused to interfere with the decision of the lower Court. Similarly, in disposing of *Bhagwandas Lilaram v. Dadanbhai Vishindas*,⁵ the learned Chief Justice refused to interfere when the standard rent of the premises had been fixed

4 (1958) Civil Revision Application No. 1376 of 1957, decided by Chagla C.J., on August 5, 1958 (Unrep.).

5 (1958) Civil Revision Applications Nos. 811 and 812 of 1957, decided by Chagla C.J., on July 2, 1958 (Unrep.).

by the lower Court on the basis of price paid by the purchaser in 1947. It is, therefore, clear that the learned Chief Justice himself had and this Court also had throughout accepted the principle that as regards lands purchased by third parties after September 1, 1940, the market values of the lands as prevailing in 1940-41 was not the true basis for determination of fair return thereon and that the prices paid and/or investments made in purchasing the lands subsequent to September 1, 1940, was the basis on the footing whereof the landlord should be entitled to fair and appropriate return. Undoubtedly, the view expressed by the learned Chief Justice in *Patel Joitraam v. Sheth Anandji Kalyanji Padhi* are emphatic and clear. The views are of, if one may use the expression, "strong Bench" and are entitled to the highest respect. Even so, it is clear that the learned Chief Justice himself and this Court has not accepted the principle that "the intention of the Legislature was that the landlord should not benefit by any increase in the value of the land brought about by war conditions after 1941" and the same has not been applied to transactions where the lands were purchased subsequent to September 1, 1940. This exception recognised throughout by this Court appears to us to prove that the general view of this Court has not been that ordinarily the landlord was not entitled to benefit of increase in the value of the land brought about by war conditions after 1941. To follow up the observations of J. C. Shah J. in the Civil Revision Applications mentioned above, it is true that in connection with properties already let out (being the properties other than those which are first let out after September 1, 1940), the Legislature intended that the landlord should not benefit by any increase in the value of the land brought about by war conditions after 1941. As regards the properties, which are first let out after September 1, 1940, there is nothing in the Act to suggest that the Legislature intended that the landlord should not benefit by increase in the value of the land brought about by war conditions after 1941.

This is clear having regard to the provisions in sub-cl. (iii) of cl. (b) of sub-s. (10) of s. 5 defining "standard rent" and also provisions in s. 11 of the Act. On a reading of these provisions, it is clear that in connection with premises first let after September 1, 1940, the contractual and/or agreed rent was provided to be standard rent except in cases where the Court considering the question could come to the conclusion that the agreed and/or contractual rent was excessive. The clear effect of these provisions is that the Court would not be justified in holding that the agreed and/or contractual rent is not the standard rent unless and until it was in a position to make a finding that the rent was excessive. This has been accepted as true position in all the decisions of this Court. Reference may in this connection be made to the reported case of *Harilal v. Jain Co-op. Housing Soc.*⁶

The question that arises is as to whether in determining that the agreed and/or contractual rent is not excessive, it is not right to hold that fair return on the value of the land should be ascertained on the basis of the market value thereof at the date of the first letting. As we have already stated, the question of importance is as to whether the rent charged is excessive. Having regard to the contents of s. 11 of the Act, this question is liable to be decided by considering three circumstances, viz. (i) the provisions of the Act, (ii) the circumstances of the case itself and (iii) fair and/or just character of the amount involved. It is to be borne in mind that ordinarily the market value of land is roughly the price which an owner willing and not obliged to sell might expect from a willing purchaser. Ordinarily, the value is ascertained on the basis of capitalisation of the net annual income. Ordinarily, the return on investments ought to be determined as at the date of the yield (of the income). This normal method is adopted in all markets and is generally evident in share market. Market values of properties are thus fixed in relation to the produce and/or the income thereof at the relevant date. This ordinary basis of arriving at the true market value is rational and can satisfy objective tests. This

has been accepted as the true basis in land acquisition proceedings under the Land Acquisition Act. This is the basis for taxing purposes in respect of all properties in all taxing statutes. If this is not adopted in arriving at market values of properties and any other basis is adopted, the same would exhibit anomalies and result in discrimination between different parties. In this connection, one may refer to the decision of the Supreme Court in the case of *The State of West Bengal v. Bela Banerjee*⁷. In considering the validity of the provisions of the West Bengal Land Development and Planning Act, 1948, the question before the Court related to the provisions in the Act that as regards the acquisitions made, the market value at the anterior date, i.e. December 31, 1946, was to be the value for compensation. The Court observed in this connection as follows (pp. 564-65):

"...but the fixing of an anterior date, which might have no relation to the value of the land when it is acquired, may be, many years later, cannot but be regarded as arbitrary....Any principle for determining compensation which denies to the owner this increment in value cannot result in the ascertainment of the true equivalent of the land appropriated."

Applying these observations, in connection with the question of ascertainment of fair return to the landlord as regards the value of the land involved, it would be right to hold that the return ought to be fixed on the basis of the market value of the land at the date of the first letting. The value fixed on any other basis would, as observed by the Supreme Court, be arbitrary. The same would not be satisfying any objective tests and would involve unfair discrimination against the landlord. This can be made evident by illustrations. One may consider the case of lands which have gone up in value tremendously after the fall in the value of the rupee and because of industrialisation taking place in suburbs of Bombay. The small land owners in these suburbs have been for some time past selling their properties at largely increased values. Suppose that a small land-holder owning since 1920-1925 10,000 square yards of land at the suburb of Mulund or Bhandup sells in 1958-59 one-half of his land, i.e. 5,000 square yards of the land, to a big industrialist for the price of about Rs. 60 to Rs. 70 per square yard and constructs on 5,000 square yards of land left with himself a building similar in all respects to a building constructed by the purchaser industrialist on the other 5,000 square yards of land. Both the buildings may be taken as completed in 1960. Having regard to what has already been held by this Court in connection with the rents charged by the industrialist purchaser, the fair return as regards the land involved would be arrived at on the basis of his investments made for the purchase of the land in 1959. In other words, the fair return would be fixed on the basis of the price of Rs. 60 per square yard. Let us take it that the rent fixed for a flat on the newly built structure by the industrialist purchaser is fixed at Rs. 400 per month. The question is whether in connection with exactly similar flat in the building constructed by the small land-holder seller who retains the 5000 square yards with himself, the standard rent should be fixed on the basis of the value of his land prevailing in 1941 as stated by Chagla C.J. in the above Civil Revision Applications. On that basis, one may imagine that the rent per month would come to about Rs. 150. The question is whether there is any provision in the Act to justify this huge difference in the amount of the standard rent in connection with two similar adjacent properties constructed on the lands which were originally owned by the small holder-seller. We have asked counsel for the tenants to point out any provisions from the Act which would justify such indiscriminate determination of standard rent between two such properties. We have also ourselves attempted to find out such provisions in the Act. The counsel have not been able to show us any such provision, nor have we been able to find any such provision. Having regard to the observations made by Chagla C.J. in the above Civil Revision Applications, we have considered this

question with some anxiety. We have, under the circumstances mentioned above, come to the conclusion that there is nothing in the Act to warrant a finding that as regards premises first let after September 1, 1940, the Legislature intended that the landlord should not benefit by any increase in the value of the land brought about by war conditions after 1941 and/or brought about by other prevalent conditions in thickly populated cities like Bombay. It has appeared to us that the basis for arriving at fair return to the landlord in respect of the value of his land must be a rational basis which could satisfy objective tests. The rational basis is the normal basis mentioned by us above, i.e. the return on investment ought to be determined at the date of the yield (of the income). This is the basis for which support can be had from the provisions in the Land Acquisition Act and the observations of the Supreme Court referred to above.

In this connection, it is also relevant to observe that there is no provision in the Act which affects the general right of land owners to sell their lands. An owner would be always entitled to sell off his lands and also buildings constructed after September 1, 1940, but not let out at all. A purchaser of such newly constructed building would, having regard to the decisions of this Court, be entitled to have the value of the land fixed on the basis of the investment made by him. This value will be almost the value at the date of the first letting. It is difficult to understand why the original landlord (who does not want to sell his land and property) should not be entitled to charge the same amount as standard rent, as the new purchaser should be otherwise entitled to charge. This discussion also shows that by accepting the contention made on behalf of the tenants, ordinarily, no benefit at all can be gained by tenants. The imaginary benefit can always be defeated by sales of properties and/or exchange of properties. By accepting the contentions made on behalf of the tenants, this Court would lay down a principle which has no rational basis at all. It is not the function of this Court to arrive at constructions for the benefit of tenants when the provisions in the Act do not warrant the same. If the Legislature in fact desired that "the landlord should not benefit by any increase in the value of the land" after 1940-41, the Legislature could have directly provided for the same. In fact, when the Legislature provided in sub-cl. (iii) of cl. (b) of s. 5(10) that the standard rent in respect of the premises first let after September 1, 1940, would be the rent at which they were first let, it exhibited an intention that the landlord was entitled to the benefit of increase in the value of the land which arose subsequent to 1940-41. This was made more clear by providing in s. 11 of the Act that in determining the amount of standard rent the Court was entitled not only to consider the provisions of the Act but also the circumstances of the case and the just and fair character of the amount fixed. The basis of the amount of the standard rent in respect of equally situate and similar properties first let after September 1, 1940, cannot, in our view, be different in the case of the same property, because it is sold subsequent to 1940 by the original landlord. The amount of the standard rent in respect of properties similar in all respects, whether they are sold or not sold, ought to be the same. We have come to the above conclusion after noticing that as regards the properties already first let before September 1, 1940, the Legislature has impliedly provided that the landlord should not be entitled to unearned increment in the value of the land.

It is necessary to point out that reliance has been placed on behalf of petitioner No. 1 landlady on the provisions in ss. 13(1)(hh), 13(1)(i), 13(1)(ii), sub-s. (3A) of s. 13 and s. 13A of the Act. These provisions go to show that tenants are liable to be ejected from old buildings of certain kinds in cases where the landlord intends to put up new constructions. The Act provides for sufficient protection to the ejected tenants for being housed in the new construction. It is contended on behalf of the landlady that these provisions show that one of the objects of the Act is to encourage building constructions.

This is one circumstance liable to be considered in connection with the question which we have just decided

It remains to be pointed out that the definition of the word "premises" as contained in sub-s. (8) of s. 5 includes open land not used for agricultural purposes. It is clear that the provisions of the Act apply to open lands which are let for residence, education, business, trade and storage purposes. In connection with such lands when they are let out prior to September 1, 1940, the amount of standard rent would be the rent at which they were let out on September 1, 1940, or, when they were not let on that day the rent at which they were last let before that day. It would be open, having regard to the provisions in s. 11 of the Act, both for the landlord and the tenant to contend that the agreed and/or contractual rent was not the standard rent. The Court would then have to determine the standard rent in respect of such lands. The principles discussed by us above would be applicable to applications made for fixing standard rent of such lands let out subsequent to September 1, 1940. The return to the landlord will have to be fixed on the basis of market value of such lands as at the date of first letting.

Now, in connection with all that is discussed above, it is necessary to make clear that before fixing the amount of standard rent, the Court is bound to consider all the circumstances of the case. The market value of the land as at the date of first letting after September 1, 1940, is only one prominent circumstance. Even so, it would be open to the Court to consider the circumstance of the landlord having become owner of the land for a much smaller price at anterior date than the date of first letting. It would be open to the Court to consider as to how the amount of standard rent should be affected because of that circumstance. In coming to the conclusion whether the amount of the agreed and/or contractual rent is excessive or not, the Court is not prevented from considering all the relevant circumstances including the circumstance mentioned above.

We have been told by counsel for the petitioners and the respondents that these revisional applications have been put up before us because certain difficulties had arisen due to previous decisions of this Court in connection with the question which we have just decided. It was otherwise unnecessary that these revisional applications should be put up before a Division Bench. Ordinarily and normally, all the revisional applications under the above Act are liable to be disposed of by a single Judge of this Court. Advocates of both sides have requested that now these revisional applications may be allowed to be placed before a single Judge of this Court for final disposal. These revisional applications will accordingly be put up before a single Judge of this Court. The costs will be ultimately decided by the learned Judge who will decide these revisional applications.

Order accordingly.

[NAGPUR BENCH]

Before Mr. Justice Patel and Mr. Justice Wagle.

SHALIGRAM HIRALAL CHANDAK.

v.

GOVINDRAO RATANLAL.*

Representation of the People Act (XLIII of 1951), Secs. 123(4) & (3A), 100(1)(d), (iv)—“Statement in relation to candidature,” meaning of expression in s. 123(4)—Whether expression means “statement in relation to the candidate”—Construction of statute—Circumstances under which words in statute have wider or narrower meaning.

In order that a statement “in relation to the candidature, or withdrawal” of a candidate should amount to corrupt practices within s. 123(4) of the Representation of the People Act, 1951, it should be in connection with the continued candidature of a candidate or his withdrawal from the candidature. It must be a statement of a fact connected with the candidature of a candidate and which affects his continued candidature during the election.

It is necessary in every case to examine the statements alleged to have been made and find out whether they are made in relation to the public and political character of the candidate or otherwise. It is possible that in some cases the criticism of a candidate's political and public activity may contain aspersions on his character or fitness to be elected. In that case the statements would be covered by the first part of s. 123(4) of the Act. But if that is not so, then merely because his party or his political and public activities or character is attacked by the statements, they are not “statements in relation to his candidature.”

Maganal Bagdi v. H. V. Kamath,¹ dissented from.

Krishnaji Bhimrao v. Shanker Shantaram,² approved.

*Inder Lal v. Lal Singh*³ and *Sarla Devi v. Birendrasingh*,⁴ referred to.

While construing a statutory provision the Court must give the words used their ordinary grammatical meaning. A word may take colour from the context, and, in the setting in which it is used it may have a wider or a narrower meaning. The words must be construed, therefore, with due regard to the context, the circumstances under which the same came to be enacted and the mischief that was intended to be prevented.

In order that an election should be set aside under s. 100(1)(d) of the Representation of the People Act, 1951, it is incumbent on the petitioner to produce sufficient number of witnesses and evidence to show that all the votes wasted would have been acquired by the defeated candidate.

*Vashist Narain v. Dev Chandra*⁵ and *Hari Vishnu v. Ahmad Ishaque*,⁶ referred to.

In a bye-election to the Legislative Assembly from Khamgaon Constituency, No. 164, the nomination papers were filed on November 18, 1963, by eight persons including respondents Nos. 1 to 4. The Returning Officer accepted all the nominations after scrutiny on November 20, 1963. Later four of them withdrew their candidature and the only persons in the field were respondents Nos. 1 to 4 to contest the election. The election was held on December 15, 1963. Respondent No. 1 secured 27,687 votes, respondent No. 2 secured 28,562 votes, respondent No. 3 secured 855 votes and respondent No. 4 secured 257 votes. On December 16, 1963, respondent No. 2 was declared elected to the Assembly.

The petitioner who was a voter and whose name was entered in the electoral roll filed the present petition challenging the election of respondent No. 2 *inter alia* on the following grounds:

(1) That respondent No. 3 at the material time at the date of his nomination had

*Decided, April 23, 1965. Appeal No. 18 of 1965, against the order passed by D. M. Aney, Member, Election Tribunal at Buldana, in Election Case No. 1 of 1964.

1 [1960] A.I.R. M.P. 362.

2 [1963] 7 E.L.R. 100.

3 [1962] A.I.R. S.C. 1156.

4 [1961] A.I.R. M.P. 127.

5 [1964] A.I.R. S.C. 513.

6 [1965] A.I.R. S.C. 233.

a subsisting contract with the Government for constructions under the scheme of small irrigation and was, therefore, disqualified for being a candidate for the election under s. 7(d) of the Representation of the People Act, 1951. Acceptance of his nomination paper, therefore, by the Returning Officer was improper and illegal and it had materially affected the result of the election.

(2) That respondent No. 2 was also guilty of corrupt and illegal practices in that he arranged for distribution of pamphlets containing false and defamatory charges against a person working for respondent No. 1 which was calculated to promote communal tension. This was done at a meeting of December 10, 1963. The effect of the same being as contemplated by s. 123, sub-ss. 3A and 4 of the Act.

The Tribunal *inter alia* held that respondent No. 3 was disqualified from being elected but the acceptance of his nomination paper by the Returning Officer was not improper and illegal, and the acceptance of the nomination paper had not materially affected the result of the election. In respect of the allegations against respondent No. 2, the Tribunal found that the same were not proved and dismissed the petition.

V. R. Manohar and G. S. Thombre, for the petitioner.

D. B. Padhye and S. A. Sohoni, for respondent No. 2.

PATEL J. [His Lordship after stating the facts, proceeded.] In this appeal the grounds of attack are limited by Mr. Manohar. He made three contentions:

1. That respondent No. 2 was guilty of a corrupt practice inasmuch as a leaflet exh. 122 was published by his supporters with his consent or, in any event, with the consent of his election agent. The contents of this leaflet fell within the definition of corrupt practice as contained in s. 123, sub-s. (3A) and sub-s. (4), of the Act.

2. That the acceptance of the nomination paper of respondent No. 3 in spite of his disqualification fell within the provisions of s. 100, sub-s. (1), cl. (d) and as it had affected the results of the election, the election of respondent No. 2 should be set aside.

3. That an application which he made for amendment of his petition under O. VI, r. 17, of the Civil Procedure Code, read with the Act, was wrongly disallowed.

The first contention is in respect of the Pamphlet exh. 122, the translation of which is at exh. 122A. It is very seriously argued that the statements contained in the same are false and that these statements fell within sub-ss. (3A) and (4) of s. 123 of the Act. The pamphlet, it must at once be stated, does not contain any direct allegation against respondent No. 1. It appears from the evidence that one Saqui Niyazi had addressed a few meetings supporting the candidature of respondent No. 1. He was a member of the Council and was also concerned in the management of INTUC. One Vinayakumar Parashar, who was known also as Chhajuram, was at the relevant time President of the Akola Congress Committee. The pamphlet is as follows:

"The Robber Miya Saqui of Chhajuram Company—Subhadrakumari the Secretary of Akola INTUC while in the course of working in the office had disappeared. She is in the *harem* at Badnera of Saqui Niyazi who has been robbing thousands of rupees under the name of INTUC. This Saqui Niyazi is now making propaganda for pair of bullocks and in doing so, is trying to defame respectable persons. Therefore detailed information will be supplied as to what are his affairs, how many bogus companies he floated, how many societies he mismanaged and how many Hindu girls he has seduced into his harem at various places. Below are photo copies of two sides of a money order sent by Saqui Niyazi to Subhadrakumari from the INTUC Office in Congress Bhavan at Akola. Soon detailed information will be published of the other girl Suman who was of Khamgaon.

Akola,

11-12-63.

Laxmikant Deshpande."

Mr. Manohar contends that this was not an innocent propaganda against a particular individual as could be seen from the circumstances under which

this pamphlet came to be published. The elections were to be held on December 15, 1963, and the pamphlet purports to have been printed on December 11, 1963. According to the evidence, it is suggested it was published on the night of December 10, 1963. Respondent No. 1 was a candidate set up by the Congress. Saqui Niyazi had addressed a few meetings and the statements published concerning this Saqui Niyazi are clearly such as to affect the chances of respondent No. 1 in the election by making the suggestion that respondent No. 1 was either keeping company with such people or that his candidature was supported by this kind of people and he says these statements were false. He also relies upon the fact that it expressly says that Saqui Niyazi was making propaganda for the pair of bullocks and that in doing so, he was trying to defame respectable persons. We may accept that the pamphlet is published to tell the public that respondent No. 1 was being supported by men like Saqui Niyazi and Chhajuram and that it was intended that this should have some influence in the voters' mind at the time of exercising their polling right. The question still is whether the pamphlet falls within the mischief of the sub-sections on which Mr. Manohar relies.

Section 100 of the Act requires the Tribunal to set aside an election of a returned candidate if it is of opinion

"that any corrupt practice has been committed by a returned candidate or his election agent or by any other person with the consent of a returned candidate or his election agent;"

Section 123 which deals with corrupt practices says that the following shall be deemed to be corrupt practices for the purposes of the Act:

"123. ...

(3A) The promotion of, or attempt to promote, feelings of enmity or hatred between different classes of the citizens of India on grounds of religion, race, caste, community, or language, by a candidate or his election agent or any other person with the consent of a candidate or his election agent for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate.

(4) The publication by a candidate or his agent or by any other person with the consent of a candidate or his election agent, of any statement of fact which is false, and which he either believes to be false or does not believe to be true, in relation to the personal character or conduct of any candidate, or in relation to the candidature, or withdrawal, of any candidate, being a statement reasonably calculated to prejudice the prospects of that candidate's election."

The question as to whether or not this pamphlet was published by respondent No. 2 or by some one with the consent either of respondent No. 2 or his election agent may be deferred from consideration for the present. The first question is whether it falls either within sub-s. (3A) or sub-s. (4) of s. 123.

The first question is whether the pamphlet falls within sub-s. (4). Mr. Manohar very seriously contended that the statements made are statements in relation to the candidature of respondent No. 1. He says inasmuch as the results of the election are bound to be affected by such a propaganda, it amounts to a statement in relation to the candidature of respondent No. 1. He relies in support of this construction of the section on the decision in *Maganlal Bagdi v. H. V. Kamath*.¹ It was said (p. 367):

"... While, on the one hand, it may only have a limited interpretation, meaning the right or qualification, or factum of candidature, as held in *Krishnaji Bhimrao v. Shanker Shantaram*,² it may, in the circumstances of a case, even have a wider import, including a reflection on the worthiness of a candidate to contest the election."

According to the dictionary "candidature" means the state of being a candidate. One may even say that it may mean the attributes necessary for being a candidate. This is the ordinary meaning of the word. The question is whether the words "statements in relation to candidature" should be con-

strued very widely to mean "statements in relation to the candidate" as contended for by Mr. Manohar and as held in the above case, or "to mean statements in relation to the candidature" in the ordinary sense.

While construing a statutory provision the Court must give the words used their ordinary grammatical meaning. It is true that a word may take colour from the context, and, in the setting in which it is used it may have a wider or a narrower meaning. The words must be construed therefore with due regard to the context, the circumstances under which the same came to be enacted and the mischief that was intended to be prevented.

The Supreme Court had occasion to consider the provisions of sub-s. (4) of s. 123 in *Inder Lal v. Lal Singh*.³ The Supreme Court held that it was intended to make a distinction between the personal character of the candidate and his political character and that the provision postulates that if a false statement is made regarding the political character, it would not constitute corrupt practice even if it has a tendency to affect the chances of the candidate being elected. We must have regard to this intendment of the section while considering the meaning of the words "in relation to the candidature" of a candidate along with the context in which the words are used.

First matter that has to be considered is that the personal character or conduct of a candidate has been specifically dealt with in the sub-section. It is clear, therefore, from the context that any statement which is made in relation to the personal character or conduct of any candidate cannot possibly be included within the words, "in relation to the candidature or withdrawal" of a candidate. These are two distinct matters and it could not possibly be suggested that the words "in relation to the candidature" in the context in which they are used ought to mean "in relation to the candidate". Mr. Manohar says that any statement in regard to the activities of a candidate which has likely effect upon the chances of election of a candidate is a statement "in relation to the candidature of a candidate" and therefore must fall within the clause. If the words were intended to have such wide application the provision as to statements regarding the personal character and conduct of the candidate was not necessary at all. By adopting such a construction, the very distinction between the personal character and conduct of a candidate and his political character intended to be made by the Legislature will be destroyed. Moreover, it is seen that the words "in relation to the candidature" are used in juxtaposition of the words "or withdrawal," of any candidate. The theme dealt with in this part of the section is only the matter of candidature—its continuance or withdrawal. This could only mean that the Legislature intended, that in order that the statements should amount to corrupt practices they should be in connection with the continued candidature of a candidate or his withdrawal from the candidature. In other words, it must be a statement of a fact which is connected with the candidature of a candidate and which affects his continued candidature during the election.

This view was taken in *Krishnaji Bhimrao v. Shankar Shanta Ram More*, by the Election Tribunal where a contention, like the present, was rejected by it. Similar view was taken in *Sarla Devi v. Birendrasingh*⁴ by a Bench of the Madhya Pradesh High Court where it was said (p. 138):

"Any false statement made in relation to the fact of a person being a candidate for an election would be covered; but by no stretch of the language can false statements in relation to the activities of a political party of which the candidate is a member be made to refer to his 'candidature'..."

They further said that (p. 137):

"...The false statement must be not in relation to the 'candidate' but in relation to his 'candidature', and candidature cannot be equated to the candidate".

With respect, therefore, it is difficult to agree with the opinion expressed in the case of *Maganlal Bagdi*.

³ [1902] A.I.R. S.C. 1150.

⁴ [1901] A.I.R. M.P. 127.

It is, therefore, necessary in every case to examine the statements alleged to have been made and find out whether they are made in relation to the public and political character of the candidate or otherwise. It is possible that in some cases the criticism of a candidate's political and public activity may contain aspersions on his character or fitness to be elected. In that case the statements would be covered by the first part of the sub-section. But if that is not so, then merely because his party or his political and public activities or character is attacked by the statements, they are not "statements in relation to his candidature". We will, therefore, examine the pamphlet exh. 122 from this point of view.

A reading of the pamphlet clearly indicates that the attack is directed to the party and not in any manner to respondent No. 1. Though it deals with Saqui Niyazi in particular, it refers to Chhajuram also who was then the President of Akola Congress Party. The statement regarding Saqui Niyazi may or may not be true, but the purport of the pamphlet is to show that those who were making propaganda for respondent No. 1 were people of a particular type, that they were robbing in the name of the INTUC, and were capable of questionable activities. There is not even an innuendo, so far as respondent No. 1 is concerned, in relation to his character or conduct. It only, in short, decries the propaganda carried on by those two in favour of respondent No. 1. We, therefore, reject this contention.

It is then contended that the matter of the pamphlet falls within sub-s. (3A) of s. 123 of the Act. Now, in order that the matter should fall within sub-s. (3A), it must amount either to the promotion or an attempt to promote feelings of (a) enmity or (b) hatred, between different classes of citizens of India, (i) on grounds of religion, (ii) on grounds of race, (iii) on grounds of caste, (iv) on grounds of community, or (v) on grounds of language. It is said that the pamphlet was intended to create hatred between the Hindu and the Mohamedan community. We may assume that telling the public the activities of those two persons who have been referred to in the pamphlet, might affect the chances of respondent No. 1 at the election. But that by itself is not enough in order to bring the pamphlet within sub-s. (3A). It is true that Saqui Niyazi is a Mohamedan. It is equally true that the pamphlet states that one Subhadrakumari was taken to his harem and that there were many other Hindu girls whom he had seduced into his harem at several places. Merely because there is a reference to the words "Hindu girls" it does not necessarily have the effect of inciting one community against another. The pamphlet itself associates Saqui Niyazi with INTUC and the Congress activities and his other Hindu friend is also mentioned in it. It may be that it had the tendency of exposing him in the eyes of the public. It may as well have the tendency of inciting a few fanatics against him as an individual, but there is nothing in the pamphlet to suggest that all Mohamedans as a class are bad or that Saqui Niyazi is having influence with his Mohamedan friends and because of that influence they were all going to vote for that candidate. It is an accident that Saqui Niyazi happens to be a Mohamedan and the girls alleged to have been seduced happen to be Hindus. But then Chhajuram was not a Mohamedan and even so, allegations were made against Chhajuram. Having regard to the nature of the contents and the manner in which two members of a particular political party are alleged to be guilty of certain malpractices in general, it cannot be said that the pamphlet had the effect of promotion of enmity or hatred between different communities.

It is also admitted that even as a result of this pamphlet nothing happened. Not one person raised his finger either against Saqui Niyazi or against any other member of his community. It is true, as pointed out by Mr. Manohar, that such a result need not follow. But the fact that such a result did not follow may be a circumstance which may be considered to show whether or not the propaganda alleged to be made by the pamphlet had the tendency

which it is claimed it had and it is to that extent only that it may be regarded as relevant. It is also true that even an attempt to create enmity between communities is sufficient. But then this is not a case of an attempted promotion of enmity between any two communities. Here it is said that in fact the pamphlet was distributed and even so it was completely innocuous. The inference therefore that the pamphlet did not have a tendency to create enmity or hatred between the Mohomedans and Hindus is fortified.

[His Lordship after considering points not material to this report, proceeded].

Mr. Manohar then contended that respondent No. 3 was admittedly disqualified and that though it could not be said that the acceptance of his nomination by the Returning Officer was improper, the fact remains that as his candidature was contrary to the provisions of the Act in that he was disqualified at the time that he was a candidate, there was non-compliance with the provisions of the Act and as the result of the election of respondent No. 2 has been materially affected by it, the election of respondent No. 2 should be set aside. That in the event such as the present it can be said that there was non-compliance with the provisions of the Act is established by the decisions of the Supreme Court in *Durga Shankar v. Raghuraj Singh*⁵ and *S. M. Bankerji v. Sri Krishna*.⁶ We may also assume for the time being that the petition does contain allegations of facts which would bring the case precisely within sub-cl. (iv) of cl. (d) of sub-s. (1) of s. 100 of the Act. The question remains whether the petitioner has established that, as a result of the non-compliance with provisions of the Act by respondent No. 3, the return of respondent No. 2 is materially affected. The Supreme Court has held in *Vashist Narain v. Dev Chandra*⁷ and *Hari Vishnu v. Ahmad Ishaque*⁸ that it is incumbent upon a petitioner, who seeks to set aside an election under cl. (d) of sub-s. (1) of s. 100 to establish by positive evidence the fact that the result of the election has been materially affected. It has also been held that there is no scope for surmises and conjectures in the matter of such proof. Indeed, the matter may be difficult of proof, but then it is not that an election can be set aside on light grounds. In order that an election should be set aside, the terms of the clause must be properly complied with and in order to do so, it is incumbent on the petitioner to produce sufficient number of witnesses and evidence to show that, all the votes wasted would have been acquired by the defeated candidate. It is admitted that there is no such evidence. Mr. Manohar started to refer to his amendment application after assuming that all the 555 votes thrown in favour of respondent No. 3 would have been obtained by respondent No. 1 and argued that he might be able to account for a few more votes. The assumption that respondent No. 1 would have got all the votes that respondent No. 3 got is highly unjustified. Even the amendment application, therefore, on which he sought to rely could not be pursued and even if it were pursued, it could not have led to any concrete result.

In the result, the appeal fails and is dismissed with costs.

Appeal dismissed.

⁵ [1954] A.I.R. S.C. 520.

⁶ [1960] A.I.R. S.C. 368.

⁷ [1954] A.I.R. S.C. 513.

⁸ [1955] A.I.R. S.C. 233.

[NAGPUR BENCH]

Before Mr. Justice Kotval and Mr. Justice Wagle.

VISHWASRAO DAJIBARAO GHUGE

v.

VALLABHDAS SHEONARAYAN SHARMA.*

Maharashtra Zilla Parishads and Panchayat Samitis Act (Mah. V of 1962), Secs. 72(7), 57, 111(6), (7), 61, 39, 42—“Total number of members of the Panchayat Samiti,” meaning of expression—Whether means total number of members actually present and voting at meeting of Panchayat Samiti.

In s. 72(7) of the Maharashtra Zilla Parishads and Panchayat Samitis Act, 1961, the expression “the total number of members of the Panchayat Samiti” refers to the total number of the possible members of the Panchayat Samiti under s. 57(1) of the Act and not the total number of members present and voting at any meeting thereof.

THE facts appear in the judgment.

V. R. Manohar, for the petitioner.

S. N. Kherdekar, for respondents Nos. 1 to 6.

S. G. Kulkarni, for respondent No. 11.

S. V. Natu, for respondents Nos. 12 and 13.

V. M. Kulkarni and S. S. Deshpande, for respondent No. 14.

KOTVAL J. We are concerned in this special civil application with a motion of no-confidence alleged to have been passed against the petitioner Vishwasrao Dajibarao Ghuge who was the Chairman of the Panchayat Samiti, Malegaon, Taluq Washim, District Akola. The Panchayat Samiti, Malegaon, it is not in dispute, consists of 14 members and 2 associate members under s. 57 of the Maharashtra Zilla Parishads and Panchayat Samitis Act, 1961 (No. V of 1962) (hereinafter referred to as the Act). The petitioner was elected Chairman of the Panchayat Samiti on August 7, 1962, and less than two years thereafter on May 11, 1964, a no-confidence motion was attempted to be moved against him, but that motion was for reasons unknown withdrawn on May 22, 1964. Thereafter a fresh notice of a no-confidence motion under s. 72 of the Act was again given on October 24, 1964, by the present respondents Nos. 1 to 6 and 13. A meeting was convened by the petitioner for November 1, 1964. At that meeting, according to respondents Nos. 1 to 6 and 13, the no-confidence motion was validly passed.

The petitioner says that there were rival-factions in the Panchayat Samiti since a considerable time and that respondents Nos. 1 to 6 were in a minority and, therefore, wanted to oust the petitioner. They had made the first attempt, and when that attempt failed, made the present attempt to pass a no-confidence motion. According to the petitioner, the resolution has not been validly passed. The total possible membership of this Panchayat Samiti is 14 [the two—associate members not being entitled to vote under s. 57(1)(c) and (d) read with s. 72(7)]. The no-confidence motion has to be passed by a majority of the total number of members of the Panchayat Samiti as laid down under s. 72(7). Therefore, the motion could only have been passed if eight members out of a total of 14 had voted for the resolution. But in the present case, the persons who voted for the resolution were only 6 and, therefore, the resolution was not legally passed. It was also stated by the petitioner that respondents Nos. 11, 12 and 13 were initially members of the Panchayat Samiti by virtue of the fact that they were Sarpanchas elected by the members of the Gram Panchayats in accordance with the provisions of s. 57(2) of the Act. Their term of office having expired, they were re-elected by the res-

*Decided, January 19, 1965. Special Civil Application No. 699 of 1964.

pective Gram Panchayats prior to the date of the meeting i.e. November 1, 1964. The dates of election and the villages from which they were re-elected as stated by the petitioner in para. 5 are as follows:

	<i>Name of the Gram Panchayat</i>	<i>Date of Election</i>
Respondent No. 11	Borgaon	September 12, 1964.
Respondent No. 12	Mairaldon	September 8, 1964.
Respondent No. 13	Shelgaon Bondade	October 13, 1964.

According to the petitioner, these persons being re-elected Sarpanchas were entitled to vote, but they were not given due notice of the meeting to be held on November 1, 1964, and, therefore, the entire proceedings of the meeting as well as the no-confidence motion passed in the meeting are vitiated.

Now, it will be seen that so far as the petitioner is concerned, he is referring to the electorate for this purpose as the total possible membership of the Samiti as prescribed by s. 57 of the Act, but the respondents say that having regard to the provisions of s. 72(7), the law only requires a majority of the total number of members actually present at the meeting on November 1, 1964. If the latter view were to prevail, then the no-confidence motion must be held to be valid because there were on that date only eleven members present and six voted for the resolution. If the former view were to prevail, the total possible membership of this Samiti was 14, and so far obtaining a majority, at least 8 votes were necessary, which was not the case. Therefore, the no-confidence motion will have to be declared invalid.

Sub-section (7) of s. 72 of the Act runs as under:

"If the motion is carried by a majority of the total number of members of the *Panchayat Samiti* (other than associate members), the Chairman, or as the case may be, the Deputy Chairman of the *Panchayat Samiti* shall cease to hold office forthwith; and the office held by such Chairman or Deputy Chairman shall be deemed to be vacant." The contention on behalf of the respondents is that when the sub-section speaks of "a majority of the total number of the Panchayat Samiti," it means the total number of the members actually present and voting at the meeting of the Panchayat Samiti, and in the present case they were 11. Therefore, the resolution must be deemed to be passed, because 6 members were in favour of it. On behalf of the petitioner it is urged that the expression "a majority of the total number of members of the Panchayat Samiti" has reference to s. 57 which lays down the constitution of the Panchayat Samiti and which shows that the total number of members of this Panchayat Samiti was 14. The 2 associate members do not enter into the picture because by s. 57 read with s. 72(7) they have no right of vote. This is the principal point which arises for decision in this petition. That gives rise to the question what is the meaning of the words "a majority of the total number of members of the Panchayat Samiti" in sub-s. (7) of s. 72 of the Act.

It was also argued on behalf of the respondents that on the date of the meeting, namely, November 1, 1964, the Panchayat Samiti itself consisted of 11 members because the three Sarpanchas, respondents Nos. 11, 12 and 13, were not entitled to sit in the Samiti because, though they had been elected as Sarpanchas of their respective Gram Panchayats as stated in the table we have reproduced above, still they had not been elected as members of the Panchayat Samiti under s. 57(1)(f). It was also therefore contended that they were not entitled to notice and no illegality was committed when no notice of the meeting was served on them. It will be noticed that the latter point can only arise if the contention of the respondents upon the first point is upheld that by the use of the words "a majority of the total number of members of the Panchayat Samiti" in sub-s. (7) of s. 72, is implied the actual number of members present at a particular meeting of the Panchayat Samiti and voting or the actual number of members entitled to sit as members of the

Panchayat Samiti, but not if the contention of the petitioner is accepted that by that expression is implied the total number of possible members of the Panchayat Samiti as contemplated by s. 57. We, therefore, turn to consider this point.

Now, first it is necessary to consider the language of sub-s. (7) of s. 72 itself, and we notice that the expression used is not "a majority of the Panchayat Samiti" but "a majority of the total number of members of the Panchayat Samiti". If the respondents' contention be correct, that it was intended to imply by this expression the members of the Panchayat Samiti who were in fact members and actually entitled to sit as members of the Samiti, then the expression "a majority of the Panchayat Samiti" or "a majority of the members of the Panchayat Samiti" would have sufficed and it would not have been necessary for the Legislature to say "a majority of the total number of members of the Panchayat Samiti". What then was intended by the Legislature when it used the expression "a majority of the total number of members of the Panchayat Samiti"? Why was the word "total" used and what is the "total number"?

In order to determine what is the connotation of this expression, we turn to the provisions of s. 57 of the Act, which deals with the constitution of Panchayat Samitis. Sub-section (1) of that section deals with six categories of members of which the Panchayat Samiti is to consist. The sub-section begins with the words "Every Panchayat Samiti shall consist of", and then enumerates the categories as follows:

"(a) all Councillors who are elected to the Zilla Parishad from the electoral divisions included in the Block,

(b) the co-opted Councillor, (if any) residing in the Block,

(c) the chairman of such co-operative society conducting the business of purchase and sale of agricultural products in the Block, as the State Government may by order specify in this behalf (to be an associate member),...

(The proviso is not necessary for our purposes).

(d) the chairman of a co-operative society conducting business relating to agriculture (not being a society falling under clause (c)) in the Block co-opted by the Panchayat Samiti (to be an associate member),

(e) (i) if the members of a Panchayat Samiti falling under clauses (a) and (f) do not include a woman, one woman residing in the Block co-opted by the Panchayat Samiti;

(ii) if the members of a Panchayat Samiti falling under clauses (a) and (f) of such Block as the State Government may specify in this behalf do not include a person belonging to the Scheduled Castes or Scheduled Tribes, a member co-opted by the Panchayat Samiti being a member of the Scheduled Castes or Scheduled Tribes, as the case may be, from amongst persons residing in the Block;

(The proviso is unnecessary for the purposes of the point before us).

(f) Sarpanchas elected by members of Panchayats in accordance with the provisions of sub-section (2)".

It will thus be seen that barring the members contemplated in cl. (e) the number of members of the Panchayat Samiti would be fixed having regard to the provisions of s. 57, and so far as the members coming under cl. (e) are concerned, their number would also be fixed after the elections. Their number would depend upon whether a woman or a member of the Scheduled Castes or Scheduled Tribes was elected from amongst the members of the categories (a) to (d). If no woman or a member of the Scheduled Castes or Scheduled Tribes was elected from amongst the categories of members elected under cls. (a) to (d), then a woman and/or a member of the Scheduled Castes or Scheduled Tribes, as the case may be, will have to be co-opted by virtue of cl. (e). In any case, after the whole procedure under s. 57 is gone through, the total number of members of the Panchayat Samiti as well as the number of members actually sitting would be known, and it seems to us that

when the expression "the total number of members of the Panchayat Samiti" was used in sub-s. (7) of s. 72, it was obviously intended to refer to the total number of the possible members of the Panchayat Samiti under sub-s. (1) of s. 57 and not the members actually entitled to sit. In the instant case, it is not in dispute that that total number of members would be 14 leaving out of account the 2 associate members.

A consideration of the other provisions of s. 72 itself as well as of the Act leads to the same conclusion. Sub-section (1) of s. 72 deals with the tabling of the no-confidence motion and it says:

"A motion of no-confidence in the Chairman or Deputy Chairman of a Panchayat Samiti may be made by a requisition from not less than one-fourth of the total number of the members (other than associate members) after giving a notice thereof..."

Here again therefore, the expression is used "one-fourth of the total number of the members" in connection with a Panchayat Samiti. Now, if the contention of the respondents were to prevail that the meaning of these expressions "total number of the members of the Panchayat Samiti" in sub-ss. (1) and (7) of s. 72 means total number of members actually present and voting, then two other provisions of the Act negate that contention. If one turns to sub-s. (6) of s. 111, one finds the same expression used. Section 111 deals with meetings of Zilla Parishads and by virtue of s. 118 thereof the same provisions apply in relation to meetings of Panchayat Samitis with the modification that the words "Panchayat Samiti" shall be read instead of the words "Zilla Parishad" and with other modifications *mutatis mutandis* as indicated in s. 118. The provisions of s. 111, therefore, directly apply to Panchayat Samitis by virtue of s. 118. Now, dealing with the question of meetings of Panchayat Samitis sub-s. (6) of s. 111 says:

"All questions shall be decided by a majority of votes of the Councillors present and voting, the presiding authority having a second or casting vote in all cases of equality of votes."

This provision would govern all meetings of the Panchayat Samiti other than meetings for which a special provision is made in the Act, such as a meeting at which a no-confidence motion is to be moved; but the language of the sub-section is in sharp contrast with the language used in sub-s. (7) of s. 72. Where a no-confidence motion is contemplated by this Act it is to be carried by "a majority of the total number of members of the Panchayat Samiti"; whereas when normal resolutions are to be passed at a meeting of the Panchayat Samiti, sub-s. (6) of s. 111 prescribes "a majority of votes of the Councillors present and voting". The provisions of s. 111(6) show that the Legislature itself made a distinction between "the total number of members of the Panchayat Samiti" and "members present and voting." In that view, it is clear that the expression used in sub-s. (7) of s. 72 cannot be held to carry the meaning "the total number of members of the Panchayat Samiti present and voting" when it says "the total number of members of the Panchayat Samiti".

Another provision of the Act which gives a similar indication is s. 61. That section deals with the removal of a member of the Panchayat Samiti for misconduct. The section has recently been amended by the Maharashtra Act No. XLIII of 1962. Prior to amendment the section prescribed:

"The State Government may, if it thinks fit, on the recommendation of two-thirds of the members of the Panchayat Samiti present and voting, remove any member thereof..."

The section has been amended and for the words "two-thirds of the members of the Panchayat Samiti," the words "the Panchayat Samiti supported by not less than two-thirds of the number of members" have been substituted. The words "present and voting" however remain. Here again, two things are patent: Firstly, the expression "the members of the Panchayat Samiti present and voting" shows again that where the Legislature intended to refer to

the members actually present, it clearly said so. Therefore, it must be held that the expression "the total number of members of the Panchayat Samiti" in s. 72(7) cannot mean the total number of members present and voting. Secondly, the amendment makes a distinction between members of the Panchayat Samiti and the Panchayat Samiti itself, and the amendment shows that the "recommendation" must be that of two-thirds of the members of the Panchayat Samiti present and voting. But the expression "total number of members" which is to be found in sub-s. (7) of s. 72 is not used here. Therefore, there is a clear distinction drawn in the statute itself between the members of the Panchayat Samiti or the number of members of the Panchayat Samiti and the total number of members of the Panchayat Samiti. This word "total", so far as we can see, is not to be found in any other provision of the Act except s. 111(7) dealing with voting. In our opinion, the real reason why it was used in sub-s. (7) of s. 72 was because it was intended to convey thereby the totality of the possible members of the Panchayat Samiti having regard to its constitution under s. 57 of the Act (excluding of course the associate members who are expressly excluded) and not the number of members who were present and voting at any meeting thereof.

Next, we find that in sub-s. (7) of s. 111 the word "total" comes to be used, and the manner of its use in that sub-section and the context in which it is used clearly indicate the intention of the draftsman. Sub-section (7) of s. 111 begins with the words:

"If less than one-third of the total number of Councillors be present at a meeting at any time from the beginning to the end thereof, the presiding authority shall adjourn the meeting to such hour on the following or some other future date as he may reasonably fix;..."

The sub-section fixes a quorum for the meetings of the Zilla Parishad and the Panchayat Samitis (when read with s. 118), and obviously if a quorum is to be prescribed it is usually the minimum number of the total possible membership of that body and that is precisely what sub-s. (7) of s. 111 prescribes. It says that the quorum shall be "one-third of the total number of Councillors" of those "present at a meeting at any time from the beginning to the end thereof". Therefore, sub-s. (7) deals with two ideas "Councillors actually present" and "total number of Councillors" and it says that those who are actually present at a meeting shall not be below "one-third of the total number of Councillors". In this context, and used as it is in contradistinction with the Councillors present at a meeting, the expression "total number of Councillors" can again only mean the total number of possible Councillors of the Zilla Parishad or possible members of the Panchayat Samiti having regard to s. 57. By the use of the word "total" before the word "number" the draftsman therefore clearly intended to refer to the totality of the possible membership of the Zilla Parishad or the Panchayat Samiti and that is the same expression which he has also used in sub-s. (7) of s. 72. Not merely is the similarity of the expression in the two sections—s. 72(7) and s. 111(7) telling but the contrast with the other expressions such as "Councillors present and voting" in s. 61 and s. 111(6) is telling. Similarly, the provisions of s. 39 which provides for removal of a Councillor for misconduct or disgraceful conduct etc. speak of "not less than two-thirds of the number of Councillors present and voting."

It is clear from these provisions of the Act that where the Legislature had in contemplation the number of members actually present at a meeting, the expression has been used Councillors or members "present and voting", but no such expression is to be found in sub-s. (7) of s. 72. Therefore, that is one indication that by the use of the words "the total number of members of the Panchayat Samiti" in sub-s. (7) of s. 72, the members actually present at a meeting or voting at a meeting were not contemplated. Secondly, the use of the expression "the total number of members" in contrast with the mere use of the words "the number of Councillors or members" in other provisions is tell-

ing. By the use of the word "total" the draftsman has always implied the totality of the possible members of the Panchayat Samiti or the Zilla Parishad or in other words its total membership, and whenever he uses the word "total", he does not have regard to the actual number of members or Councillors present. Thus, the internal indications furnished by the provisions of the Act show that the contention raised on behalf of the petitioner is correct and the interpretation sought to be placed on those words of sub-s. (7) of s. 72 on behalf of the respondents cannot be sustained.

Reference was made by Mr. Kheredekar to s. 112 of the Zilla Parishads and Panchayat Samitis Act. Sub-section (1) of s. 118 says that during any vacancy in a Zilla Parishad, the continuing Councillors may act as if no vacancy had occurred, and sub-s. (2) says that the Zilla Parishad shall have power to act notwithstanding any vacancy in the Councillorship; and also provides that notwithstanding any defect in the constitution, the power to act remains. Read along with s. 118, this shows that a Panchayat Samiti frequently has its membership fluctuating and that its total number of members may never be known. We are not able to accept this contention, because in the first place s. 112 does not indicate what is the total number of members of the Panchayat Samiti. All that it provides for is that the acts and things done at meetings of the Panchayat Samiti should not be invalidated because some person who was not entitled to do so, sat or voted or otherwise took part in the proceedings or that there was a defect in the constitution. It is the usual provision made to safeguard deliberations of public bodies consisting of many members where due to an inadvertent error in its constitution or the inadvertent taking part by a person not qualified to do so may have the effect of vitiating the entire proceedings. The section which really deals with the constitution of Panchayat Samitis is s. 57, and as we have already indicated, upon an analysis of that section, after the entire process contemplated by that section for bringing into existence the Panchayat Samiti is complete, the total number of members of the Samiti must get fixed even having regard to cl. (c) of sub-s. (1) thereof. Section 112 does not, therefore, assist in the interpretation of sub-s. (7) of s. 72.

It was next argued by Mr. Kheredekar that the word "total" must be regarded as mere surplusage or included with a view to additional emphasis and nothing more. The argument would have some force in it if the expression "the total number of members" had been uniformly used throughout the Act wherever it was intended to indicate the number of members present and voting at a meeting or entitled to sit for the time being in a Panchayat Samiti. But we have shown that in other provisions of this very Act, wherever it was intended to refer to persons actually present and voting the legislative draftsman has used appropriate expressions such as "the members present and voting". This contention, therefore, also fails.

A considerable part of the arguments were directed to the object and purpose of the legislation which, it was said, ought to influence our interpretation. The interpretation which we are inclined to accept appears to us to be consistent with the object behind the legislation so far as it can be gathered from this provision. The provisions for the moving of no-confidence motions against the Chairman and Deputy Chairman of the Zilla Parishads and the Sarpanch and Upa-Sar-panch of the Panchayat Samiti are, so far as we are aware, somewhat unique in a legislation on Local Self-Government, and the Legislature, it appears, thought that the extraordinary right given to the members of these bodies to throw out the Chairman or the Sarpanch should be exercised carefully and only in extreme cases and so it appears the law deliberately imposed more stringent limitations upon the exercise of that right than the limitation imposed for decisions on other subjects. That is why also, originally a bare majority was sufficient, but now by the amending Act No. XLIII of 1964 what is required is a two-thirds majority of the total number of members of the body concerned. For the same reason it appears that the simple

majority contemplated in the section as it originally stood was deliberately limited not to the members present and voting at a meeting but to the total number of possible members of the Panchayat Samiti, that is to say, the total membership of the Panchayat Samiti. The principle is understandable having regard to the extraordinary nature of the right granted by s. 72 to the other members. On the other hand, the construction canvassed on behalf of the respondents may result in a grave abuse of this right and bring about a deadlock. The provisions of sub-ss. (1), (2) and (3) indicate that after the notice is given the Chairman has to call a meeting to consider such a motion within 10 days of the receipt of the notice. Sub-section (1) prescribes that in order to give a notice of no-confidence the requisition must be signed by not less than one-fourth of the total number of members. Now, if one turns to s. 57 and glances through the various categories of members, it is clear that some of the members could go out of office and be replaced during the life of a Samiti, thus adding to the membership of the Samiti and enlarging the number of persons who could be actually present and vote at the meeting where the no-confidence motion is to be discussed. If the interpretation which the respondents seek to put upon sub-s. (7) of s. 72 were to be accepted, there may be a conceivable case where a large number of members may become sitting members of the Panchayat Samiti after the notice of no-confidence is given, as for example, under s. 57(1)(f). In that event, the question would arise whether the no-confidence motion is sponsored by one-fourth of the total number of members. Thus, on the date on which it was given the requisition though valid would be rendered invalid before the meeting to be called ten days after. Such a state of affairs could not have been in the contemplation of the Legislature, and indeed that is why the law expressly mentions the total number of members of the Panchayat Samiti, that is to say, the totality of the possible members comprising the Samiti, and not the actual members for the time being. That total membership is always a fixed membership before each meeting.

Upon the view we have taken it is clear that in the instant case the respondents had 6 votes in favour of the no-confidence motion and those 6 votes did not constitute "a majority of the total number of members of the Panchayat Samiti". The majority, having regard to the facts here that the Panchayat Samiti was constituted of 14 members, would be 8. In the result, therefore, the no-confidence motion which is said to have been carried must be set aside as invalidly passed.

In the view we have taken it is not necessary to discuss the other point arising in this petition as to whether respondents Nos. 11, 12 and 13 were members of the Panchayat Samiti on November 1, 1964 and whether they could be counted as members of the Samiti. In our view, the number of members actually sitting in the Samiti on a particular day is not the criterion so far as sub-s. (7) of s. 72 is concerned, but the only criterion is the totality of the possible membership of the Samiti. The question whether respondents Nos. 11, 12 and 13 were members, therefore, does not arise.

In the result, the rule is made absolute and the motion of no-confidence passed on November 1, 1964 against the petitioner is quashed. Respondents Nos. 1 to 6 shall pay the costs of the petitioner.

Leave to appeal to the Supreme Court refused.

Rule made absolute.

[NAGPUR BENCH]

Before Mr. Justice Kotval and Mr. Justice Wagle.

KISAN BHAGUJI BURKLE

v.

THE COLLECTOR, BULDANA.*

Maharashtra Municipalities (Postponement of General Elections pending Unification of Municipal Laws) Act (Maharashtra XLII of 1964), Secs. 3, 7, 2(a)(c)—Central Provinces and Berar Municipalities Act (C. P. and Berar II of 1922), Secs. 18(3), 16(2), 16(2A)—Term of office of members of Municipality extended under Mah. Act XLII of 1964—Whether term of office of President of Municipality also extended.

Upon extension of the term of office of Councillors or members of a Municipality under the Maharashtra Municipalities (Postponement of General Elections pending Unification of Municipal Laws) Act, 1964, such an extension is not granted as would fulfil the requirements of the second proviso to s. 18(3) of the C. P. & Berar Municipalities Act, 1922. Therefore, where the term of life of the members of a Municipality is extended under Maharashtra Act XLII of 1964, the President of the Municipality does not also get the advantage of having his term of office automatically extended.

In re Wood's Estate, Ex parte Her Majesty's Commissioners of Works and Buildings,¹ distinguished.

THE facts appear in the judgment.

P. G. Palshikar, for the petitioner.

S. M. Hajarnavis, Assistant Government Pleader, for the respondents.

B. A. Masodkar, for the Intervener.

S. G. Kukde, for the Intervener.

KOTVAL J. As the question arising in this petition is said to be a question which also arises in other petitions, we have heard M/s. Masodkar and Kukday as Interveners, as they are interested in Special Civil Application No. 222/65 and Special Civil Application No. 77/65 in addition to Mr. Palshikar for the petitioner. The short question that arises for determination is as to the effect of Ordinance No. V of 1964 promulgated by the Governor of Maharashtra and Maharashtra Act No. XLII of 1964. These laws were passed in order to stay general elections of Municipalities in Maharashtra State and for making consequential provisions and the question that has to be determined is, what is the effect of their provisions so far as the office of President of a municipality is concerned.

In the present petition, the facts in brief are as follows. We are concerned with the Nandura Municipal Committee. The general elections to that Municipal Committee were held in July 1959 and the notification of election of its present members was published in the Gazette on August 6, 1959. The result of that publication was that under the provisions of s. 16(2) of the C. P. & Berar Municipalities Act those members were entitled to continue in office for a period of five years from the said date till August 5, 1964. Thus, their term of office would have expired on that date; but first of all, the State Government intervened to extend their term of office till November 6, 1964, under the powers given to them under s. 16(2-A) of the Act. While the term of office of the members thus stood extended till November 6, 1964, the Governor of Maharashtra promulgated Ordinance V of 1964. By that Ordinance the life of the Councillors or members was further extended till December 31, 1965. The Ordinance came into force on September 30, 1964, but was later replaced by Mah. Act No. XLII of 1964, which came into force on December

*Decided, March 10, 1965. Special Civil 1 (1886) 31 Ch. D. 607.
Application No. 717 of 1964.

16, 1964. Therefore, today the Councillors or members of this Municipal Committee are continuing to hold office by virtue of Act No. XLII of 1964. It is explained that the reason for all this legislative activity is that the State is about to enact a new law to provide a new and uniform pattern of administration for municipalities in the entire State and till then it was considered expedient that no new general elections should be held but that the *status quo* should be maintained.

Now, on November 17, 1964, the Collector, Buldana, purporting to act under rule 3(2) of the C. P. & Berar Municipalities President and Vice-President (Election and Appointment) (Bombay) Rules, 1958, announced the appointment of an officer to hold a meeting of the members of the Municipal Committee of Nandura for the purpose of electing a new President of the said Committee. He also issued a notice to all the members including the petitioner. In the present petition, the petitioner challenges not merely the notification appointing the officer to be the Chairman of the meeting at which the election is to be held, but also the issuance of the notice of the meeting to sitting members and the principal ground upon which both these acts of the Collector are challenged is that the petitioner is the present President and entitled to continue in office under law. On behalf of the respondents, the Collector, the sub-Divisional Officer and the State of Maharashtra, this stand of the petitioner is contested and it is urged that the life of the President was not in any way extended by the Ordinance or the Act or under the Municipalities Act and that the fresh elections would, therefore, be justified, and necessary under the Municipalities Act.

The provisions of s. 18 of the C. P. & Berar Municipalities Act, as amended by Bombay Act No. XVI of 1959, govern the election and continuance in office of the President of a Municipality and sub-s. (2) thereof prescribes that each Committee shall have a President who shall be elected by the members from among their number, and sub-s. (3) lays down the period for which he should hold office. Sub-section (3) runs as follows:

"Save as otherwise provided in this Act,—

(a) the President shall hold office for such term, not less than one year or not less than the residue of the term of office of the Committee, whichever is less, and not exceeding three years, as the Committee shall, previous to the election of the President, determine or until the expiry within the said term of his term of office as member, but shall be eligible for re-election; and

(b) the Vice-President shall hold office during the term of office of the President who appoints him:

Provided that the term of office of such President or Vice-President shall be deemed to extend to, and expire with, the date on which his successor is elected or appointed, as the case may be:

Provided further that where the term of office of a Committee is extended under this Act, the President and Vice-President holding office immediately before the date with effect from which such term is extended shall continue to hold their respective offices until the date on which the term so extended expires."

Reading the second proviso to s. 18(3), it is clear beyond any doubt that the right of a President or Vice-President to continue in office is limited to an extension earned by him under that Act itself and no other Act. This is clear from the vital words which lay down a condition to the application of the proviso itself "where the term of office of a Committee is extended *under this Act*" and the concluding words "until the date on which the term *so extended* expires."

It will be noticed that originally the provision which governed the term of office of the petitioner was sub-s. (3)(a) of s. 18 read with s. 16(2) and under those provisions the petitioner would have continued to hold office till September, 1964, but before the expiry of his term of office under those provisions the State Government extended the term of office of the members of the Municipal Committee under powers vested in it under s. 16(2-A). There-

fore, by virtue of the second proviso to sub-s. (3)(b) of s. 18 the term of office of the President was extended "under this Act" and he continued to hold office. It was during the period that the petitioner was thus holding office by virtue of the extension granted by the State Government under s. 16(2A), read with sub-s. (3) of s. 18, proviso 2, that the Ordinance No. V of 1964 came to be promulgated. Almost the identical terms of the Ordinance were later enacted in Mah. Act No. XLII of 1964. The short question that now arises is whether the petitioner as the President can get the advantage of the extension of the term of life of the members, implied by the postponement of the general elections and say that he as the President also continues. The only provision that can be pointed out on his behalf is the second proviso to s. 18(3) of the Municipalities Act. That proviso speaks of an extension "under this Act" i.e. the Municipalities Act and the question is whether there is anything in Act XLII of 1964 which directly or indirectly grants such an extension as can be said to be an extension under the Municipalities Act.

Act No. XLII of 1964, as its preamble states, was an Act passed for two purposes, namely,

(i) "to provide for the postponement of general elections to certain municipalities until the enactment of law providing a new and uniform pattern of municipal administration in respect of certain municipalities"

and (2) because it was considered expedient

"that the advantages of the new pattern of administration should be available to those municipalities simultaneously with the holding of general elections in accordance with the provisions of the new law".

Two points arising from the terms of this preamble maybe noted here (1) that the Act and Ordinance were in terms temporary or interim provisions. They were intended so to say to maintain the *status quo* in municipal administration until a new law imposing a new and uniform pattern of administration was enacted, (2) that for the achievement of the above object, it was considered necessary by the Legislature that only *general elections* to the said municipalities should be postponed until the enactment of the new law, and nothing else. It is, in our opinion, of the greatest importance that the preamble itself says that the object of the Act was to postpone only the general elections, and not Presidential elections by a committee of its own President.

Section 3 of the new Act, which is the operative section, deals with the postponement of municipal elections and it provides:

"Notwithstanding anything in any Act by or under which any municipality is constituted or established,

(a) during the period beginning with the date of the commencement of the Ordinance and ending on the 31st day of December 1965, no general election to a municipality shall be held, or if commenced, and the poll has not taken place, shall be completed;

(b) the term or extended term of office, of the Councillors or members of a municipality, who were in office on the date of the commencement of the Ordinance (and whose term or extended term will expire before the 31st day of December 1965), shall be deemed to be extended to and inclusive of the 31st day of December 1965."

Then ss. 4, 5 and 6 give certain powers to the State Government to nominate members or appoint an administrator to carry on the duties of such municipality. Section 5 gives power of delegation to the officer so appointed and s. 6 provides for the appointment of an Advisory Council which may consist of the erstwhile members of the municipality. Then, for the purpose of the points raised in this petition s. 7 is important. It provides:

"Except as otherwise provided by this Act, the relevant Act shall in all other respects apply to the municipality concerned."

Now, the expression "relevant Act" is defined in s. 2(c) as follows:—"as respects any municipality, means the Act by or under which it is constituted or

established". A "municipality" is defined in s. 2(a) as follows:

"'Municipality' means a local authority by whatever name called constituted or established by or under any of the Acts specified in the Schedule."

One of the Acts specified in the Schedule is the C. P. & Berar Municipalities Act. Therefore, reading s. 2(a) with s. 2(c) and s. 7, the result is that except as provided by Mah. Act No. XLII of 1964, the C. P. & Berar Municipalities Act continues in all other respects to apply to the Nandura Municipal Committee.

Now, it will be noticed that s. 3(b) of the Maharashtra Act No. XLII of 1964, refers only to the Councillors or members of a Municipality. It does not refer to the President or Vice-President and the question, therefore, is whether under the circumstances under which the petitioner was holding office as the President of the Nandura Municipal Committee, his term of office has been extended by operation of either the C. P. & Berar Municipalities Act or Mah. Act No. XLII of 1964.

So far as the provisions of s. 18(3) are concerned, we have already referred to the second proviso to that sub-section and the plenary language of that proviso is:

"Provided further that where the term of office of a Committee is extended under this Act the President and Vice-President... shall continue to hold their respective offices until the date on which the term so extended expires." (the italics are ours). Nothing could be clearer than the language of this proviso. The extension must be under the C.P. & Berar Municipalities Act and none other and it is only a term "so extended" that validates further continuance in office. The power conferred under the Municipalities Act of extension of the President's term of office is conferred on the State Government by s. 16(2A). That sub-section provides:

"(2A). Notwithstanding anything contained in sub-section (2), if on any occasion the State Government thinks fit, the State Government may by order in the Official Gazette, for reasons which shall be notified with such order, extend the term of office of the members of any Committee by a period not exceeding one year in the aggregate."

The proviso to this sub-s. (2A) which is new says that the State Government shall first invite and consider objections, if any, a provision with which we are not here concerned. Reading sub-s. (2A) of s. 16 with the second proviso to s. 18(3)(b) of the Act, it is quite clear that the President for the time being holding office may automatically claim an extension of his office as President if the life of the members of the Committee is extended under sub-s. (2A) of s. 16. In that case, it would be an extension "under this Act" and, therefore, the consequence indicated by the proviso will follow. There does not appear to be any other provision either in the C. P. & Berar Municipalities Act or in the Mah. Act No. XLII of 1964, granting extension to the existing incumbent of the office of the President.

What is here contended is that that is the effect of the provisions of the new Act, read in the light of the second proviso to s. 18(3) of the Municipalities Act. It is a little difficult to comprehend the argument but so far as we can gather Mr. Palshikar appearing for the petitioner contends that in view of s. 7 of Mah. Act No. XLII of 1964 the provisions of the C. P. & Berar Municipalities Act, and the provisions of Mah. Act No. XLII of 1964 are so to say approximated to each other. They become one law and the provisions of either Act can be read into the other. It was urged that upon that construction it must be held that when the Maharashtra Act XLII of 1964 extends the life of the Councillors or members of a Municipality, it virtually extends their life under the C. P. & Berar Municipalities Act.

It is urged that this conclusion follows from the provisions of s. 7 of Act No. XLII of 1964. It seems to us that the conclusion should be the exact opposite of what is contended. All that s. 7 of Act No. XLII of 1964 says is that "except as otherwise provided by this Act," the C. P. & Berar Muni-

cipalities Act "shall in all other respects apply to the municipality concerned." It would be begging the question to say that the extension under Act XLII of 1964 is an extension under the C. P. & Berar Municipalities Act because the wording of s. 7 is that the Municipalities Act shall "in all other respects apply." It can only apply in all other respects when its provisions are not in conflict with the provisions of the Maharashtra Act No. XLII of 1964. So far as the C. P. & Berar Municipalities Act is concerned, s. 16(2A) only speaks of an extension of the life of the members of the Municipal Committee being extended by the State Government and upon such an extension the life of the President for the time being is also extended until the date on which the extended term of the Municipal Committee expires. But the essential condition to the operation of this provision is that the extension must be "under this Act". We cannot find anything in the provisions of the Maharashtra Act No. XLII of 1964 to suggest that any provisions of the Municipalities Act are either incorporated in that Act or vice versa. In fact the provisions of the Mah. Act No. XLII of 1964 themselves indicate that the Municipalities Act is treated as a separate piece of legislation and s. 7 says that the provisions of that piece of legislation shall "in all other respects apply". We are unable to accept the contention that upon extension of the term of office of Councillors or members under the Mah. Act No. XLII of 1964, such an extension was granted, as would fulfil the requirements of the second proviso to sub-s. (3) of s. 18 of the C. P. & Berar Municipalities Act.

Another shade of the same argument was that by virtue of s. 3(b) of the new Act, s. 16(2) of the Municipalities Act stood amended, and the extension indicated by s. 3(b) was really an extension under s. 16(2) thus attracting the second proviso to s. 18(3)(b). Normally when a Legislature wishes to amend a legislation it says so in unmistakable language by the use of such words as "amended" or "substituted." No such words appear in Act XLII of 1964 or in its preamble. There is moreover no reference in s. 3(b) of the new Act to the C. P. Municipalities Act except indirectly because of the use of the word "municipality" which is defined in s. 2(a) read with the third entry of the Schedule to the new Act nor is there any intention to amend expressed. We cannot suppose that the Legislature effected an amendment of s. 16(2) of Municipalities Act in this vague and indirect manner. There must be a clear intention to amend expressed before we can hold that the Legislature has altered the provisions of a statute. There is no such intention to be found in s. 3(b) of the new Act.

Another argument which may here be noticed was advanced by Mr. Kukday who was appearing for one of the interveners. It is based upon the provisions of cl. (b) of s. 3 of the Mah. Act No. XLII of 1964. As we have shown, cl. (b) says that the term or extended term of office of the Councillors or members of a municipality who were in office on the date of the commencement of the Ordinance "shall be deemed to be extended to and inclusive of the 31st day of December 1965". Now, when the clause opens with the words "the term or extended term of office" Mr. Kukday points out, and rightly in our opinion, that the clause refers to "the term" as mentioned in s. 16(2) of the C. P. & Berar Municipalities Act or the extended term of office as mentioned in s. 16(2A) of the Act. So far we are in agreement with the submission. But the further contention is that since this term or extended term of office of the councillors or members is by cl. (b) of s. 3 "deemed to be extended to and inclusive of the 31st day of December 1965", the extension granted by s. 3(b) of Mah. Act No. XLII of 1964 is an extension under s. 16(2) or 16(2A) of C. P. & Berar Municipalities Act. If so, it is urged it will immediately be covered by the provisions of the second proviso to sub-s. (3) of s. 18, as an extension "under this Act".

We are unable to accept this contention. Clause (b) of s. 3 of Act XLII of 1964 creates a well recognised fiction by the use of the words "shall be deemed to be extended to". The exercise of the positive power conferred up-

on the State Government, by s. 16(2) or s. 16(2A) to extend for a particular time cannot be equated with the powers exercised under s. 3(b) of Mah. Act No. XLII of 1964 fictionally extending time till December 31, 1965. It is well known that where a fiction of this kind is created, the fiction is essentially and radically different from the real thing. Indeed, if it were the real thing, it would be unnecessary to resort to the fiction at all. Thus, where s. 3(b) says that the term or extended term of office under s. 16(2) or 16(2A) of the C. P. & Berar Municipalities Act shall by a fiction be deemed to be a term up to December 31, 1965, it is clear that the law did not regard that extended term as the real exercise of power under s. 16. In fact, if it were the real exercise of power under s. 16 of the Municipalities Act, it would not be necessary to make any such provision at all. But because it was not considered the exercise of power under s. 16, s. 3(b) had to say that after that power was once exercised, the resultant terms would expire, but shall be deemed to be extended. It cannot, therefore, be held that by virtue of s. 3(b) any power under the Municipalities Act has been exercised. If so, the second proviso to sub-s. (3) of s. 18 of the Municipalities Act would not be attracted.

Reference was made to the objects and purposes of the new Act. Normally, the objects of an Act would not affect its interpretation. But it was urged that where there is no doubt or difficulty, the preamble can be looked to as well as the purpose of an enactment. Even looking to the purpose and object of the enactment, we can see no valid reason why the term of office of Presidents or Vice-Presidents should necessarily be extended because general elections of municipalities had to be postponed in order to await the new legislation intended to usher in a new and uniform pattern of municipal administration. The object of the enactment is clear enough. It was intended that until the proposed new law was passed and began to operate, the *status quo* in the matter of elections of members to municipalities should be maintained and, therefore, no general elections should be held. The holding of such a general election would result in considerable time, money and energy being expended upon it, which would be wasted if the new measure came into operation within a short time thereafter and fresh election had to be held. But while these were weighty considerations for the passing of that legislation, we cannot see how these considerations would also make it necessary not to hold the periodical elections of the Presidents or Vice-Presidents of those municipalities. The election of the Presidents or Vice-Presidents of the municipalities does not depend upon the general vote of the people, but upon the vote of the members of a Municipal Committee for the time being. Once the life of the Municipal members for the time being is extended, the whole purpose and object of the new enactment would be fully subserved. Therefore, the interpretation which we think is the only possible interpretation of the provisions of Mah. Act No. XLII of 1964 as well as s. 18(3) of the Municipalities Act is in complete agreement with the objects and purposes of the new enactment.

An earlier decision of the English Courts reported in *In re Wood's Estate: Ex parte Her Majesty's Commissioners of Works and Buildings*,¹ was relied on in aid of the construction which we have earlier negatived that the provisions of the new Act No. XLII of 1964 should, by implication, be read into the C. P. & Berar Municipalities Act. In that decision the provision of law which fell to be construed was wholly different. There, the legislation expressly provided that the main sections of one legislation shall be deemed to be repeated in another legislation and be deemed to be incorporated in that Act. There is no such provision here. On page 609, the provisions of s. 9 of Act 14 and 15 Victoria Chapter 42, are given in the Chancery Division report as follows:

"Section 9 provided that, for the purposes of the Act, the following sections of the

Act 3 & 4 Vict. c. 87—namely, secs. 11 to 28, both inclusive; secs. 28 to 57, both inclusive; and secs. 66 to 75, both inclusive, 'shall be deemed to be herein repeated, with the alterations necessary to make the same applicable to the purposes of this Act, and to the Commissioners hereby incorporated, instead of the Commissioners by that Act incorporated, and so as to enable the Commissioners hereby incorporated to carry into effect the purposes of this Act'.

It is clear that in the enactment which was constituted in that case, there was an express reference to stated sections of another Act which were made part of the enactment to be construed. There is no such reference whatsoever in the Mah. Act No. XLII of 1964 before us. The decision, therefore, is distinguishable upon its own facts.

We can see no substance in the contentions raised in this petition. Both the notice to the petitioner and the appointment of an officer to hold the elections were valid acts on the part of the Collector, Buldana. The petition is dismissed with costs. Leave to appeal is granted, as it has been represented that this question affects municipalities and their Presidents and Vice-Presidents in all parts of the State. It would, therefore, be a "fit case" for the grant of leave.

Petition dismissed.

Before Mr. Justice Patel and Mr. Justice Bal.

ARJANDAS DAYARAM VACHHANI v. J. S. BAJAJ.*

Displaced Persons (Compensation and Rehabilitation) Rules, 1955, Rule 19—Lineal descendants of member of joint Hindu family entitled to claim partition, who are—Father and four sons forming joint family—Applicability of rule 19(2)(b).

The condition for the exclusion of a member of the joint family contained in clause (b) of rule 19(3) of the Displaced Persons (Compensation and Rehabilitation) Rules, 1955, is intended to apply to a case where a joint family consists of more than two persons where each one of them is entitled to claim partition and the members sought to be excluded are lineal descendants of one of such members. It is only in such case that it can be said that they were lineal descendants of a member who was entitled to claim partition against another.

THE facts appear in the judgment.

H. G. Advani, N. H. Gursahani and J. Ramchandani, for the appellant.
G. N. Vaidya, for respondents Nos. 1, 2 and 7.

PATEL J. The petitioner is one of the sons of respondent No. 3. The petitioner and respondents Nos. 4, 5 and 6, who are the other sons of respondent No. 3, along with two other sons of respondent No. 3 formed a joint Hindu Family before the partition of 1947 and were residing in Sindh. The petitioner and respondents Nos. 4 to 6 are the sons of respondent No. 3 by one wife. The other two Sobhraj and Lokumal were the sons by a predeceased wife. In 1944 respondent No. 3 and his sons, who are now before the Court, filed a suit for the partition in the Court of First Class Sub-Judge, Nawabshah, against the two other sons Sobhraj and Lokumal. Large number of properties were included in the suit. It resulted into a decree on December 2, 1944, whereby one property described as item No. A of schedule 'D' to the plaint was awarded to one of his sons and the properties which fell to the share of the plaintiffs were awarded to them jointly. After their migration they filed claims in respect of the properties left in Sindh. The claims were processed after verification. The original application was made by respondent No. 3 and the claim of the joint family of respondent No. 3 and his sons, who are now on record, was verified. Thereafter the present petitioner made an application for being granted the benefit

*Decided, June 15/16, 1965. Special Civil Application No. 2061 of 1962.

of r. 20 framed under the Displaced Persons (Compensation and Rehabilitation) Act of 1954. This prayer was rejected and it was observed by the Assistant Settlement Officer that the sons may apply for apportionment of compensation under s. 9 of the Act. Thereafter an application came to be made under s. 9 of the Act to the Regional Settlement Commissioner. He rejected the same. In an appeal which was filed before the Chief Settlement Commissioner the matter was remanded for reconsideration by the Settlement Commissioner with delegated powers of the Chief Settlement Commissioner. It was held that the matter ought to be decided by the Regional Settlement Commissioner and not by his delegatee. Again the matter was heard by the Regional Settlement Commissioner who rejected the application. An appeal was filed against that judgment, which was heard by the Deputy Chief Settlement Commissioner who allowed the appeal holding that Dayaram and his four sons got the property jointly and had remained joint and as such they were entitled to apportionment according to the rules. While processing the claim the petitioner made a claim that the joint family was entitled to the benefit of r. 20 and in any event of r. 19 of the Rules framed under the aforesaid Act. Both these prayers were rejected by the Assistant Settlement Officer at Bombay by his order dated June 12, 1963. The orders were confirmed in appeal and revision by the Settlement Officer with delegated powers of the Regional Settlement Commissioner and by the Deputy Chief Settlement Commissioner with delegated powers of Chief Settlement Commissioner. The petitioner seeks to challenge the orders made by the authorities below.

In view of the fact that the decree of the Sub-Judge with regard to the share of the plaintiffs in suit for partition Mr. Advani fairly enough did not press his contention that the petitioner is entitled to claim the benefit of r. 20. That portion of the order, therefore, must be confirmed. He has, however, pressed the contention that the joint family of the petitioner and his brothers and father is entitled to the benefit of r. 19.

Rule 19 so far as is relevant is as follows:—

“Where a claim relates to properties left by the members of an undivided Hindu family in West Pakistan (hereinafter referred to as the joint family) compensation shall be computed in the manner hereinafter provided in this rule.

(2) Where on the 26th September 1955 (hereinafter referred to as the relevant date) the joint family consisted of:—

(a) two or three members entitled to claim partition, the compensation payable to such family shall be computed by dividing the verified claim into three equal shares and calculating the compensation separately on each such share.

(b) four or more members entitled to claim partition, the compensation payable to such family shall be computed by dividing the verified claim into three equal shares and calculating the compensation separately on each such share.

(3) For the purpose of calculating the number of the members of a joint family under sub-rule(2), a person who on the relevant date:—

(a) was less than 18 years of age, or

(b) was a lineal descendant in the male line of another living member of joint Hindu family entitled to claim partition shall be excluded:

[The proviso has no application and need not therefore be referred to.]

Explanation.—For the purpose of this rule, the question whether a family is joint or separate shall be determined with reference to the status of the family on the 14th day of August, 1947, and every member of a joint family shall be deemed to be joint notwithstanding the fact that he had separated from the family after that date.”

The authorities below have not given the benefit to the joint family of sub-r. (2) of r. 19 on the ground that sub-r. (3) is applicable to them. The reasoning is that inasmuch as the four sons and the father constituted a joint family the sons being the lineal descendants of the father they must be excluded from the computation of the number of members of the family under sub-r. (2), cl. (b). Mr. Advani contends that this construction is erroneous and does not take into account the words used in this provision.

It is not denied and it cannot be denied that Dayaram and his sons formed a joint family. Inasmuch as the explanation put the relevant date as August 14, 1947, and as it is admitted that on August 14, 1947, the family continued as it was under the partition decree, it must be held that it was a joint family whether or not the members separated subsequently after that date. If sub-cl. (3) of r. 19 cannot apply then it also cannot be doubted that the joint family consisted of more than four members entitled to claim partition inasmuch as it is settled law that every member of the joint family is entitled to claim partition, except in Bombay where during the life time of his father a grandson is not entitled to claim partition against his grand-father (See Sir Dinshaw Mulla's Hindu Law, p. 479, Art. 307). Now, sub-r. (3) lays down two alternative conditions for the exclusion of a member of the joint family. One is that the member must be less than 18 years of age and the second is that he must be a lineal descendant in the male line of another living member of a joint Hindu family entitled to claim partition. It is clear that this condition is intended to apply to a case where a joint family consists of more than two persons where each one of them is entitled to claim partition and the members sought to be excluded are lineal descendants of one of such members. It is only in such case that it could be said that they were lineal descendants of a member who was entitled to claim partition against another.

In the present case the father and each of the sons is entitled to claim partition against each other. If the lineal descendants are to be excluded even in a case like the present it only means that all the descendants of the father must be excluded even though there is no other member against whom the father can seek to enforce partition. Having regard to the words used the only interpretation which can be placed on cl. (b) of sub-r. (3) of r. 19, is the one adopted by us.

Mr. Vaidya on behalf of the respondents has emphasised the words lineal descendant in the male line and has argued that the sons being descended from the father must be considered as only one unit. It is this argument that appealed to the authorities below but then we must construe a provision giving meaning to every word that is used in the rule unless it leads to manifest absurdity. The context in which the expression is used is that he must be a descendant in the male line of another living member of the joint family. The sons are no doubt the lineal descendants of the father but then there is no other living member of the joint family. The contention that is being pressed, therefore, on behalf of the respondent cannot possibly be accepted.

In the result we set aside the orders of the authorities below and hold that the joint family is entitled to the benefit of r. 19 and we direct that the claim be processed accordingly.

The petitioner to get his costs.

Orders set aside.

ORIGINAL CIVIL.

Before Mr. Justice Kantawala.

IN THE MATTER OF GAGALBHAI JUTE MILLS PVT. LTD.*

Companies Act (I of 1956), Sec. 17—Application for confirmation of alteration in objects of company involving new departure from existing business—Whether Court can refuse confirmation—Present desire to carry on new business in near future whether essential for such confirmation.

Under s. 17 of the Companies Act, 1956, the additional business proposed to be carried on by a company in respect of which confirmation from the Court is sought may involve a new departure from its existing business. The additional business may be one which is different from the original business, but that by itself is not a

*Decided, March 22, 1962. O.C.J. Company Petition No. 111 of 1961.

sufficient ground to refuse confirmation. What the Court has to consider is whether the additional business is destructive of or inconsistent with the existing business. If it is not so, then it may very well be capable of being conveniently and advantageously combined with the existing businesses of the company.

Unless there is a present desire on the part of the company to carry on the new business in the near future, the Court cannot grant the application for confirmation of alteration in the objects of the company.

In the exercise of jurisdiction under s. 17 of the Act, the Court should not overlook the fact that it is for the shareholders to decide what business should be carried on by the company and it is not for the Court to tell the company what business it should carry on and how it should be carried on.

*Parent Tyre Co. In re,*¹ *Jayantilal v. Tata Iron & Steel Co. Ltd.,*² *Re John Brown & Co: Tredegar Iron & Coal Com. Ltd.*³ and *In the matter of Bhutoria Brothers,*⁴ referred to.

THIS was an application by the Gagalbhai Jute Mills Private Limited for confirmation of alterations in the objects of the Company, as proposed by the Special Resolution passed unanimously at the Extra-Ordinary General Meeting of the Company, held on August 3, 1961. The application was made under s. 17 of the Companies Act, 1956.

The main object of the Company was to carry on in British India the business of spinners, weavers, manufacturers, balers, and pressers of jute, jute cuttings, jute rejections, hemp, cotton, and any other fibrous materials and the cultivation thereof and the business of buyers and sellers of and dealers in jute, jute cuttings, jute rejections, and any other fibrous materials, hides, skins, oilseeds, and other seeds thereof, and to transact all manufacturing, curing and preparing process and mercantile business that may be necessary or expedient and to purchase and vend the raw materials and manufactured articles. By a Special Resolution of the Company duly passed in accordance with s. 189 of the Companies Act, 1956, at an Extra-Ordinary General Meeting thereof on August 3, 1961, it was resolved that:—

"In accordance with section 17 of the Companies Act and other applicable provisions of the Act, the provisions of the Memorandum of Association of the Company be and are hereby altered as follows:—

In Clause III after Sub-para. (2), the following objects shall be added as sub-para. (2A).

(2A) To carry on all or any of the businesses following:—

(a) To carry on the business of manufacturing of and dealers in chemicals, chemical compounds and chemical products of any nature and kind whatsoever, and as wholesale and retail chemists and druggists, chemical engineers, analytical chemists, importers, exporters, manufacturers of and dealers in heavy chemical acids, alkalis, petrochemicals, chemical compounds and elements of all kinds (solid, liquid and gaseous), drugs, medicines, pharmaceuticals, anti-biotics etc., tannins, tannin extracts, essences, solvents, plastics of all types, dyes, dyestuffs, intermediates, textile auxiliaries, artificial silks, staple fibres, and synthetic fibre of all kinds and types, regenerated fibres or filaments, cellophane, colours, paints, varnishes, disinfectants, insecticides, fungicides, deodorants, as well as biochemical, pharmaceutical, medicinal, sizing, bleaching, photographic and other preparations and articles of any nature and kind whatsoever.

(b) To manufacture medicinal, pharmaceutical, biological and other preparations and chemicals and to manufacture alkaloids, extracts, drugs, anti-biotics and tranquillisers, useful in human therapy and for use against pathogenic bacteria, fungi, protozoa and virus infections, by physical, chemical fermentation, bacteriological or other methods independently or under license.

(c) To prepare synthetic and other goods for human consumption, cattle and other feeds of all kinds by chemical fermentation or other process or by compounding such as yeast, vitamins, hormones, proteins, amino acids and preparations containing minerals.

1 [1923] 2 Ch.D. 222.

2 (1957) 59 Bom. L.R. 738.

3 (1916) 112 L.T. 232.

4 [1937] A.I.R. Cal. 593.

(d) To carry on the business of the manufacture of insecticides, fungicides, antibiotics and sprays, dips, manures, fertilisers and other requisites of all kinds for animal therapy and agriculture, horticulture, silviculture, fruit and flower gardens.

(e) To manufacture plastics and their raw materials, synthetic fibres, and their raw materials and aids or accessories.

(f) To prepare auxiliaries for any industry or trade and to carry on the business of processing any kind of fibre or cloth, metals, metal wires and sheets, papers or any other materials, vegetable or animal, such as by water proofing, India rubber coatings, with oils, chemicals, plastics, synthetic resins, rubber etc.

(g) To acquire mining rights for extracting minerals, to sell them as such, to process them or to use them as raw materials for the manufacture of chemicals.

(h) To refine, purify and process chemicals raw or wash materials of any kind on contract basis or otherwise.

(i) To manufacture packing cases or other packing materials out of wood or cardboard plastics or any other raw materials.

(j) To manufacture paints for use in factory or for sale.

(k) To manufacture polishing compositions for various industries".

In the explanatory statement annexed to the notice for convening the extraordinary general meeting, it was stated that the additional objects would help the company to carry on its existing business more economically and more efficiently by having all businesses under one company rather than promote separate companies for such businesses and hold shares therein. Further the Directors were of the view that the establishment of such new businesses would enlarge the area of the company's operations as the businesses i.e. industries proposed to be undertaken may be established at various suitable places in India. The undertaking of such businesses as proposed would help the company to carry on the same, combined with the existing business, more conveniently and advantageously, as the company had necessary funds for undertaking such businesses, and it will be economical and advantageous to combine those businesses, under one management and under one company.

M. P. Amin, instructed by *Manilal Kher Ambalal & Co.*, for the petitioners.

F. S. Nariman, instructed by *G. M. Divekar*, for the Registrar of Companies.

KANTAWALA J. [His Lordship after setting out the facts, proceeded.] In the course of the hearing of this petition, Mr. Amin, who appeared on behalf of the company, did not press for confirmation of alterations of the objects set out in sub-paras. (b), (c) and (d) of clause 2A set out above. I am, therefore, not called upon to consider whether the proposed alterations in respect of the objects mentioned in the said paras. (b), (c) and (d) of clause 2A should be confirmed by this Court.

The notice of this petition was served upon the Registrar of the Joint Stock Companies and the Registrar has opposed this application. He has mainly objected to additional objects contained in sub-paras. (a) to (e) in clause 2A of the Object clause.

Section 17 of the Indian Companies Act, 1956, makes *inter alia* the following provision in respect of alteration of objects.

"17. *Special resolution and confirmation by Court required for alteration of memorandum.*—(1) A company may, by special resolution, alter the provisions of its memorandum so as to change the place of its registered office from one State to another, or with respect to the objects of the company so far as may be required to enable it

(a) to carry on its business more economically or more efficiently;

(b) to attain its main purpose by new or improved means;

(c) to enlarge or change the local area of its operations;

(d) to carry on some business which under existing circumstances may conveniently or advantageously be combined with the business of the company;

(e) to restrict or abandon any of the objects specified in the memorandum;

(f) to sell or dispose of the whole, or any part, of the undertaking, or of any of the undertakings, of the company; or

(g) to amalgamate with any other company or body of persons.

(2) The alteration shall not take effect until, and except in so far as, it is confirmed by the Court on petition."

Mr. Amin, who appeared on behalf of the company, has urged before me that the new business, which is proposed to be carried on by the company under the proposed alterations of the object clause can under the existing circumstances be combined conveniently and advantageously with the business of the company; that it is primarily for the company to decide what is for its good and that the Court must presume that the company knows its business and that it is not for the Court to tell the company how it should carry on its business.

On the other hand, it is urged by Mr. Nariman on behalf of the Registrar of Joint Stock Companies that the proposed alteration in the objects clause would enable the company to embark upon several businesses foreign to its main existing business; if the proposed alterations in the object clause are confirmed, it would enable the company to carry on an entirely new class of business having no sort of relation to the existing business of the company; that the provisions of s. 17 of the Companies Act, 1956, do not authorise the carrying on of the business of any nature whatsoever, it must be a cognate one and not one which bears no relation to the existing business of the company; that the proposed new businesses being entirely foreign, are not such businesses as may be conveniently and advantageously combined with the Company's existing business.

It is also contended by Mr. Nariman that in view of the fact that distinct businesses are proposed by the alterations suggested, the Court should not sanction them except upon the evidence that there was really a present desire on the part of the company to extend its business in the directions indicated. I propose to consider hereafter the rival contentions raised by both the parties. Mr. Amin does not dispute that the businesses proposed to be carried on by the Company are wholly different from and bear no relation to the existing business of the Company. But he says that in spite of that, the company can carry on the same, under the existing circumstances conveniently and advantageously in combination with the present business of the company. Mr. Amin relied upon the principles laid down in the case of *Parent Tyre Co.*, In re¹. In that case, the business that was sought to be introduced was one of bankers and financiers in the existing business of the company, which consisted in the holding and management of large investments in two other companies. In construing s. 9(1) (d) of the Companies (Consolidation) Act, 1908, (section similar to s. 17 of the Companies Act, 1956) Lawrence J. observed (p. 228):

"Dealing now with the main part of the resolution, I have come to the conclusion that, although the businesses there described are, in my opinion, a new departure, in the sense that they do not fall within the memorandum as at present drawn and are businesses which have no definite relation to the present business of the company, yet, in my judgment, this fact is not fatal to the introduction of the additional objects enumerated in the special resolution. The question whether any given additional business is one which may conveniently or advantageously be combined with the business of the company carried on at the time when the special resolution is passed must, in my judgment, be determined by the persons engaged in the business of the company. It is essentially a business proposition, whether an additional business can or cannot be conveniently or advantageously carried on under existing circumstances with the business of the company. The additional business, of course, must not be destructive of or inconsistent with the existing business; it must leave the existing business substantially what it was before; but the additional business may be one which is different from the original business and

yet may well be capable of being conveniently and advantageously combined with the business which is being carried on. I think it would be placing altogether a too narrow construction upon s. 9, to hold that, because the additional business involves a new departure which was not contemplated by the original memorandum, therefore it does not fall within the purview of the section".

Thus the additional business proposed to be carried on by the company may involve a new departure from its existing business. It may be that the additional business may be one which is different from the original business, but that by itself is not a sufficient ground to refuse confirmation. What the Court has to consider is whether the additional business is destructive of or inconsistent with the existing business. If the additional business is not destructive of or inconsistent with the existing business, then it may well be capable of being conveniently and advantageously combined with the existing businesses of the company.

Mr. Amin on behalf of the company also relied upon the observations in Palmer's Company Law, 20th edn., pp. 291-292. The said observations are to the following effect:-

"the Statutory authority to alter the objects is not limited to business *ejusdem generis* but the alteration may extend to quite different business if it can be conveniently or advantageously combined with the existing business of the company."

Mr. Amin on behalf of the company accepted the position that in considering the application for confirmation of alteration in the object clause, the Court has got discretion. But he contended that that discretion has to be exercised on judicial principles. The judicial principles which guide the Court in exercising the discretion are clearly laid down in the decision of this Court in the case of *Jayantilal v. Tata Iron & Steel Co. Ltd.*² At page 755 of the Report, in construing the provisions of s. 17 of the Companies Act, Chagla C.J. observes as follows:—

"...But in exercising the discretion under s. 17 the Court must always bear in mind what is almost axiomatic in the company matters. It is primarily for the company to decide what is for its good. The Court must presume that the company knows its business and it is not for the Court to tell the company how it should carry on its business. It is not for the Court to impose upon the company its own political or moral views. However much we may disagree with the company in the action that it seeks to take, it is not for us to tell the company how it should carry on its business if its shareholders think that the business should be carried on in a particular way".

The special resolution is passed unanimously by the shareholders and no reason is suggested by the Registrar why the Court should take a view contrary to the one taken by the shareholders themselves.

Mr. Nariman on behalf of the Registrar has, however, emphasized the fact that the proposed alterations in the object clause are introduced without there being sufficient evidence that the company has a present desire to extend its business in the directions indicated. He contends that the Court should grant the applications only if the application is limited to those objects which the directors desire to carry out in near future. He relied upon the decision in *Re John Brown & Co.; Re Tredegar Iron & Coal Com. Ltd.*³ There, the new clauses as proposed were numerous and lengthy and included almost every kind of business, and some of the clauses only amplified the existing objects. An interpretation clause was introduced among the clauses by reason of which the objects stated in any clause could be treated as an independent business, unless otherwise so stated in the clause. It was held that the alterations in that case could be sanctioned only when the clauses were reduced in number and simplified, and the interpretation clause had been deleted and that a further clause was inserted disabling the directors from treating any of the new objects as principal objects without the consent of a special resolution of

the company. Neville J. at page 234 of the report observed:

"I have been thinking this matter over a great deal. The Legislature may pass a law which will prevent companies trading except within the limits of their memorandum; but, if you have got a memorandum which is co-extensive with the business of the whole world, you get behind the ambit of the legislation.

I think this would meet the case where it is desired (I think unwisely) to have these enormously extended memorandums...The point is that the directors could abandon the main business and take up an entirely new business without consulting the shareholders. I should stand in the way of the company taking up distinct businesses. Where distinct businesses were proposed by the alterations suggested I would not sanction them except upon evidence that there was a really present desire on the part of the company to extend its business in the directions indicated".

The learned Judge's subsequent observations on the same page of the Report are equally cogent and relevant on the point under consideration:

"That is one of the anomalies of the company law.

What I really feel is that if the court takes up the line of least resistance, some day the court may wake up and find that shareholders have lost their money through directors embarking on speculative business.

I am rather inclined to think that it would be better if the application were limited (even as to ancillary powers) to those the directors desire to carry out, not immediately, but in the near future, rather than to put in ancillary powers which you thought might at some future time be desired to be carried out. I don't want you to come once for all and ask for an extended memorandum covering every conceivable alteration in the business of the company".

In fact, Neville J. had observed earlier at the same page of the report:

"...If the circumstances of the company change, they can always come and ask reasonably to enlarge their memorandum".

It is thus clear that unless there is a present desire on the part of the company to carry on the new business in the near future, the Court should not grant the application. There is, therefore, considerable force in this contention of Mr. Nariman. During the course of the hearing, however, Mr. Amin on behalf of the company, abandoned the objects which are mentioned in sub-paras. (b), (c) and (d) of the Object clause 2A. As these objects are abandoned by the company and as the company's main desire is to carry on the businesses which are mentioned in sub-para. (a) of clause 2A of the Object Clause, there is evidence on record that the company intends to start the businesses in chemicals in the near future. Under these circumstances, I find it difficult to accept this contention of Mr. Nariman.

Mr. Nariman also relied upon the case in *In the matter of Bhutoria Brothers*.⁴ In this case, the principles laid down in the case *Parent Tyre Co.* In re., and in *Re. John Brown & Co.; Re. Tredegar Iron & Coal Co. Ltd.*, are followed. After referring to these cases at p. 595 of the report, Mukharji J. observed (p. 596):

"I arrive at a similar conclusion from a construction and interpretation of the language of S. 17(1)(d) of the Companies Act, 1956. That provision says that the memorandum may be altered with respect to the objects of the company to enable it to carry on 'some business'. The words 'some business' in that clause apparently must include business other than the business which is already being carried on under the existing memorandum. Therefore, the addition of 'some business' may be the addition of a business which is entirely a new departure from the business already carried on. The only requirement of the Statute law in India is that such business must be one which can (1) conveniently or advantageously be combined with the business of the company, and (2) that this must be so under the existing circumstances. So long as these two limits are observed I should think that the shareholders and the management of the company should be left free to add to or reduce their business by suitable alterations in their memorandum".

In the present case, the company is a private limited company and has only two shareholders. Both the shareholders have unanimously approved of the proposed alteration in the object clause. None of the creditors of the company has come forward to oppose this application for confirmation of the alteration in the object clause. The only opposition to this petition is from the Registrar of the Joint Stock Companies. The company has ample capital with which it can carry on its existing business and also the proposed additional businesses. Simply because the businesses proposed to be carried on are wholly different from and bear no relation to the existing business of the company, it cannot be said that it cannot be conveniently and advantageously combined with the existing business. The proposed businesses, in my opinion, are not destructive of or inconsistent with the business which the company is now carrying on. In exercise of my jurisdiction, I should not overlook the fact that it is for the shareholders to decide what business could be carried on by the company and it is not for the Court to tell the company what business it should carry on and how it should be carried. In view of the facts stated in the petition and the affidavit in rejoinder, I am satisfied that the businesses proposed to be carried on by the company under the proposed alteration of the object clause (save and except those which are abandoned) can conveniently and advantageously be combined with the business of the company under its existing circumstances.

I, therefore, allow the alteration proposed by the object clause 2A set out in para. 6 of the petition on condition that clauses (b), (c) and (d) thereof are deleted therefrom. The objects in clauses (b), (c) and (d) of the Object clause 2A are in fact abandoned during the course of the hearing. The Company will pay the costs of the Registrar of the Joint Stock Companies and will bear its own costs.

Before Mr. Justice Kantawala.

F. HOFFMAN LA ROCHE & COMPANY LIMITED

v.

THE SANITEX CHEMICAL INDUSTRIES LIMITED.*

Trade and Merchandise Marks Act (XLIII of 1958), Secs. 11(a), 12(1)—Burden of proof under ss. 11(a) & 12(1)—Construction of s. 12(1)—Where marks indetical whether permissible to consider manner of intended user of mark applied for registration for limited class of goods—Where marks not identical whether enquiry limited to comparison of two marks—Nature of such enquiry—Tests for determining what is likely to deceive or cause confusion.

Under ss. 11(a) and 12(1) of the Trade and Merchandise Marks Act, 1958, the onus is upon the applicant to establish to the satisfaction of the Court that there is no real and tangible danger of confusion. On the other hand, the objections put forward by the opponents must equally be real and not fanciful. It is not for the Court to consider imaginary and unlikely cases in order to bring s. 12(1) of the Act into operation. Even though the burden is on the applicant their case is not to be defeated by constructing rather fantastic or far-fetched imaginary cases involving a combination of circumstances which, however possible it may be, has no reasonable probability in any business sense. The Court is not concerned with hypothetical possibilities but with the ordinary practical business probabilities having regard to the circumstances of the case. If at the conclusion of the enquiry, the answer to the question: Is deception or confusion likely to occur? is "yes" or if the matter remains in dubio, registration must be refused.

Section 12(1) of the Act deals with two types of cases. The first type of cases deals with two identical trade marks. If the mark of which registration is sought and the mark which is already registered are identical, the registration must be refused. It is not then permissible to proceed to consider whether notwithstanding the circumstances that the marks are identical, the manner of intended user of the mark applied

*Decided, October 4, 1962. O.C.J. Miscellaneous Petition No. 342 of 1961.

for would justify allowing the registration in respect of some limited class of goods. The second type of cases are those in which it is necessarily postulated that the two marks under consideration are not identical. Here the enquiry is not limited to the comparison of two marks but involves a comparison of the two marks in relation, as regards the existing mark, to the goods in respect of which the marks are registered and in relation as regards the proposed mark, the goods in respect of which registration is applied for. In the conduct of this enquiry, the surrounding circumstances properly to be taken into account must be considered. When the marks have been considered in relation to the goods, in the light of the surrounding circumstances, the question must be answered: "Is there likely to be confusion or deception if the application is granted?" When the question is answered, the enquiry under the section is concluded for all purposes and if the answer to the question is either in the affirmative or that the matter remains in dubio, it is incompetent to the tribunal to take into account any further matter in order to consider whether, in the light of those matters, the probability of confusion would be removed and thus the answer already given might be otherwise.

The Act does not lay down any criterion for determining what is likely to deceive or cause confusion. Every case must depend on its own particular facts and the value of authorities lies not so much in the actual decision as in the tests applied for determining what is likely to deceive or cause confusion. A trade mark is likely to deceive or cause confusion by its resemblance to another already on the register, if it is likely to do so in the course of its legitimate use in a market where the two marks are assumed to be in use by the traders in that market. In considering the matter, all the circumstances of the case must be considered.

In the Matter of an application by Smith Hayden & Coy., Ltd.,¹ In the Matter of an Application by William Bailey (Birmingham) Ltd.,² In the Matter of an Application by Bayer Products, Ltd.,³ and In the Matter of an Application by the Pianotist Company Ltd.,⁴ referred to.

On January 30, 1957, the Sanitex Chemical Industries Limited (applicants) made an application under s. 14 of the Trade Marks Act, 1940, for registration of a trade mark in class 5 in respect of pharmaceutical preparations containing iron in injectible form. The trade mark consisted of a label containing *inter alia* the word "Saniron" in black letters below which were the letters "SCI" appearing prominently in special lettering within a rectangle. The letters "SCI" and the rectangle are in white colours. The label also contained the word "poison" in red colours and the various ingredients that had gone into the composition of the pharmaceutical injectible product as also the name and address of the applicant company. One of the ingredients as specified in the label that went into the composition of the product is "Procain hydrochloride".

The registration was opposed by Messrs. F. Hoffman La Roche and Company Limited (opponents) under s. 8(a) and s. 10(a) of the Trade Marks Act, 1940, corresponding to ss. 11(a) and 12(1) of the Trade and Merchandise Marks Act, 1958. The opponents were the registered proprietors of the mark "SARIDON" registered in class 5 in respect of pharmaceutical preparations as on June 1, 1942. In the notice of opposition, the opponents *inter alia* contended that the marks sought to be registered by the applicants consisted of a label in which the word "SANIRON" was depicted as an essential feature, that the word "SANIRON" so nearly resembled the opponents' trade mark "SARIDON" that the applicants' mark "SANIRON" was likely to deceive or cause confusion and that their mark "SARIDON" was so well-known throughout India that the use of the "SANIRON" mark and/or their registration was likely to deceive or cause confusion in the trade and the public would assume a connection in the course of trade between the applicants and/or their goods and the opponents.

In their counter-statement, the applicants stated that the applicants' goods and those of the opponents were of different description as they were meant

1 (1945) 63 R.P.C. 97.

2 (1935) 52 R.P.C. 136.

3 † (1947) 64 R.P.C. 125.

4 (1906) 23 R.P.C. 774.

for totally different ailments and that between their respective trade marks there was no similarity whatsoever; that the applicants' product under the trade mark "SANIRON" was in the form of injections which could not be sold in the market without a doctor's prescription and as such there was no possibility of any deception or confusion taking place nor was it likely that wrong medicine would ever be given by a chemist to his customer. The applicants further stated that their mark "SANIRON" was coined by taking prefix "SAN" from the first three letters of the applicants' name "SANITEX" and the subsequent part "IRON" indicated iron of the product which was quite distinct and distinguishable from the opponents' trade mark "SARIDON"; that there was no possibility of confusion as the trade marks of the applicants and the opponents were different both visually and phonetically and the goods in respect of which the said marks were used were also goods of different description and meant for totally different indications: that the applicants' medicine was regarded as "Poison" as clearly indicated on their trade mark label and that it could not be sold at all, according to the provisions of the Indian Drugs Act, without a doctor's prescription and therefore, there was not the slightest danger of confusion having regard to the restrictions imposed under the Drugs Act.

At the hearing before the Assistant Registrar of Trade Marks, it was admitted on behalf of the opponents, that their particular pharmaceutical preparation in respect of which mark "SARIDON" was used, was an analgesic preparation in tablets form from its very inception and that their mark was advertised as such extensively both in the medical press as well as in the general press. It was held by the Assistant Registrar that the reputation and the user of the opponents' mark had been proved in respect of a preparation used as an analgesic and sold in the form of tablets only since the inception of the mark upto the date of application. He also held that visually the two marks were not similar, that even if the opponents used the mark in respect of identical injectible preparation as used by the applicants or some such preparation, there was no possibility of confusion because in that event, the two injectible preparations under the marks "SARIDON" and "SANIRON" would be administered by a doctor and an expert nurse and professional men of that character were not likely to commit a mistake.

The opponents appealed against the decision of the Assistant Registrar allowing registration of the applicants mark.

K. S. Shawaksha, instructed by *Crawford Bayley & Co.*, for the petitioners.

S. B. Shah, with *S. P. Bharucha*, instructed by *Manilal, Kher Ambalal & Co.*, for the respondents.

KANTAWALA J. [His Lordship after stating the facts and evidence in the case, proceeded.] The sections on which the opposition was based, are ss. 11(a) and 12(1). Section 11(a) provides as follows:—

"11. A mark—

- (a) the use of which would be likely to deceive or cause confusion; or
- (b) ...
- (c) ...
- (d) ...

shall not be registered as a trade mark".

This section is contemplating the consequences of the use of the trade marks.

Section 12(1) provides:—

"12. (1) Save as provided in sub-section (3) no trade mark shall be registered in respect of any goods or description of goods which is identical with or deceptively similar to a trade mark which is already registered in the name of a different proprietor in respect of the same goods or description of goods".

The words "deceptively similar" are defined in s. 2(d) as under:—

"(d) 'Deceptively similar':—A mark shall be deemed to be deceptively similar to another mark if it so nearly resembles that other mark as to be likely to deceive or cause confusion".

It is necessary to have in mind at the outset the scope of the enquiry under each section. For this purpose, one cannot do better than adapt to the present case a passage in the judgment of Evershed J. in the case of *In the matter of an application by Smith Hayden & Coy., Ltd.*¹ substituting the marks with which I am concerned in this case for those with which the learned Judge was concerned in the case before him: (a) under s. 11: Having regard to the reputation acquired by the name "SARIDON", is the Court satisfied that the mark applied for, if used in a normal and fair manner in connection with any goods covered by the registration proposed, will not be reasonably likely to cause deception and confusion amongst a substantial number of persons; and (b) under s. 12: Assuming use by the appellants of their mark "SARIDON" in a normal and fair manner for any of the goods covered by the registration of their mark (and including particularly goods also covered by the proposed registration of the mark "SANIRON" i.e. pharmaceutical preparation containing iron in injectible form) is the Court satisfied that there will be no likelihood of deception or confusion among a substantial number of persons if the applicants also use their mark SANIRON normally and fairly in respect of any goods covered by their proposed registration.

In the case of each section, the onus is upon the applicant to establish to the satisfaction of the Court that there is no real and tangible danger of confusion. On the other hand, the objections put forward by the opponents must equally be real and not fanciful. It is not for the Court to consider imaginary and unlikely cases in order to bring s. 12(1) of the Act into operation. Even though the burden is on the applicants, their case is not to be defeated by constructing rather fantastic or far-fetched imaginary cases involving a combination of circumstances which, however possible it may be, has no reasonable probability in any business sense. The Court is not concerned with hypothetical possibilities but with the ordinary practical business probabilities having regard to the circumstances of the case. If at the conclusion of the enquiry, the answer to the question: Is deception or confusion likely to occur? is "Yes" or if the matter remains in dubio, registration must be refused.

It is equally made clear on the authorities as was pointed out by Farwell J. in *the matter of an Application by William Bailey (Birmingham) Ltd.*² that:

"The decision of the Registrar or the Assistant Registrar is one which should not be disturbed at all lightly. *Prima facie* his decision should stand and, in my view, though this Court might take a different view from that which was taken by the Registrar as to the similarity or dissimilarity of the two marks or the two words, or even if this Court were to take a different view as to the effect of the evidence as a whole from that taken by the Registrar, the Court would hesitate long before reversing the decision of the Registrar on any such grounds as those. In my judgment, before this Court interferes with the decision of the Registrar in a case of this kind it ought to be satisfied that the Registrar in arriving at his decision has acted upon some wrong principle, e.g., has not approached the problem in the right way, or has taken into consideration matters which he ought not to have taken into consideration or has omitted to take into consideration matters which were proper for consideration. Unless there are some such grounds as those for interfering with the decision of the Registrar, in my judgment that decision ought not to be disturbed".

It was argued on behalf of the opponents that the Assistant Registrar did not approach the problem in the right way; that he had taken merely the decisions of the cases reported and unreported without taking into consideration the facts of those cases and applied them to the present case; that the Assistant Registrar instead of taking into consideration the marks as actually applied for by the opponents, took into consideration the marks as actually used by the opponents, that he misconstrued s. 12(1), that he wrongly applied the provisions of the Drugs Act and the rules made thereunder and that he has, therefore, erred on

1 (1945) 63 R.P.C. 97, at p. 101.

2 (1935) 52 R.P.C. 136, at p. 148.

a matter of principle and in consequence, I am in a position to consider the matter afresh.

In view of this argument, it is necessary to consider the true construction of s. 12(1). Section 12(1) deals with two types of cases. The first type of cases is that no trade mark shall be registered in respect of any goods or description of goods which is identical with a trade mark which is already registered in the name of a different proprietor in respect of the same goods or description of goods. There is an absolute bar of registration of two identical trade marks. It requires that the two marks under consideration should be compared. If the two marks under consideration, that is, the mark of which registration is sought and the mark which is already registered are identical, the registration must be refused. It is not then permissible to proceed to consider whether notwithstanding the circumstances that the marks are identical, the manner of intended user of the mark applied for would justify allowing the registration in respect of some limited class of goods. The second type of cases dealt with by the section are those in which it is necessarily postulated that the two marks under consideration are not identical. Here the enquiry is not limited to the comparison of two marks but involves a comparison of the two marks in relation, as regards the existing mark, to the goods in respect of which the marks are registered and in relation as regards the proposed mark, the goods in respect of which registration is applied for. In the conduct of this enquiry, the surrounding circumstances properly to be taken into account must be considered. When the marks have been considered in relation to the goods, in the light of the surrounding circumstances, the question must be answered: "Is there likely to be confusion or deception if the application is granted?" When the question is answered, the enquiry under the section is concluded for all purposes and if the answer to the question is either in the affirmative or that the matter remains in dubio, it is incompetent to the tribunal to take into account any further matter in order to consider whether, in the light of those matters, the probability of confusion would be removed and thus the answer already given might be otherwise. See *In the Matter of an Application by Bayer Products, Ltd.*,³ per Wynn-Parry, J. at p. 131.

It is not disputed before me that the goods in respect of which the opponents' mark is registered and the applicants' mark is applied for registration are the same or of the same description. It is also not disputed that the two marks are not identical.

It will be noticed that the words used in the section relevant for the purpose are "deceptively similar", that is, likely to deceive or cause confusion. The Act does not lay down any criterion for determining what is likely to deceive or cause confusion. Every case must depend on its own particular facts and the value of authorities lies not so much in the actual decision as in the tests applied for determining what is likely to deceive or cause confusion. A trade mark is likely to deceive or cause confusion by its resemblance to another already on the register, if it is likely to do so in the course of its legitimate use in a market where the two marks are assumed to be in use by the traders in that market. In considering the matter, all the circumstances of the case must be considered.

The matters which are to be taken into consideration were stated by Lord Parker (then Parker J.) in *In the Matter of an Application by the Pianotist Company Ltd.*,⁴ where he said:

"...You must take the two words. You must judge of them, both by their look and by their sound. You must consider the foods to which they are to be applied. You must consider the nature and kind of customer who would be likely to buy those goods. In fact, you must consider all the surrounding circumstances; and you must further consider what is likely to happen if each of those trade marks is used in a normal way as a trade mark for the goods of the respective owners of the marks. If, considering

all those circumstances, you come to the conclusion that there will be a confusion—that is to say, not necessarily that one man will be injured and the other will gain illicit benefit, but that there will be confusion in the mind of the public which will lead to confusion in the goods—then you may refuse the registration, or rather you must refuse the registration in that case”.

It is necessary to apply each of these considerations in the present case. So far as visual comparison is concerned, one has to compare the opponents’ mark as actually appearing on the register and the applicants’ mark as applied for registration. The mark of the opponents as registered is the word “SARIDON” *per se*, while the applicants’ mark as applied for registration is not the word mark but is a label mark. The essential feature of the applicants’ mark consists of the word “SANIRON” along with the letters SCI appearing very prominently on a label in a multi coloured background. In view of the statutory restrictions in respect of the labelling of the mark, which I will hereinafter refer to in some detail, the word “poison” appears in red or against red background. The label of the applicants in a normal and fair user of the mark, must be a multicoloured one and in any visual comparison of the mark, the presence of the letters SCI in bold letters cannot be ignored. In my opinion, visually, the two marks are not similar.

It was, however, argued that the essential feature or at least the feature by which the applicants’ mark will be asked for is SANIRON. Both the words SANIRON and SARIDON are the words of three syllables and both the words begin with syllable SA and end with the syllable ON. In the middle portion in one case it is NIR and in the other it is RID. In written order the letter ‘N’ in the word “SANI” and the letter ‘R’ in the word “SARI” especially since both the words are followed by the letter ‘I’ are likely to be written alike and there is a great chance of confusion. It is true that in the two words “SARIDON” and “SANIRON” there are common syllables. But, taken as a whole there is no overall similarity so as to cause confusion. Judging the two words by their sound, the test to be applied in such cases, is the one that is laid down by Luxmoore L.J. *In the Matter of an Application by Rysta Ltd.*⁵ and which is approved by the House of Lords in appeal in *Aristoc, Ltd. v. Rysta, Ltd.*⁶ At p. 108, Luxmoore L.J. said:—

“The answer to the question whether the sound of one word resembles too nearly the sound of another so as to bring the former within the limits of section 12 of the Trade Marks Act, 1938, must nearly always depend on first impression, for obviously a person who is familiar with both words will neither be deceived nor confused. It is the person who only knows the one word, and has perhaps an imperfect recollection of it who is likely to be deceived or confused. Little assistance, therefore, is to be obtained from a meticulous comparison of the two words, letter by letter and syllable by syllable, pronounced with the clarity to be expected from a teacher of elocution.

The Court must be careful to make allowance for imperfect recollection and the effect of careless pronunciation and speech on the part not only of the person seeking to buy under the trade description, but also of the shop assistant ministering to that person’s wants”.

In approaching the question whether the sound of one word resembles too nearly the sound of another, from the point of view of a man of average intelligence and imperfect recollection, it is difficult to find phonetic similarity between the two words SARIDON and SANIRON. Judging the two words by their sound I do not find that there is such a close and near resemblance between them as is likely to cause confusion.

The next thing is to consider the nature and the kind of the customer who would be likely to buy the respective goods and the surrounding circumstances. *In the Matter of an Application by Bayer Products Ltd.*, Lord Green, M. R., emphasised the importance of this consideration in the following words (p. 137) :

“The question whether there is likelihood of deception or confusion cannot be con-

sidered under Sec. 12(1), without reference to surrounding circumstances; in other words, the Court is not confined merely to looking at the Register and comparing the two marks as words in the English language or some invented language; it has to consider to what extent, in all the circumstances, deception or confusion is likely."

[The rest of the judgment is not material to this report.]

Petition dismissed.

APPELLATE CIVIL.

Before Mr. Justice Chandrachud.

IBRAHIM MAHOMMED ISSAK v. M/s. MACKINNON
MACKENZIE & Co. PRIVATE LTD.*

Workmen's Compensation Act (VII of 1923), Secs. 3, 30(1)—Merchant Shipping Act (XLIV of 1958), Sec. 101—Indian Evidence Act (I of 1872), Sec. 108—"Accident arising out of employment", meaning of expression in s. 3, Workmen's Compensation Act—Tests to determine whether accident arose out of employment—Balance of probabilities as to whether death caused by accident or design—Presumption to be drawn in such case—Inference of accidental death whether can be drawn in absence of evidence of eye-witness—Whether s. 108, Indian Evidence Act exhaustive of circumstances in which death can be inferred.

The words "accident arising out of employment" in s. 3 of the Workmen's Compensation Act, 1923, mean that there should be a direct connection between the accident and the employment. If the accident has occurred on account of a risk which is an incident of the employment, the claim for compensation must succeed, unless the workman has exposed himself to an added peril by his own imprudent act.

It is open to a Court to find on an inference that the accident arose out of employment though no human being was present who could give direct evidence how and when the accident happened.

The expression "out of employment" is not confined to the nature of the employment, but applies to the employment as such—to its nature, its conditions, its obligations and its incidents. If by reason of any of these, the workman is brought within the zone of special danger or is injured or killed, the accident would be one arising out of employment. If the employment brings the workman within or allows him to be within proximity of the peril to which the injury or death can properly be ascribed, the accident can be said to have arisen out of employment.

If the workman is properly in a place to which some risk attaches and an accident occurs which is capable of being attributed to a risk which is ordinarily inherent in the discharge of his duties, it is legitimate, notwithstanding the absence of evidence as regards the immediate circumstances of the accident, to attribute the accident to the risk and to hold that it arose out of employment.

It is not necessary to prove that the workman was engaged in a particular duty in the discharge of which he was at a particular spot where the accident happened. By the place of danger is meant not a particular spot of danger but the entire place, as for example, the ship or the train.

A seaman's employment puts him in a dangerous position, the ship on high seas or in deep waters being a place to which some risk is incidental. There are perils, surrounding the seaman's life and duty, which are inherent in his employment.

As the employment of a seaman, by the very nature of it, exposes him to certain dangers, whether at work or not, as for example, the danger of falling overboard or being swept overboard, there is a *prima facie* presumption, if death by drowning be proved, that the death was caused by an accident which arose out of employment.

The presumption thus arising can be rebutted by the employer by leading evidence

of facts and circumstances showing that the workman had at or about the time of his death departed from the controlling incidents of his employment or that he had added to the peril by his own imprudent act.

Bender v. Owners of Steamship Zent,¹ *Marshall v. Owners of Steamship Wild Rose*,² *Marshall v. Owners of S. S. Wild Rose*,³ *Swansea Vale (Owners) v. Rice*,⁴ *Kerr or Lendrum v. Ayr Steam Shipping Company, Limited*,⁵ *Thom or Simpson v. Sinclair*,⁶ *Simpson v. L.M. & S.Ry. Co.*⁷ and *Rosen v. S. S. "Quercus", (Owners)*,⁸ referred to.

Where there is a balance of probabilities as to whether death is caused by accident or by design and there is no clear evidence as to the cause of death, death must be presumed to be accidental. An innocent cause of death must be preferred to a cause which, if accepted, would lead to an inference of crime.

Harvey v. Ocean Accident and Guarantee Corporation,⁹ *Bender v. Owners of Steamship Zent*¹⁰ and *Ranjanibai v. New India Assurance Co.*,¹¹ referred to.

Whether an inference of accidental death can properly arise must necessarily depend upon the circumstances of each individual case. But the view that one cannot hold a death to be accidental unless there is an eye-witness to the accident is a rigorous view of the rules of evidence and will defeat the protection afforded to the workers in a large number of cases, especially in cases of seamen whose death is caused by drowning.

Section 108 of the Indian Evidence Act, 1872, is not exhaustive of the circumstances in which death can be inferred. There may be cases in which death cannot be presumed under s. 108 of the Act, as for example, cases in which a person has not been heard of for less than seven years and yet the fact of death can be inferred from the circumstances of the case.

Under the first proviso of s. 30(1) of the Workmen's Compensation Act, 1923, the High Court has no jurisdiction to interfere with the decision of the Commissioner if the questions raised in appeal are pure questions of fact, or even if the appeal raises but a settled question of law.

THE facts are stated in the judgment.

J. I. Mehta, with *B. M. Madnani*, for the appellant.

S. J. Sorabjee, instructed by *Crawford Bayley & Co.*, for the respondents.

CHANDRACHUD J. The application filed by the appellant for compensation for the death of his son, a seaman, has been dismissed by the learned Additional Commissioner for Workmen's Compensation, Bombay, on the ground mainly that neither the fact of death nor that it occurred on account of an accident arising out of employment is proved. The facts leading to the application are few, and indeed it is a matter of common experience in cases of 'unexplained accidents', that the paucity of material is due partly to the fact that in the very nature of things the heirs of a deceased seaman can have no personal knowledge of the circumstances in which the death of the seaman was caused and partly due to the apathy of the Shippers to lead oral evidence of the relevant facts and circumstances.

Shaikh Hassan Ibrahim was employed as a deck-hand, a seaman of category II on the ship S.S. 'Dwarka', which is owned by the British India Steam Navigation Co. Ltd., of which the respondents Messrs. Mackinnon Mackenzie & Co. (Pvt.), Ltd. are the agents. The medical log book of the ship shows that on December 13, 1961, Shaikh Hassan complained of pain in the chest and was therefore examined, but nothing abnormal was detected clinically. The Medical Officer on board the ship prescribed some tablets for Shaikh Hassan and he reported fit for work on the next day. On the 15th, however,

1 [1909] 2 K.B. 41.
2 [1909] 2 K.B. 46.
3 [1910] A.C. 486.
4 [1912] A.C. 238.
5 [1915] A.C. 217.
6 [1917] A.C. 127.

7 [1931] A.C. 351.
8 [1933] A.C. 404.
9 (1905) 2 Irish Reports 1.
10 [1909] 2 K.B. 41.
11 [1956] A.I.R. Bom. 633.

he complained of insomnia and pain in the chest, for which the Medical Officer prescribed sedative tablets. The official log book of the ship shows that on the 16th when the ship was in the Persian Gulf, Shaikh Hassan was seen near the bridge of the ship at about 2.30 a.m. He was sent back, but at 3 a.m. he was seen on the Tween Deck when he told a seaman on duty that he was going to bed. At 6.15 a.m. he was found missing and a search was undertaken. At 7.15 a.m. a radio message was sent by the Master of the ship saying:

"One Seaman missing between Khorramshahr and Ashar Stop May be in river Stop All ships please keep look out."

The ship arrived alongside Ashar Jetty at 8 a.m. when a representative of the respondents was informed that Shaikh Hassan was missing. The representative in turn passed on the information to the local Police and the Port authorities. The last entry in the log book shows that at 4 p.m. an inquiry was held on board the ship by the local Police and the British Consul-General. On a suggestion made by the latter, the personal effects of the missing seaman were checked and sealed by the Consulate authorities for being deposited with the Shipping Master, Bombay. On February 20, 1962, the appellant filed an application under s. 3 of the Workmen's Compensation Act (Central Act VIII of 1923), claiming compensation of Rs. 4,000 for the death of his son, which according to him, occurred on account of a personal injury caused by an accident arising out of and in the course of his employment.

The respondents disputed the appellant's claim on the ground, amongst others, that there was nothing to show that the seaman was in fact dead, that the death, if any, was not caused in the course of the employment, that in any event the death could not be said to have been caused by an accident which arose out of employment and that the probabilities were more consistent with a suicidal death than with an accidental death.

The parties did not lead oral evidence at the trial of the claim. The learned Additional Commissioner has held on such facts and circumstances as appeared to him undisputed and indisputable, that there was no evidence to show that the seaman was dead and there was in any view no evidence to justify the inference that the death of the seaman was caused by an accident which arose out of employment. The learned Additional Commissioner has, however, negatived the contention of the respondents that the death, if any, was caused by the seaman's voluntary act.

Before I deal with the main issues arising on this appeal, it is necessary to refer to the first proviso of s. 30(I) of the Workmen's Compensation Act under which no appeal can lie to the High Court against an order passed by the Commissioner unless a substantial question of law is involved in the appeal. If the questions raised in the appeal are pure questions of fact, or even if the appeal raises but a settled question of law, the High Court has no jurisdiction to interfere with the decision of the Commissioner. In my opinion, however, the judgment of the learned Additional Commissioner suffers from errors of law so serious, so substantial that interference with the view expressed by him seems inevitable.

The learned Additional Commissioner has held that the death of the seaman is not proved, because, firstly, there is no evidence that he fell overboard or was drowned and, secondly, because the period for which the seaman was not heard of was much too short to raise a presumption under s. 108 of the Indian Evidence Act. This approach, in my opinion, is erroneous, because in order to find that the seaman is dead, it is not necessary that there should be direct or positive evidence that he was seen falling overboard or being drowned; nor indeed is s. 108 of the Evidence Act exhaustive of the circumstances in which death can be inferred. There may be cases in which death cannot be presumed under s. 108, as for example, cases in which a person has not been heard of for less than seven years and yet the fact of death can be inferred from the circumstances of the case. As the learned Additional Commissioner, in dealing with the fact of death, restricted himself to a consideration of the presumption

arising under s. 108 of the Evidence Act and as he wrongly assumed that without that presumption and without direct evidence of death, one cannot hold that the death is proved, it would be necessary to consider whether on the record as it stands, the death of the seaman can be held proved.

On my part, I see no difficulty in inferring that the seaman is in fact dead. That he was on board the ship on December 16, 1961, is admitted. The medical log book maintained on the ship shows that he was indisposed on the 13th and the 15th and that certain medicines were prescribed for him. The ship's log book, which is signed by the Mate and the Master shows that in the early hours of the morning of the 16th the seaman was seen first near the bridge and then on the Tween Deck of the ship. The log book further shows that at 6-15 a.m. a Deck Sarang informed the Chief Officer of the ship that the seaman was missing, whereupon an immediate search was made to find him. As soon as it appeared that he was not on board, a radio message was sent saying that the seaman was missing between Khorramshahr and Ashar, that he might be in the river and that the ships round about should be on the look out for him. As the seaman could not be traced, intimation was given to the respondent's representatives at 8 a.m. and an official inquiry was held on board the ship by the local Police and the British Consul-General at 4 p.m. The last entry in the log book shows that the "personal effects" of the seaman were checked and sealed by the Consulate authorities for being deposited with the Shipping Master, Bombay.

These facts, in my opinion, must raise an inference that the seaman died by being drowned on or about December 16, 1961. The faint suggestion made by Mr. Sorabji, who appears on behalf of the respondents, that the seaman may have swam to safety seems to me too brave to be true. The physical condition of the seaman on the eve of his being found missing as reflected in the medical log book, would in any event render such a possibility too far beyond his endurance.

The next question for decision is whether the seaman died an accidental death. The approach of the learned Additional Commissioner to this question also is erroneous. In para. 9 of his judgment the learned Additional Commissioner has indicated the reason why it was difficult to presume that the death of the seaman was caused accidentally. The difficulty which was felt was that there was no evidence to show how, when and from which place the seaman fell into the sea. In my opinion, the absence of direct evidence showing that the seaman was doing a particular type of work at a particular time at a particular place or that he fell into the sea in a particular manner cannot conclude the question whether he died an accidental death. The view taken by the learned Additional Commissioner can more frankly be expressed by saying that you cannot hold a death to be accidental unless there is an eye-witness to the accident. In my opinion, such a rigorous view of the rules of evidence will defeat the protection afforded to the workers in a large number of cases, especially in cases of seamen, and I see no reason why a Court of facts should not draw an inference, if the facts and circumstances of the case justify it, that the death of the workman occurred on account of an accident. I do not suggest that in every case in which a seaman is found missing he must be presumed to be dead nor that in every case in which a seaman dies a death by drowning must he be presumed to have died an accidental death. Whether an inference of accidental death can properly arise must necessarily depend upon the circumstances of each individual case, but I do not agree that the death of a workman cannot be held to have been caused by an accident unless there is direct evidence to establish the accident.

From such facts as appear on the record, it would, in my opinion, be legitimate to infer that the seaman died an accidental death. There is no dispute that at about 6-15 a.m. he was found missing from the ship when the ship was in the deep waters of a navigable river. The death of the seaman, which I have already held proved, could be caused either by his own act or by the act of some

other person or by accident. The learned Additional Commissioner has negatived the possibility of a suicidal death, after taking into account the circumstances that the seaman was suffering from insomnia and was seen on the Tween Deck at an odd hour of the night. I agree with that view. As regards the possibility of a homicidal death, if the choice is between death by accident and death by design, there must be a presumption in favour of an accidental death, for, as observed in *Harvey v. Ocean Accident and Guarantee Corporation*¹, which was a case of death by drowning,

"the death can only be reasonably accounted for in one of the two ways—immersion in the water by accident or design; and an innocent cause ought to be presumed as against what would be *prima facie* a crime. There is ample authority that the presumption against crime is applicable in a civil action."

In *Bender v. Owners of Steamship Zent*² in which a chief cook was lost overboard on high seas, the possibility of suicide was excluded by Farwell L.J. on the ground

"...suicide being a crime, the presumption is against it."

Finally in *Ranjanbhai v. New India Assurance Co.*³ it was held by a learned Single Judge of this Court in the case of a death by fall from the fourth floor of a building, that though there is no presumption in law of an accidental death in the abstract, where it is proved that a person died of a cause such as drowning or a fall, presumption against violence or suicide must be raised and in the absence of evidence in rebuttal, the presumption must be allowed to prevail. In the case before me, suicide has been negatived on facts by the learned Additional Commissioner, and very rightly. Even otherwise, the possibility that the death of the seaman was caused by design, that is to say, by the commission or attempted commission of a crime must be excluded, for if there is a balance of probabilities and if there is no clear evidence as to the cause of death, death shall have to be presumed to be accidental. An innocent cause of death must be preferred to a cause which, if accepted, would lead to an inference of crime. As regards the possibility of homicidal death, in addition to there being a presumption against it, Mr. Sorabjee has very fairly conceded that it is not possible in this case to suggest that the seaman was murdered. As death by suicide or murder has thus to be excluded, I am of the opinion that the seaman must be held to have died an accidental death. This conclusion emerges not only out of a process of elimination—a process, by which the only two other possibilities in which death may have been caused can be reasonably excluded—but the conclusion would seem to accord best with the broad probabilities of the case.

Having cleared the initial ground as regards the fact of death and whether the death was caused by accident or by design, it is necessary now to consider the two main questions which arise under s. 3 of the Workmen's Compensation Act: whether the accident arose in the course of employment and whether it arose out of employment. As stated in Halsbury's Laws of England, 2nd edn., Vol. 34, p. 823, para. 1161.

"The words 'in the course of the employment' mean in the course of the work which the workman is employed to do and what is incidental to it."

It is unnecessary to cite other authorities on what is the true connotation of the phrase "in the course of employment", for the position stated in Halsbury is accepted generally as containing the correct exposition of law. The question whether the death arose in this case in the course of employment does not present any difficulty, because it is inherent in the very nature of a seaman's employment that to be able to discharge the duties assigned to him, he must be on board the ship during a voyage, at all hours of the day and night. Seamen, therefore, sign for the whole voyage and are deemed under the terms of their employment to be on duty at all times during the voyage. Section 101 of the

1 (1905) 2 I.R. 1, at p. 37.

2 [1909] 2 K.B. 41.

3 [1956] A.I.R. Bom. 633.

Merchant Shipping Act (Central Act XLIV of 1958) provides that an agreement with the crew shall be in the prescribed form and the statutory form of contract would show that under the contract of his employment a seaman is on duty all through the voyage for which he has signed, though for convenience, the timings of his actual duty may be limited to specified hours of the day and night. It is interesting, though it cannot by itself decide the point, that amongst the several authorities cited at the Bar, there is none in which it was suggested that the death of a seaman, which occurred during the course of a voyage when the seaman was on board the ship, did not occur in the course of employment. As observed by Fletcher Moulton L.J. in *Marshall v. Owners of Steamship Wild Rose*⁴

"...Seamen in their employment are necessarily on board continuously, by which I mean that not only when they are employed in active work about the ship, but also in the intervals between their active employment, they must be upon the ship. Therefore I have no doubt that the leisure of a sailor on board the vessel is as much in the course of his employment as the time which he spends in active work."

In my opinion it being clear in this case that the seaman died during the course of voyage, his death must be held to have occurred during the course of his employment.

The decision of the second question whether the death of the seaman occurred on account of an accident which arose out of his employment is rendered somewhat difficult by a marked conflict of views expressed by the English Judges. Counsel for either side contends that the conflict is resolved by the House of Lords, but the respective submissions as to how the conflict is resolved are widely divergent. Ultimately, after a discussion of the authorities, it may be necessary to remind oneself of the warning uttered by Viscount Dunedin in *Simpson v. L. M. & S. Ry. Co.*⁵ that decided cases are only useful so far as they lay down principles, but it is no use trying to decide a case simply by looking at other cases and then inquiring which case most resembles the present on the facts.

As regards the second requirement that the death must be caused by an accident arising out of employment, it is not always possible to keep this and the first requirement entirely separate. The words "arising out of employment" are understood to mean, as stated in Halsbury, that

"during the course of the employment, injury has resulted from some risk incident to the duties of the service, which, unless engaged in the duty owing to the master, it is reasonable to believe the workman would not otherwise have suffered." (p. 823).

The same thought has been variously expressed by different authorities, the choice of language being influenced by subjective considerations. It is, for example, said that there must be a causal relationship between the accident and the employment; or that the accident must arise directly out of the fulfilment of the conditions of service; or that the nature, conditions, obligations and incidents of employment must all be considered and if, by reason of any of these factors, the workman is brought within the zone of special danger, the injury would be one which arises 'out of employment'. Phrases apart, the essence of the matter is that there should be a direct connection between the accident and the employment. If the accident has occurred on account of a risk which is an incident of the employment, the claim for compensation must succeed, unless, of course, the workman has exposed himself to an added peril by his own imprudent act.

The question to consider therefore is whether the seaman died in this case on account of an accident which is directly connected with his employment, an accident which occurred on account of a risk incidental to his employment. Having held that he died an accidental death by drowning during the course of his employment, the question for consideration is whether the accidental death by drowning is due to a risk which is an incident of the seaman's employment.

4 [1909] 2 K.B. 46, at p. 49.

5 [1931] A.C. 351, at p. 357.

It is contended by Mr. Sorabji for the respondents that there is no inherent risk of drowning in a sailor's profession, that there is not even a general risk of drowning incidental to a sailor's employment and, therefore, the death in this case cannot be said to have occurred on account of an accident "arising out of employment." It is urged that in the absence of such general risk, it is obligatory on the appellant to establish the precise circumstances in which the death of his son was caused, for every death, which occurs in the course of employment, does not necessarily occur out of employment. On the other hand, it is contended by Mr. Mehta, who appears on behalf of the appellant, that the risk of drowning is incidental to a sailor's employment, and if a sailor is proved to have died accidentally by drowning during the course of his employment, the burden is on the employer to establish that the accident did not arise out of employment. In support of these rival contentions, my attention has been drawn by the learned counsel to several decisions dealing with cases of unexplained deaths, the more important of which are noticed below.

In *Bender v. Owners of Steamship Zent*,⁶ no one knew how the chief cook of the ship was lost overboard when the ship was in mid-ocean. The chief cook was seen at 5.25 a.m. standing in the port alleyway and he was last seen at 5.35 a.m. going towards the water closet. His absence was discovered at 6.20 a.m. when he was wanted by the Chief Steward. The County Court Judge made an award in favour of the dependants, holding that the death of the cook was caused by an accident arising out of and in the course of his employment. In an appeal by the employers, it was held that it was open to a Court to find on an inference that an accident arose out of employment though no human being was present who could give direct evidence how and when the accident happened. On the facts, however, it was concluded that the circumstances of the case did not justify the inference that the accident arose out of employment.

In the same volume is reported another case: *Marshall v. Owners of Steamship Wild Rose*⁷ which was decided by the same three learned Judges, namely, Cozens-Hardy, M.R., Fletcher Moulton L.J. and Farwell L.J., who had decided the *Zent* case. The *Wild Rose* case is one of an unexplained accident which occurred while the ship was in the harbour. The second engineer of a steam trawler 'Wild Rose' was seen on board the ship at about 9 p.m. He came out of his berth, went on deck, and, as he passed the first engineer, said that he was going on deck for a breath of fresh air. He was found missing at midnight and his body was discovered next morning just under the place where the staff of the ship usually sat. The decision of the County Court Judge that the accident arose out of employment was reversed in appeal on the view that the unexplained drowning of a sailor by a fall from his ship when at sea, is not by itself sufficient to justify the inference that the accident arose out of employment. The learned Judges followed their earlier decision in the *Zent* case observing that they were bound by it as there was no distinction between the facts of the two cases. In his concurring judgment Fletcher Moulton L.J. expressed the hope that the point involved in the case would go to the highest Tribunal so that one may have directions upon the question whether because a seaman's employment puts him in a dangerous position, that is to say, on board the ship surrounded by water as opposed to being on land, the mere fact that he is drowned while the ship is at sea is sufficient to raise a *prima facie* presumption that the death by drowning arose out of employment.

The decision of the Court of Appeal was taken to the House of Lords and is reported in *Marshall v. Owners of S. S. Wild Rose*.⁸ The House of Lords affirmed the decision by a majority of 3:2 on the view that there was no evidence to show that the engineer's death was caused by an accident arising out of employment. Lord Atkinson, Lord Shaw and Lord Mersey delivered three separate but concurring judgments and the minority view was expressed by Lord Loreburn L.C. and Lord James. In his dissenting judgment Lord Loreburn

6 [1909] 2 K.B. 41.

7 [1909] 2 K.B. 46.

8 [1910] A.C. 486.

L.C. expressed the view that the employment of the engineer, by the very nature of it, exposed him to certain dangers whether at work or not, one of which was falling or being washed off his ship; and if in the course of that employment the man being on the ship accidentally perishes by one of those dangers, the accident arose out of employment. Lord James, who concurred with Lord Loreburn L.C., observes in his judgment that the accident had occurred during the employment under circumstances which showed that the injured person had not at the time of the injury departed from the controlling incidents of the employment and it was for the employers to establish that the accident did not arise out of employment. Since the employer failed to discharge that burden, the death, according to Lord James, occurred out of employment. Lord Atkinson, who delivered the leading judgment of the majority, took the view that it could not be held that the risk of falling into the water was a risk incident to or connected with the employment of the engineer while his ship was in port,

"though it may well be that the risk of being blown or swept overboard or of falling overboard while his ship was at sea was such a risk."

Lord Shaw also observes in his majority judgment that (p. 495)

"...Had the ship been at sea one could have understood the answer better, because the sailor might have been pitched overboard by the rolling of the vessel or blown overboard by the wind. These would have been the perils surrounding the seaman's life and duty, and injuries or accident through them might well enough be held to fall within the category of things arising out of and in the course of the employment. But in the present case such a question does not arise, for the ship was lying quietly in port." Lord Mersey, who delivered a separate judgment concurring with the view of Lord Atkinson and Lord Shaw, has made an observation while concluding his judgment that he did not regard the case as laying down any general principle and that it turned entirely on its particular facts.

It seems to me clear from the majority judgment of the House of Lords that though the decision of the Court of Appeal was affirmed, it was not affirmed for the reason that no risk attaches to a sailor's employment. The judgments of Lord Atkinson and Lord Shaw show that a distinction was drawn between the ship being at port and the ship being at sea, and the conclusion that the death of the engineer did not arise out of his employment was influenced largely by the consideration that the ship was at port. In the case before me the death of the seaman occurred when the ship was in the deep waters of a navigable river and Mr. Mehta seems to me right in his contention that the majority decision far from being against him would support his contention that the death must in this case be held to have arisen out of employment.

In *Swansea Vale (Owners) v. Rice*⁹, William Rice the first mate of the ship died an unexplained death when he was on the steamship Swansea. On June 28, 1909, the ship sailed for Algiers on her maiden voyage. On June 30, at 4 a.m., Rice complained to the captain of giddiness and took a dose of castor oil. He then went on deck for the purpose of keeping his watch. He would have been on duty from 4 a.m. to 8 a.m. and in the performance of his duty he would be sometimes on the bridge and sometimes on deck superintending the work of the watch. The weather was fair but hazy and the sea was calm. Rice was seen on the bridge at about 7 a.m., but nothing was known of him afterwards. The County Court Judge made an award in favour of the dependants of Rice, which was upheld by the Court of Appeal by a majority of 2:1. Cozens-Hardy M.R., and Fletcher Moulton L.J., constituted the majority, and Buckley L.J. expressed the dissenting opinion. The House of Lords upheld the view of the majority of the Court of Appeal, holding that there was sufficient ground for inferring that the first mate accidentally fell overboard and met his death by accident arising out of his employment. The decision of the Court of Appeal in *Bender v. Owners of Steamship Zent* and of the

House of Lords in *Marshall v. Owners of S. S. Wild Rose* were cited before the learned Law Lords, but these decisions were held peculiar to their facts. Lord Loreburn L.C., who delivered the leading opinion, observes in his judgment (p. 239):

"...In the present case employment on board ship necessarily exposed this unfortunate man to the danger of falling overboard",
and that

"...if you weigh the probabilities one way or the other, the probabilities are far greater that this man perished through an accident arising out of and in the course of his employment."

Lord Shaw, who was a party to the majority judgment in *Marshall v. Owners of S. S. Wild Rose*, observes in his judgment in this case that few cases arise in ordinary life, or in the Law Courts, in which analogy is complete and that in his judgment in the *Wild Rose* case he had specially reserved the incidents of a sailor whose life was sacrificed under circumstances of mystery. The unanimous judgment of the House of Lords in the *Swansea Vale* case shows, in my opinion, a distinct swing of the pendulum in favour of the view that the risk of falling overboard is an incident of the sailor's employment and that if the death of a sailor occurs by drowning in mysterious circumstances, the death can be justifiably held to arise out of employment.

In *Kerr or Lendrum v. Ayr Steam Shipping Company, Limited*¹⁰, Lendrum was employed on the steamship Turnberry as a cook and steward. On the morning of December 16, 1911, the ship was lying in the harbour of Larne, and was to sail at 6 p.m. At about 4 p.m. the Captain of the ship told Lendrum, who was resting in his bunk, to prepare and serve tea to the crew before the ship sailed. The Captain afterwards asked the Chief Officer to see if Lendrum was getting the tea ready but the Chief Officer reported to the Captain that he could not find Lendrum in the ship. Lendrum's disappearance from the ship was at once reported to the Police and his dead body dressed in his day underclothes was found next day in the sea. The dead body bore no marks of violence. The evidence showed that Lendrum was a good tempered and sociable man who was subjected to attacks of nausea and sickness. It was held by the House of Lords by a majority of 3:2 that there was evidence to support the finding of the arbitrator that Lendrum had met his death by accident arising out of his employment. Earl Loreburn, Lord Shaw and Lord Parmoor have delivered separate but concurring speeches of the majority, whereas Lord Dunedin and Lord Atkinson have expressed the dissenting opinion. Mr. Sorabji may perhaps be right that this decision would not help the appellant, because the majority view largely rests on the circumstance that the arbitrator having taken a particular view, which was supportable on evidence, it was not open to the House of Lords to take a contrary view of facts. It is, however, important that the evidence on which the arbitrator took the view that the death of the cook arose out of employment was not the direct or positive evidence of any witness who had seen how the death had occurred but was merely evidence of circumstances from which a fair inference could be drawn that the death arose out of employment. It would be useful in this regard to refer to a part of the speech of Earl Loreburn, which reads thus (p. 223):

"This man was in his bed, and a few minutes afterwards he was in the water. Murder is negatived. Suicide is negatived. There is absolutely nothing that points to either. No suggestion was made either of the one or the other, and the arbiter has negatived both. The man was on the ship, a place of some danger if you are careless, in pursuance of his duty. It was not found that he had withdrawn himself from his duty. I really do not know whether he fell overboard because he was trying to vomit over the ship's side. I conclude that he must have fallen over by accident while on board as his duty required."

Lord Shaw emphasises like Earl Loreburn, that the question whether the death

of the cook arose out of employment was for the Tribunal of facts to decide and since there was evidence to justify the view taken by that Tribunal, it was not for the House of Lords to take a different view of the evidence. Lord Shaw, however, observes in his speech that were it not that two of his colleagues had expressed a different view, he would say that it was difficult to conceive of a fairer case for the inference that the death had occurred out of employment. Lord Atkinson, who delivered the dissenting speech, has distinguished the *Swansea Vale* case on the ground that there an officer in a sick and giddy condition was sent to perform duties which would necessitate his being sometimes on the bridge of the ship and sometimes on the deck of the ship. His Lordship took the view that there was no evidence to justify the finding of the arbiter that the death of the cook arose out of his employment and, therefore, the award was liable to be set aside.

*Thom or Simpson v. Sinclair*¹¹ is the case of a woman employed by a fish-curer, who while working in a shed belonging to her employer, was injured by the fall of a wall which was being built on the property of an adjoining proprietor. As a result of the wall falling, the roof of the shed collapsed and the woman was buried under the wreckage. It was held by the House of Lords that the accident arose out of the employment of the woman. It would be useful to draw attention to a passage in the speech of Lord Shaw which is to the following effect (p. 142):

"There may be causes of danger arising to all employees, which causes are not confined to the individual situation, but are general and applicable to the employment as a whole. It may be that that employment is underground, with all the risks attached to underground work. It may be in the air or on the sea, with a special exposure to the dangers relative to such elements; or it may be on the surface of the earth, in surroundings which are those of peril. In all such cases it is quite possible to figure injuries by accident in the course of and arising out of the employment, which are totally disconnected with the nature of the employment upon which the workman was generally or for the moment engaged, but which, without any doubt, sprang from the employment in the sense that it was on account of the obligations or conditions thereof, and on that account alone, that he incurred the danger. In short, my view of the statute is that the expression 'arising out of the employment' is not confined to the mere 'nature of the employment.' The expression, in my opinion, applies to the employment as such—to its nature, its conditions, its obligations, and its incidents. If by reason of any of these the workman is brought within the zone of special danger and so injured or killed, it appears to me that the broad words of the statute 'arising out of the employment' apply."

The decisions which I have discussed above and many others have been considered by the House of Lords in *Simpson v. L. M. & S. Ry. Co.*¹² In that case, a railway guard, who was asked to travel from Glasgow to Gourock in order to take charge of a train at Gourock, entered a railway compartment at Glasgow. When the train arrived at Gourock, the guard was found missing and his articles were found in the compartment. The compartment had its left door shut, but the window was open. The guard was subsequently discovered lying unconscious in a tunnel between Glasgow and Gourock, and he soon died from a fractured skull, without recovering consciousness. In a claim filed by his dependants for compensation, the arbitrator negatived violence and suicide and found that the man had met his death by falling accidentally from the window of the compartment. The arbitrator concluded from this circumstance that the accident had arisen out of employment. The arbitrator stated a special case to the First Division of the Court of Session in Scotland, which took a contrary view and held that there was nothing to show that the accident had arisen out of employment. In appeal, the House of Lords upheld, by a unanimous judgment, the view of the arbitrator. Viscount Duncedin has examined in his speech an array of cases bearing on the subject, including the *Zent* case,

11 [1917] A.C. 127.

12 [1931] A.C. 351.

the *Wild Rose* case, the *Swansea Vale* case, *Simpson's* case and *Lendrum's* case. He has expressed his conclusion at page 365 by saying that if the deceased was in the course of his employment and if there are facts from which it may be deduced that his employment brought him within, or allowed him to be within, proximity of the peril to which his death could properly be ascribed, and the arbitrator comes to the conclusion that the accident which causes death arises out of, as well as in the course of, his employment, his judgment should not be disturbed. In the concluding portion of his speech Viscount Dunedin says at page 366 that the presence of the guard in the compartment was due to the orders which he had received, that the door and the window of a railway compartment are dangerous places in the same sense as the bulwark of a ship is a dangerous place and that these circumstances justified the finding of the arbitrator that the accident arose out of employment. Lord Tomlin deduces in his concurring judgment the ratio of the cases which he has discussed thus (p. 369) :

"Now, my Lords, from these passages to which I have referred I think this rule may be deduced for application to that class of case which may be called unexplained accident cases—namely, that where the evidence establishes that in the course of his employment the workman was properly in a place to which some risk particular thereto attaches and an accident occurs capable of explanation solely by reference to that risk, it is legitimate, notwithstanding the absence of evidence as to the immediate circumstances of the accident, to attribute the accident to that risk, and to hold that the accident arose out of the employment; but the inference as to the origin of the accident may be displaced by evidence tending to show that the accident was due to some action of the workman outside the scope of the employment.

Such a rule so stated seems to me to be consistent with all the previous decisions of Your Lordships' House, including *Marshall v. Owners of S. S. Wild Rose*, where there was some evidence from which it could be inferred that the seaman who fell overboard had by action of his own outside his employment added a peril to his position."

On the factual aspect of the case, Lord Tomlin took the view that the findings of the arbitrator would justify the inference that at the time of the accident the deceased was travelling in the railway carriage in the course of his employment,

"subject to the inherent risks, slight though they may ordinarily be, of falling from the carriage through insecurely fastened doors or open windows."

Lord Thankerton has also discussed in his concurring judgment, leading cases on the subject of unexplained deaths and he expresses his view by saying that (p. 371) :

"...if the accident is shown to have happened while the deceased was in the course of his employment and at a place where he was discharging the duties of his employment, and the accident is capable of being attributed to a risk which is ordinarily inherent in the discharge of such duties, the arbitrator is entitled to infer, in the absence of any evidence tending to an opposite conclusion, that the accident arose out of the employment."

On the facts of the particular case, Lord Thankerton expressed the opinion that the deceased met with the accident while he was on duty, that it was possible for a railway passenger without any abnormal conduct on his part to fall through an open window or through an insecurely fastened door of a train by pure accident and that the arbitrator was justified on consideration of these circumstances in taking the view that the accident arose out of employment.

This case, in my opinion, is important from more than one point of view. In the first place, it facilitates a clearer understanding of the earlier decisions and it shows that some of the decisions, in which the unexplained accidents were held not to arise out of employment, were confined to their own peculiar facts. Secondly, even a railway compartment was held to be a place which was subject to some inherent risk, slight though it may ordinarily be. Then again, it is not the particular seat near the door nor the window which was held to be a place to which some risk was incidental but the entire compartment was held to be such a place. Thirdly, the decision contains the formulation of

a unanimous ratio that if the workman was properly in a place to which some risk attaches and an accident occurs capable of explanation solely by reference to that risk, it is legitimate, notwithstanding the absence of evidence as regards the immediate circumstances of the accident, to attribute the accident to that risk and hold that the accident arose out of employment.

The last of the decisions cited at the Bar is *Rosen v. S. S. "Quercus" (Owners)*.¹³ In that case a fireman who was employed on a steamship was permitted to sleep on the deck, when the ship was moored to a quay in the port. On the night of February 7, 1931, he slept on the deck, and on the following day his dead body was found in the water. There was no evidence whatsoever showing that he was on duty during the night. There was also no suggestion of suicide or murder or of the man being drunk. The application filed by the dependants for compensation was dismissed by the County Court Judge on the view that he could not infer from the facts that the accident arose out of the man's employment. This view was upheld by the Court of Appeal. The House of Lords, however, set aside the decision by a unanimous judgment and remitted the matter to the County Court Judge for a fresh decision, in the light of the observations made by it. Lord Buckmaster, with whom Lord Warrington, Lord Tomlin, Lord Russel and Lord Wright concurred, observes in his speech that if the County Court Judge were to hold, on a consideration of the evidence, that the accident did not arise out of the employment of the deceased, it would have been impossible for the House to interfere with that decision. The County Court Judge, however, had held that he was bound to come to the conclusion to which he came as there was no evidence to show that the deceased was at the spot where he fell overboard in the discharge of some duty which he owed to the owners of the ship. Commenting on this view, Lord Buckmaster observes in his speech (p. 497):

"...If that once be accepted as the true meaning of his award, I do not think that even counsel for the respondents would urge that the award could stand."

The County Court Judge seems to have been largely influenced in his decision by the observations of Lord Thankerton in *Simpson v. L. M. & S. Ry. Co.* at p. 371 that the accident can be held to have arisen out of employment if the deceased was "at a place where he was discharging the duties of his employment" and the accident is capable of being attributed to a risk, which is ordinarily inherent in the discharge of such duties. In rejecting the view of the learned Judge of the County Court that by "place" was meant the actual spot where the deceased was working, Lord Buckmaster says (p. 497):

"That is, of course, perfectly true if the word 'place' be regarded in this case as the ship, and in the case of the railway as the train, but if it is meant that when a man is on a train or on a ship and an accident occurs, it is necessary to establish some particular duty in the discharge of which he was at the particular spot where the accident happened, I think that is a misinterpretation of what the learned Lord meant, and is not in accordance with the decision."

At page 499, Lord Buckmaster deals with the decision of the Court of Appeal which, while affirming the decision of the County Court Judge, had observed that the deceased

"...must have been doing something which was not involved in or necessary to his sleeping on the deck and not involved in the duty, for at the time he was not operating in any duty."

This, according to Lord Buckmaster, was a clear misunderstanding of the true position. He observes (p. 499):

"...the true position,....I think, is laid down in clear terms in the opinion expressed by Lord Tomlin in the case of *Simpson v. L. M. & S. Ry. Co.* at p. 369 where he says this: 'Where the evidence establishes that in the course of his employment the workman was properly in a place to which some risk particular thereto attaches'—

let me pause there to say that it is quite plain from the context that the learned Lord meant by 'place' the railway train, and not a particular spot in the railway train, as in this case it would mean the ship and not a particular spot on the ship—and an accident occurs capable of explanation solely by reference to that risk, it is legitimate, notwithstanding the absence of evidence as to the immediate circumstances of the accident, to attribute the accident to that 'risk'...."

These then are the more important of the decisions to which my attention has been drawn by the learned counsel. On a consideration of these decisions it would, I think, be possible to deduce the following propositions.

(1) It is open to a Court to find on an inference that the accident arose out of employment though no human being was present who could give direct evidence how and when the accident happened.

(2) The expression 'out of employment' is not confined to the nature of the employment, but applies to employment as such—to its nature, its conditions, its obligations and its incidents. If by reason of any of these, the workman is brought within the zone of special danger or is injured or killed, the accident would be one arising out of employment. In other words, if the employment brings the workman within or allows him to be within proximity of the peril to which the injury or death can properly be ascribed, the accident can be said to have arisen out of employment.

(3) If the workman is properly in a place to which some risk attaches and an accident occurs which is capable of being attributed to a risk which is ordinarily inherent in the discharge of his duties, it is legitimate, notwithstanding the absence of evidence as regards the immediate circumstances of the accident, to attribute the accident to the risk and to hold that it arose out of employment.

(4) It is not necessary to prove that the workman was engaged in a particular duty in the discharge of which he was at a particular spot where the accident happened. By the place of danger is meant not a particular spot of danger but the entire place, as for example, the ship or the train.

(5) A seaman's employment puts him in a dangerous position, the ship on high seas or in deep waters being a place to which some risk is incidental. There are perils, surrounding the seaman's life and duty, which are inherent in his employment.

(6) As the employment of a seaman, by the very nature of it, exposes him to certain dangers, whether at work or not, as for example, the danger of falling overboard or being swept overboard, there is a *prima facie* presumption, if death by drowning be proved, that the death was caused by an accident which arose out of employment.

(7) The presumption thus arising can be rebutted by the employer by leading evidence of facts and circumstances showing that the workman had at or about the time of his death departed from the controlling incidents of his employment or that he had added to the peril by his own imprudent act.

Applying these tests, I am of the opinion that the death of the seaman in this case must be held to have occurred on account of an accident which arose out of his employment. If one weighs the probabilities one way or the other, the probabilities are far greater that he perished through an accident arising out of his employment than that his death occurred without regard or reference to the risk inherent in his employment.

In the result, the appeal succeeds and the application for compensation is granted. Though the appellant had claimed a sum of Rs. 4,000 by way of compensation, he had agreed to accept a smaller amount from the respondents, which the latter had expressed their willingness to pay, irrespective of the result of the appeal. Since the parties have arrived at an agreement on costs, it is unnecessary to pass a separate order in that behalf.

Appeal allowed.

CRIMINAL REVISION.

Before Mr. Justice Tulzapurkar.

BASHIR HUSSEIN PESHIMAM v. H. R. JOKHI.*

Criminal Procedure Code (Act V of 1898), Secs. 173(4), 94, 96, 403(1), 252-259, 204(1)(a), 251A(1)—Accused in warrant case upon private complaint—Whether accused entitled to copies of statements and documents on which prosecution going to rely—Whether such copies to be made available on principles analogous to s. 173(4)—Prosecution witness's name disclosed after framing of charge—Maintainability of accused's application for reasonable time to prepare cross-examination of such witness—Permissibility of accused's request for roving discovery of all materials collected by prosecution during investigation—Court under s. 94 how should decide question of necessity or desirability of production of documents or thing.

Section 173(4) of the Criminal Procedure Code, 1898, is applicable only to those cases in which the investigation has been made by a police officer and that too under Chapter XIV of the Code. Therefore, an accused person against whom a warrant case has been launched on the basis of a private complaint is not entitled as a matter of right to get copies of all the statements of witnesses whom the prosecution is going to examine and of all the documents on which the prosecution is going to rely at or before the commencement of the inquiry or the trial against him. Copies of such statements and documents cannot also be made available to the accused on principles analogous to the provisions of s. 173(4) of the Code.

Narayan Rao v. State of Andhra Pradesh,¹ referred to.

In a warrant case instituted upon a private complaint if the prosecution examines any important witness whose name has been disclosed for the first time after the charge was framed and if such witness gives out a long drawn out or complicated narration, it would be open to the Magistrate to entertain or grant a request for reasonable time on the part of the accused to enable him to prepare for cross-examination of such witness.

*Emperor v. Burn*² and *Emperor v. Nagindas*,* referred to.

Where in such a case an offer was made by the prosecution before the Magistrate that copies of the previous statements of all witnesses who would be examined—either before a charge was framed or thereafter—would be furnished to the accused as and when the examination-in-chief of each of such witnesses was over and the documents on which the prosecution were going to rely as and when they would be tendered in evidence, *Held*, that such an offer met the ends of justice and fair trial.

A request made by an accused in a warrant case instituted upon a private complaint for roving discovery or fishing inspection of all the materials collected by the prosecution during investigation, irrespective of whether the prosecution was going to make use of such materials at the trial or not, on the ground that a study of such materials might be helpful to the accused in the preparation of his defence cannot be granted.

People Ex Rel. Lemon v. Supreme Court,* referred to.

Section 94 of the Criminal Procedure Code, 1898, confers no right upon any party to a criminal proceeding to obtain production of any document or thing. The provisions of the section can be invoked at any stage of any investigation, inquiry or trial and they confer discretion upon the Court enabling it to order production of any document or thing. Before the Court exercises its discretion and orders the production of any document or thing under this section, it must satisfy itself that such production of the document or the thing is either necessary or desirable for the purposes of the trial and in deciding that question the Court has to exercise its discretion judicially, in the sense that it must satisfy itself that the document or the thing has a bearing upon and is relevant to the case. While deciding whether pro-

*Decided, June 15, 1965. Criminal Revision Application No. 129 of 1965.

¹ [1957] A.I.R. S.C. 737.

² (1909) 11 Bom. L.R. 1153.

³ [1942] A.I.R. Bom. 214, s.o. 44 Bom L.R. 452.

⁴ 245 N.Y. 24, 156 N.E. 84.

duction of a document or a thing is necessary or desirable or not, the Court must take into consideration the aspect of the relevancy of such document to the issues involved in the case, but that is not the only consideration which would guide the Court for ordering production. Everything that is relevant to the facts in issue may not necessarily be either necessary or desirable for the purpose of a trial. Therefore, the relevancy of a statement or document or a thing of which production is sought would be one of the considerations which the Court will have to take into account, while deciding the question of the necessity or desirability of production of such statement, document or thing. Before ordering production of any such statement, document or thing the Court might consider whether such statement, document or thing is being suppressed or might be tampered with or destroyed by the party in whose possession it is or might be lost altogether or whether it would come before it in a normal way without resorting to the compelling processes contained in s. 94 or 96 of Chapter VII of the Code. These considerations would also weigh with the Court in exercising its judicial discretion while deciding the question whether the production of a document or a thing is either necessary or desirable for the purposes of an inquiry or trial.

Muhammad Rahim v. Emperor,⁵ and *Hari Charan v. The State*,⁶ referred to.

THE facts are stated in the judgment.

J. M. Gandhi, with *S. B. Khoja*, for the petitioner.

Adi P. Gandhi, with *B. M. Mistry*, for the Central Excise as Special Prosecutors.

U. A. Kazi, for opponents Nos. 2 to 4.

L. D. Shah, for opponent No. 5.

T. C. Patil, for opponents Nos. 6 and 7.

V. H. Gumaste, Additional Government Pleader, for the State.

R. Jethmalani, instructed by *Hooseini Doctor & Co.*, for accused No. 5 in Case No. 100/W of 1964 (Intervener).

Karl J. Khandalawala, for the Central Excise, to oppose.

TULZAPURKAR J. This criminal revision application has been preferred by the petitioner Bashir Hussein Peshimam against the order passed by the learned Presidency Magistrate, 28th Court, Esplanade, Bombay, on February 5, 1965, whereby the learned Magistrate rejected the application of the petitioner for a direction that the Special Prosecutor or the Collector of the Central Excise be directed to furnish him with copies of certain statements and documents in their possession or, in the alternative, to issue a summons under s. 94 of the Criminal Procedure Code, directing the Special Prosecutor or the Collector of Central Excise to produce such statements and documents for his inspection before the inquiry started.

The facts giving rise to the application made by the petitioner to the learned Magistrate and the order passed by the learned Magistrate thereon may be stated: On August 3, 1964, Shri H. R. Jokhi, Assistant Collector of Central Excise, Marine Preventive Division, Central Excise, Bombay, filed a complaint (being Criminal Case No. 203/W/64) in the Court of the learned Presidency Magistrate (28th Court, Esplanade, Bombay), charging the petitioner Bashir Hussein Peshimam (being accused No. 1) and eight others under s. 120B of the Indian Penal Code, under ss. 8(1) and 23 of the Sea Customs Act, 1878, as amended, under s. 167(81) of the Sea Customs Act read with ss. 109 and 114, Indian Penal Code, under ss. 8(1) and 23 of the Foreign Exchange Regulation Act and under ss. 120-B, Indian Penal Code read with ss. 8(1) and 23 of the Foreign Exchange Regulation Act, in respect of 77,600 tolas of gold brought into India at Bombay from places outside India between July 1960 and March 1962 in pursuance of a conspiracy. It appears that prior to the lodging of this complaint against the petitioner and eight others, under directions of Shri

H. R. Jokhi investigation had been carried on by several Customs Officers and during the course of such investigation, statements of various persons including those of the accused were recorded. Similarly, several documents and papers were seized under Panchanamas. *Inter alia* on February 10, 1962, the houses of accused No. 1 and accused No. 2 were searched and gold was seized from the house of accused No. 2 while a motor car bearing Registration No. BMU 7805 was seized from near the house of accused No. 1. No documents as such were seized from either of them or from any other accused during the investigation. It further appears that during the course of this investigation, reports of the investigation done from time to time and notes or note-sheets in respect thereof were submitted by the inferior officers to their superior officers. Accused No. 1 was arrested on February 22, 1962, accused No. 2 was arrested on March 3, 1962, accused No. 5 was arrested on March 14, 1962, while accused Nos. 3 and 4 were arrested on April 19, 1962. Accused Nos. 6 and 7 were required to remain present in Court on August 3, 1964, when the complaint was filed and they were put under arrest on that day. Accused Nos. 8 and 9 are still absconding. It further appears that before filing the complaint, adjudication proceedings for confiscation of the gold were undertaken and show cause notices were issued and served upon some of the accused and in particular upon the petitioner, in which diverse allegations were made against the petitioner and in the correspondence that ensued between the petitioner and/or his advocate on the one hand and the Customs Authorities and/or their advocate on the other, a request was made on behalf of the petitioner that he should be furnished with copies of all the statements of persons that had been recorded and of all the documents which had been seized during the course of investigation to enable him to show cause why the gold or the motor car should not be confiscated but that request was not acceded to. It further appears that even after the complaint was filed the petitioner through his advocate's letter dated September 17, 1964, *inter alia* requested for furnishing of copies of all the statements of persons recorded and of documents, and papers seized including the reports and notings made by the Customs officers and offered to pay the necessary charges therefor. By his reply dated September 22, 1964, Shri Adi P. Gandhi, the learned advocate (who appears as the Special Prosecutor in the case) stated that the petitioner was not entitled to the copies of any statements, documents etc. at that stage but without prejudice to that contention it was made clear in the said reply that the statements of such of the witnesses on which the prosecution would rely, would be tendered in evidence by way of corroboration at the time when the evidence would be led and that such of the statements of the witnesses called on which the prosecution would not rely by way of corroboration would be made available to the petitioner on his asking for the same at the time of cross-examination. It was further stated that the documents on which the prosecution would rely would be tendered at the time of leading evidence and it would be open to the petitioner to see those documents at that time for the purpose of cross-examination. In other words, the request for copies of statements and documents beforehand was turned down.

Thereafter, on January 4, 1965, the petitioner made an application to the learned Magistrate for two reliefs viz.

(a) to direct the Special Prosecutor or the Collector of Central Excise to furnish him with the copies of the statements of various witnesses whom the prosecution was going to examine and of the documents on which the prosecution was going to rely including the statements of accused persons as well as notings, note-sheets and reports of the Central Excise officers made during the course of the investigation;

(b) in the alternative, to issue a summons under s. 94 of the Criminal Procedure Code, directing the Special Prosecutor or the Collector of Central Excise to produce in Court before the inquiry starts the statements of various witnesses, whom the prosecution was going to examine as well as the documents on which the prosecution relied including the statements of the accused persons as well as the notings, note-sheets and

the reports of the Central Excise Officers made during the course of the investigation of the case.

The first relief was sought by the petitioner on the ground that though the complaint had been filed as a private complaint, the complainant was a public officer (being the Central Excise Officer) and as such enjoyed all the powers which a police officer enjoyed including the powers to interrogate, arrest and carry out searches and that, therefore, the complaint filed by him should not be treated as a private complaint and, therefore, under the provisions of s. 173(4) of the Criminal Procedure Code, which would be applicable, he was entitled, before the commencement of the inquiry, to get the copies of all the statements of witnesses recorded and of all the documents on which the prosecution proposed to rely, including the statements of accused persons and even the notings, note-sheets and reports of the Central Excise Officers, in order to enable him to properly mould his defence and instruct his advocate to defend the case against him. In the alternative, the petitioner averred that in case the Court held that the complaint lodged by the Central Excise Officer was a private complaint and not a complaint lodged by any police officer, in the interest of justice and fair trial, he should be furnished with the copies of all the aforesaid statements and documents on which the prosecution was going to rely, on principles analogous to the principle contained in s. 173(4) of the Criminal Procedure Code. In further alternative, the petitioner averred that if the copies of all the statements and documents could not be furnished to him as prayed for either under the provisions of s. 173(4) of the Criminal Procedure Code or on principles analogous to the principle contained in that section, the Court should exercise its powers under s. 94 of the Criminal Procedure Code by issuing a summons directing the Special Prosecutor or the Collector of Central Excise to produce in the Court before the inquiry starts the aforesaid statements and documents. On behalf of the prosecution, a reply was filed on January 11, 1965, wherein it was contended that the petitioner's application was misconceived inasmuch as s. 173(4) of the Criminal Procedure Code was not applicable to the facts of the case and that the copies of the statements and documents could not be ordered to be furnished to the petitioner in the interest of justice and fair trial on principles analogous to the principle contained in s. 173(4) of the Criminal Procedure Code. It was pointed out that the investigation that had preceded the lodging of the complaint was not carried on by any police officer under Chapter XIV of the Criminal Procedure Code and as such the provisions of s. 173(4) of the Criminal Procedure Code were inapplicable and further it was a warrant case instituted otherwise than on a police report and, therefore, the procedure enacted in ss. 252 to 259 under Chapter XXI of the Criminal Procedure Code was applicable and there was no provision in those sections for furnishing copies of such statements and documents on which the prosecution wanted to rely to the accused before the commencement of the inquiry or trial and having regard to the scheme of the Criminal Procedure Code no order directing the furnishing of the copies of the statements and documents to the petitioner could be made on principles analogous to the provision of s. 173(4) of the Criminal Procedure Code. As regards the petitioner's prayer for issue of a summons under s. 94 of the Criminal Procedure Code was concerned, it was contended that the scope of s. 94 of the Criminal Procedure Code was very limited and it was not open to the petitioner to apply for an issue of an omnibus summons for production of statements of all witnesses and of all documents seized during the investigation including the notings, note-sheets and reports made by the Central Excise Officers. It was also contended that at the stage at which such an application was made by the petitioner, there were no materials placed before the learned Magistrate from which the learned Magistrate could come to the conclusion that production of all such statements and documents was either necessary or desirable for the purposes of the inquiry and the learned Magistrate should not exercise his discretion in favour of the petitioner. The learned Magistrate, after hearing the arguments on both the sides, took the view that

The petitioner was not entitled to get copies of all the statements of the witnesses and of all the documents on which the prosecution wanted to rely before the inquiry commenced. He held that the provisions of s. 173(4) of the Criminal Procedure Code were not applicable to the facts of the case, inasmuch as it was a warrant case instituted otherwise than upon a police report. He further negatived the petitioner's contention that copies of the statements of witnesses and the documents on which the prosecution wanted to rely should be ordered to be given to the petitioner in the interest of justice and fair trial on the grounds analogous to s. 173(4) of the Criminal Procedure Code, as in his view, Parliament while amending the Criminal Procedure Code by Act XXVI of 1955 had deemed it expedient to provide for two separate and distinct procedures for police cases and the cases filed otherwise than on police reports, and to try to act upon an analogy of s. 173(4) in cases instituted otherwise than on police reports, would result in removing the said distinction in the said procedures and it would be an action against the scheme of the Criminal Procedure Code itself. Regarding the petitioner's prayer for an issue of summons under s. 94 of the Criminal Procedure Code, the learned Magistrate took the view that the inquiry had not even commenced before him when the application was preferred by the petitioner and hence there was absolutely no material before him at that stage to determine the necessity or desirability of a summons being issued under s. 94, especially when the application was not for a particular document or a thing but was for all documents, statements of witnesses, statements of the accused and notings, note-sheets and reports etc. He further held that the only use that could be made of any previous statement of a witness was either for the purposes of corroboration or contradiction and nothing more and since the learned Special Prosecutor had offered to make all previous statements of such of the persons who were going to be examined as prosecution witnesses in the case available to the defence after examination-in-chief of each one was over and since the Special Prosecutor had further offered to make available to the defence all such documents on which the prosecution wanted to rely at the time when they would be tendered while leading evidence, there was no question of any prejudice being caused to the petitioner or the other accused in their defence and as such no case had been made out by the petitioner for the exercise of the discretion vested in the Court under s. 94 of the Criminal Procedure Code. In this view of the matter, the learned Magistrate rejected the petitioner's application on February 5, 1965. The petitioner has come in revision against the said order.

At the outset I may state that since I was informed at the Bar that the question involved in this revisional application has been constantly arising in several customs cases and since several cases involving this point are still pending in the Magistrates' Courts below, apart from Mr. J.M. Gandhi, who argued the revisional application on behalf of the petitioner herein with ability, I also permitted Mr. Jethmalani to intervene and put forth his submissions on the point involved in the case as Mr. Jethmalani is appearing in several customs prosecutions that are still pending in lower Courts in which a similar point has arisen. On behalf of the Customs authorities Messrs. Khandalawala and Adi P. Gandhi and Mr. Gumaste, the learned Additional Government Pleader tried to support the learned Magistrate's order on several grounds. Having regard to the rival contentions that have been put forward at the Bar the following three questions arise for determination in the case: First, whether an accused person against whom a warrant case has been launched on the basis of a private complaint and not upon a police report, is entitled as a matter of right to get copies of all the statements of witnesses whom the prosecution is going to examine and of all the documents on which the prosecution is going to rely at or before the commencement of the inquiry or the trial against him? Secondly, if he is not so entitled whether the same should be made available to him on principles analogous to the provisions of s. 173(4)? and, thirdly, whether the Court under s. 94 of the Criminal Procedure Code should exercise

its discretion in a manner so as to enable the accused to obtain such copies of statements and documents at or before the commencement of the inquiry or trial? For the purpose of deciding these questions, it is obvious that I will have to take into consideration—(i) the provisions of Chap. XIV of the Code under which cognizable offences are investigated by the police officers and non-cognizable offences are investigated by the police officers only upon receipt of an order of a Magistrate in that behalf, (ii) Chap. XXI of the Code, under which procedures for trial of warrant cases (warrant cases instituted upon a police report as well as warrant cases instituted otherwise than on police report) by Magistrates have been prescribed and (iii) s. 94 which occurs in Chap. VII of the Code. During the course of arguments reference was made to the provisions of ss. 145 and 157 of the Evidence Act and I will also consider those provisions.

On the first point as to whether in the present case the petitioner and his co-accused are entitled to get copies of all the statements of witnesses, whom the prosecution is going to examine and of all the documents on which the prosecution is going to rely, reliance was placed upon the provisions of s. 173(4) of the Criminal Procedure Code, but it is obvious that s. 173(4) is inapplicable to the present case, inasmuch as it is a warrant case instituted not upon a police report but upon a private complaint and the procedure contained in ss. 252 to 259 occurring in Chap. XXI of the Code would be applicable. Section 173(4) is applicable only to those cases in which the investigation has been made by a police officer and that too under Chap. XIV of the Code. In the present case the prosecution has been instituted otherwise than upon police report at the instance of Shri H. R. Jokhi, Assistant Collector of Central Excise, Marine Preventive Division, Central Excise, Bombay, upon a private complaint lodged by him before the learned Magistrate and the investigation into the case has been done by the various customs officers under the supervision of Shri H. R. Jokhi, and such investigation is obviously not under Chap. XIV of the Criminal Procedure Code. Mr. Gandhi, however, urged that the Assistant Collector of Central Excise, who has filed the complaint is a public officer and as such officer he enjoys powers to interrogate, arrest and to carry out searches under the provisions of the Sea Customs Act, which are similar to the powers enjoyed by a police officer, who undertakes investigation under Chap. XIV of the Criminal Procedure Code and, therefore, he should be regarded as a police officer and the criminal case should be treated as having been instituted upon a police report and not on the basis of a private complaint. It has now been well settled by the decision of the Supreme Court in *State of Punjab v. Barkat Ram*¹, that a customs officer is not a police officer though in matters of interrogation, arrest and search he performs similar functions as are performed by a police officer. I may also mention that recently in *Laxman Padma v. The State*² a similar view has been taken that a customs officer is not a police officer. In view of this position it is not possible to accept Mr. Gandhi's contention that the Assistant Collector of Central Excise, who has lodged this complaint should be regarded as a police officer. Further, it is also clear that by no stretch of imagination it could be said that the investigation carried on by the several customs officers under the supervision of Shri H. R. Jokhi in this case is an investigation under Chap. XIV of the Criminal Procedure Code. It is, therefore, clear that the provisions of s. 173(4) which occur in Chapter XIV of the Criminal Procedure Code would be inapplicable to the present case and as such the petitioner and his co-accused are not entitled to get copies of all the statements of witnesses whom the prosecution wants to examine and of all the documents on which the prosecution proposes to rely at or before the commencement of the inquiry or trial.

The next ground on the basis of which the petitioner's claim to copies of all the statements of witnesses, whom the prosecution was going to examine and of all the documents on which the prosecution was going to rely, was pressed

¹ [1962] A.I.R. S.O. 276.

² (1965) 67 Bom. L.R. 317.

was that such copies of statements and documents should be furnished on principles analogous to the principle contained in s. 173(4) of the Criminal Procedure Code. It was urged on behalf of the petitioner that if in prosecutions which were launched on the basis of police reports—and which prosecutions usually pertained to serious cognizable offences like murder etc.—it has been made obligatory under s. 173(4) upon the officer in charge of a police station to furnish a copy of the First Information Report and the copies of all other documents on which the prosecution proposes to rely, including the statements and confessions, if any, recorded under s. 164 and the statements recorded under s. 161 of all the persons, whom the prosecution proposes to examine as witnesses, to the accused before the commencement of the inquiry or trial, it would be fair and just to furnish copies of similar statements and documents to the accused in a private complaint launched against him to enable him to properly defend the case. It was pointed out that the object of introducing s. 173(4) in Chap. XIV of the Criminal Procedure Code was not merely to avoid delay and help expeditious disposal of criminal cases but also to enable the accused to know the case that he has to meet and to safeguard his interest by giving him the fullest information in the possession of the prosecution, on which the prosecution case was based and statements made against him, so that he could have a complete picture of the entire case beforehand and he could mould his defence accordingly and effectively defend himself. In that behalf reliance was placed upon the observations of his Lordship Mr. Justice Shah of the Supreme Court in the case of *Noor Khan v. State of Rajasthan*.³ It was, therefore, contended that on principles analogous to the principle contained in s. 173(4) copies of all such statements and documents should be ordered to be furnished to the accused in warrant cases instituted upon a private complaint like the present one. As I will indicate presently, it is difficult to accept this contention for more than one reason.

In the first place, the argument based on the proposition that on principles analogous to the principles contained in s. 173(4) of the Criminal Procedure Code such copies of statements and documents should be furnished to the accused in a warrant case instituted upon a private complaint, is, in my view, fallacious, for it postulates or presupposes that s. 173(4) embodies some principle. If the provisions of s. 173(4) are carefully scrutinised, it will at once become clear that it is a purely procedural section and all that it provides for is to enjoin upon a police officer in charge of the police station to see that after he has furnished a report under sub-s. (1) to the Magistrate, a copy of such report as also of the First Information Report recorded under s. 154 and of all other documents or relevant extracts thereof, on which the prosecution proposes to rely, including the statements and confession, if any, recorded under s. 164 and the statements recorded under s. 161(3) of all the persons, whom the prosecution proposes to examine as its witnesses are furnished to the accused before the commencement of inquiry or trial. In other words, the section prescribes what should be done by a police officer in charge of a police station and at what stage he should do what he is enjoined to do thereunder. It is no doubt true that it is by virtue of this provision, which was introduced by way of an amendment in 1955 that an accused person has become entitled to receive copies of all the statements of witnesses, whom the prosecution is going to examine as its witnesses and also of documents, on which the prosecution is going to rely at the trial, but it is well settled that the provisions of sub-s. (4) are directory and not mandatory and the word 'shall' occurring in the said sub-section has been construed accordingly. I may refer to the judgment of the Supreme Court in the case of *Narayan Rao v. State of Andhra Pradesh*,⁴ where the effect of non-compliance or non-observance of the provisions of s. 173(4) and s. 207 A(3) has been considered. The relevant observations appear in para. 10 of the judgment and run as follows (p. 741) :

3 [1964] A.I.R. S.C. 286.

4 [1957] A.I.R. S.C. 737.

"...There is no doubt that those provisions have been introduced by the amending Act of 1955, in order to simplify the procedure in respect of inquiries leading upto a Sessions trial, and at the same time, to safeguard the interests of accused persons, by enjoining upon police officers concerned and Magistrates before whom such proceedings are brought, to see that all the documents, necessary to give the accused persons all the information for the proper conduct of their defence, are furnished.

It has rightly been contended on behalf of the appellant that it was the duty of the Magistrate to see that the provisions aforesaid of the Code, have been fully complied with. Magistrates, therefore, have to be circumspect, while conducting such proceedings, to see to it that accused persons are not handicapped in their defence by any omission on the part of police officers concerned, to supply the necessary copies.

But we are not prepared to hold that non-compliance with those provisions has, necessarily, the result of vitiating those proceedings and subsequent trial. The word 'shall' occurring both in sub-s. (4) of s. 173 and sub-s. (3) of s. 207-A, is not mandatory but only directory, because an omission by a police officer, to fully comply with the provisions of s. 173, should not be allowed to have such a far-reaching effect as to render the proceedings including the trial before the Court of Sessions, wholly ineffective...

Certainly, if it is shown, in a particular case, on behalf of the accused persons that the omission on the part of police officers concerned or of the Magistrate before whom the committal proceedings had pended, has caused prejudice to the accused, in the interest of justice, the Court may re-open the proceedings by insisting upon full compliance with the provisions of the Code."

Their Lordships have further gone on to observe that unless such non-compliance has caused prejudice to accused, the same will amount to an irregularity curable by the provisions of s. 537 of the Code. In other words, it is clear that the provisions of s. 173(4) have been held to be directory and non-compliance thereof, unless it has caused serious prejudice to an accused person, or resulted in failure of justice, is an irregularity curable by s. 537 of the Criminal Procedure Code. Similarly, I may also point out that though sub-s. (4) of s. 173 clearly provides for furnishing of copies of all statements of witnesses and of all documents on which the prosecution is going to rely to the accused *before the commencement of inquiry or trial*, it is not as if that once a trial has already commenced, the prosecution is prevented from producing and tendering additional documents, which may be relevant and necessary (copies whereof may not have been furnished to the accused before the commencement of the trial), or from examining additional witnesses, whose statements might have been recorded even after the trial has commenced. The prosecution is never precluded from leading such additional evidence simply because copies of the statements of such witnesses or of such additional documents have not been furnished to the accused before the commencement of the trial. In such situations, all that the Court is required to do is to see that the accused is not in any manner handicapped in his defence and this the Court can ensure by calling upon the prosecution to make such additional documents or statements of such further witnesses available to the accused in good time, and if necessary by granting adjournment. It will thus appear clear that s. 173(4) both in its content as well as scope is purely procedural and it merely provides as to what should be done by a police officer and at what stage he should do it. Unlike s. 403(1) of the Code which embodies the doctrine of *autrefois acquit*, s. 173(4) does not enact any fundamental principle of criminal jurisprudence as such and the provisions thereof being purely procedural it would be a fallacious argument to contend that on principles analogous to the principle contained in s. 173(4) (which it does not) copies of statements of witnesses and documents on which the prosecution is going to rely should be ordered to be furnished to accused persons in a warrant case instituted upon a private complaint. At the highest, one could only say that in view of the provisions of s. 173(4) the prosecution should not be allowed to examine witnesses or produce documents at the trial in a manner so as to cause prejudice to the accused or to put him under any handicap in the

matter of his defence, but certainly no principle of criminal jurisprudence as such is involved especially on the aspect of the matter as to at what stage such copies of statements and documents should be furnished to the accused, even in trial of cases to which s. 173(4) is applicable. In the present case, in view of the offer made by the Customs authorities through their Special Prosecutor that statements of all witnesses, which would be relied upon by way of corroboration would be made available to accused persons no sooner the evidence of such witnesses in chief is over and in view of the further offer that the statements of such of the witnesses, which may not be relied upon for the purpose of corroboration, would be made available to accused persons on a demand being made by them in that behalf at the end of the examination-in-chief of such witnesses and in view of the further offer that all documents would be made available to the accused persons as and when they are tendered in evidence, I do not think that the petitioner and his co-accused would in any manner be prejudiced or handicapped in the matter of their defence. In my view, therefore, since s. 173(4) does not embody any principle as such, it is difficult to accept the argument that on principles analogous to the principle contained in the said provision copies of statements of witnesses and of documents on which the prosecution is going to rely should be made available to the accused before the commencement of the inquiry or trial.

Secondly, having regard to the scheme of the Criminal Procedure Code and the manner in which the material amendments have been effected to the relevant provisions of the Code by Act XXVI of 1955, it is difficult to pass an order directing furnishing of copies of statements of witnesses and of documents on which the prosecution is going to rely to the petitioner and his co-accused before the commencement of the inquiry or trial, as has been sought by the petitioner. In this behalf certain facts will have to be borne in mind. Admittedly, the present case is a warrant case instituted otherwise than upon a police report, that is to say, upon a private complaint lodged by the Assistant Collector of Central Excise, Bombay, and as such the procedure enacted in ss. 252 to 259 contained in Chap. XXI of the Criminal Procedure Code would be applicable, and admittedly there is no provision in those sections for furnishing of copies of such statements and of documents on which the prosecution would rely to the accused before the commencement of inquiry or trial. For the first time by the Amending Act XXVI of 1955 s. 173(4) was introduced in Chapter XIV of the Criminal Procedure Code, which deals with powers of the police officers to investigate cognizable offences and also non-cognizable offences only upon receipt of an order from a Magistrate in that behalf. Prior to the introduction of s. 173(4) in Chap. XIV and prior to the amendment that was made in s. 162 occurring in the same Chapter, the position was that a very limited or restricted use of police statements of witnesses could be made and that too in a certain manner as was indicated by the proviso to the old s. 162(1). Under the proviso to the old s. 162(1), it was enacted that whenever any witness was called for the prosecution, whose statement had been taken down in writing, the Court shall on the request of the accused refer to such writing and may then, if the Court thinks it expedient in the interest of justice, direct that the accused be furnished with a copy thereof and that such statement may be used to impeach the credit of such witness in the manner provided by the Evidence Act, 1872. In other words, any use other than the one mentioned in the aforesaid proviso, of such police statement of a witness was completely barred and it was only by the Amending Act, XXVI of 1955, that a provision for furnishing copies of all statements of witnesses and of all documents, on which the prosecution was going to rely to the accused before the commencement of inquiry or trial, came to be introduced, by incorporating s. 173(4) in Chap. XIV of the Code. Further, prior to the amendment of the Code by Act XXVI of 1955 the procedure for trial of warrant cases instituted on police reports and for those instituted otherwise than on police reports (i.e. upon private complaints) was the same but as a result of the amendment made by Act XXVI

of 1955 a different procedure was introduced for trial of warrant cases instituted on police reports and such procedure is now to be found in s. 251A and sub-s. (1) of s. 251A provides that whenever the accused appears or is brought before a Magistrate at the commencement of the trial of such case instituted on the police report, the Magistrate shall satisfy himself that the documents referred to in s. 173 have been furnished to the accused, while Parliament deemed it fit and expedient to retain the same old procedure that was applicable to warrant cases instituted otherwise than on police reports and the Parliament did not think it expedient or necessary to incorporate in the set of procedure contained in ss. 252 to 259 of the Code a provision for furnishing of copies of statements of witnesses and documents on which the prosecution is going to rely, to the accused. Having regard to the manner in which the amendments were effected in the Criminal Procedure Code, it would be reasonable to hold that the Parliament deliberately omitted to make a provision similar to s. 173(4) in warrant cases instituted upon a private complaint and, therefore, it is difficult to accept the argument that on the analogy of s. 173(4), copies of such statements of witnesses and documents, on which the prosecution is going to rely should be ordered to be furnished to the accused in warrant cases instituted upon a private complaint.

Mr. Jethmalani offered an explanation as to why Parliament did not make a specific provision—similar to s. 173(4), while prescribing procedure applicable to warrant cases instituted upon a private complaint. He pointed out that in cases instituted upon a private complaint, the complainant, who is an individual and has no State machinery behind him does not record statements of witnesses nor does he seize documents from the custody of others before he lodges a complaint and therefore, a private complainant is ordinarily not in possession of any statements of witnesses or any documents and, therefore, Parliament with knowledge of these facts may not have thought it necessary to make a provision similar to s. 173(4) while prescribing the procedure for cases instituted upon a private complaint. I am unable to accept this explanation for the absence of such provision in the procedure prescribed for trial of warrant cases instituted upon private complaints. It is common knowledge that even before the Criminal Procedure Code was amended by Act XXVI of 1955, for a number of years prosecutions on the basis of private complaints were launched at the instance of several local bodies or public authorities under provisions of different statutes like the District Municipal Boroughs Act, the City Municipal Corporations Act, the Sales Tax Act, the Income-tax Act, the Companies Act and the Sea Customs Act. Prosecutions under these statutes were always instituted and are even now instituted upon a private complaint lodged by some officer duly authorized in that behalf and these prosecutions were always tried and are being tried as warrant cases instituted otherwise than on police reports. It cannot for a moment be believed that Parliament while it passed the Amending Act XXVI of 1955 was unaware of these innumerable cases which were instituted otherwise than on police reports and Parliament was equally aware of the fact that the local bodies or public authorities or the public officers concerned in such cases first collected materials in the form of statements and documents and had the same in their possession before the complaints were lodged and even so Parliament while amending the Criminal Procedure Code by Act XXVI of 1955 did not think fit to incorporate in the set of procedure contained in ss. 252 to 259 (which is applicable to such cases instituted upon a private complaint) a provision similar to s. 173(4) of the Criminal Procedure Code. In view of these facts, it must be held that Parliament intentionally omitted to provide for furnishing of copies of statements and documents on which the prosecution was going to rely to the accused at or before the commencement of inquiry or trial of cases that were instituted otherwise than on police reports. For these reasons, it is not possible to accept Mr. Jethmalani's contention that by analogy of s. 173(4) copies of statements of witnesses and documents, on which the prosecution is going to rely should be ordered to be furnished to the petitioner or his co-accused.

It was, however, contended by Mr. Jethmalani that in the interest of justice and fair trial the copies of all such statements and documents should be made available to the accused so that he could have a complete picture of the case he has to meet and he could effectively defend himself. It was urged that even in a warrant case instituted upon a private complaint to which provisions of ss. 252 to 259 are applicable, it is open to an accused to cross-examine the prosecution witnesses, not only after but even before a charge is framed and it is further open to him to satisfy the learned Magistrate, even before a charge is framed, that no case has been made out against him by the complainant and that he should be discharged; in this behalf he relied upon sub-ss. (1) and (2) of s. 253 of the Code. Mr. Jethmalani, therefore, urged that since a right to cross-examine the prosecution witnesses means a right to effectively cross-examine them, it would not be possible for the accused to effectively cross-examine the prosecution witnesses without their previous statements being furnished to him. Mr. Jethmalani referred to the provisions of s. 145 of the Evidence Act under which a witness could be cross-examined with reference to his previous statements which have been reduced to writing and relevant to matters in question. He, therefore, contended that in fairness to the accused copies of all such statements and documents should be furnished to him beforehand without which he is bound to be prejudiced in the matter of cross-examination of prosecution witnesses and in his attempt to satisfy the Magistrate, even before a charge is framed, that there is no case against him and that he deserves to be discharged. In reply Mr. Khandalawala fairly conceded that the accused should be furnished with copies of statements of all the witnesses, whom the prosecution was going to examine to enable him to effectively cross-examine them by reference to their previous statements and he, therefore, pointed out that the offer made by the Special Prosecutor before the learned Magistrate that copies of the previous statements of all witnesses who would be examined—either before a charge was framed or thereafter—would be furnished to the petitioner and his co-accused as and when the examination-in-chief of each of such witnesses was over and the documents on which the prosecution were going to rely as and when they would be tendered in evidence, was sufficiently just and fair and in this manner if copies of statements and documents were made available to the defence, there was no question of the accused being prejudiced or he not receiving a fair trial. There is considerable force in the argument of Mr. Khandalawala. In my view since the previous statement of a witness could only be used either for contradiction under s. 145 or for corroboration under s. 157 of the Evidence Act an offer of furnishing copies of such statements and documents to the defence in the manner suggested by the Special Prosecutor in the present case would meet the ends of justice and fair trial. Mr. Jethmalani, however, demurred and pointed out that in order to ensure a fair trial it was necessary that the accused should be informed in sufficient time before the trial of the nature of the evidence to be called for by the prosecution. I do not for a moment dispute that in order that an accused person should have adequate opportunity to prepare his defence he must be informed in sufficiently good time of the nature of the evidence intended to be led by the prosecution against him. But in serious cases involving trial of cognizable offences this is ensured by s. 173(4) under Chap. XIV and in warrant cases instituted upon police reports by s. 251-A(1) in Chap. XXI, while in criminal cases instituted upon private complaints by the very procedure contained in ss. 252 to 259 of the Code. That procedure envisages leading of all such evidence—which ordinarily includes testimonies of the complainant and his material witnesses—as would be produced in support of the prosecution before any charge is framed and then the accused's plea is taken on the charge that may be framed and under s. 256 ordinarily at the commencement of next hearing (which means an adjournment after framing of the charge and recording the accused's plea is contemplated) the accused is given the right to recall all or such of the prosecution witnesses already examined as he wants for his cross-examination, notwithstanding the fact that he might have cross-

examined them earlier i.e. before the charge was framed. It is thus clear that the accused is usually apprised of almost all the material prosecution evidence (and not merely the nature thereof) in sufficient time to enable him to prepare his defence. It is possible, however, that the Magistrate might frame a charge before all witnesses named by the complainant under s. 252(2) are examined or the complainant might examine some material or important witnesses after the accused's plea on the charge framed is taken and after the accused has exercised his right of recalling the previously examined prosecution witnesses,—which is permissible under s. 256—but in either of such cases the prosecution cannot spring a surprise upon the defence and sufficient opportunity must be given to the latter to prepare for cross-examination of such witnesses and this could be and is usually ensured by granting reasonable time to the accused. For instance, in *Emperor v. Burn*,⁵ which was followed in *Emperor v. Nagindas*⁶ it has been held that s. 256 enables the prosecution to examine witnesses, who had not been examined or whose names had not been disclosed before the charge was framed, and if the accused desires time to enable him to cross-examine witnesses whose names had not been disclosed, it is open to the Magistrate to give time. In my view, if the prosecution were to examine any important witness, whose name had been disclosed, for the first time after the charge was framed and if such witness were to give out a long drawn out or complicated narration, it would be open to the Magistrate to entertain or grant a request for reasonable time on the part of the accused to enable him to prepare for cross-examination of such witness. Such being the procedure applicable to warrant cases instituted upon private complaints, the accused is invariably apprised of all material prosecution evidence in sufficient time to prepare his defence and hence the offer made by the Special Prosecutor in my view sufficiently meets the ends of justice and fair trial to the petitioner and his co-accused.

It was next contended by Mr. Jethmalani that the defence in this case should be supplied not merely the copies of statements of witnesses whom the prosecution was going to examine and documents on which the prosecution was going to rely at the trial but copies of statements of all persons who had been interrogated during the investigation, irrespective of whether the prosecution was going to examine them or not and of all documents that have been seized during the investigation again irrespective of whether the prosecution was going to make use of or rely on them or not, for according to him unless all such material collected by the prosecution during investigation is furnished to the defence it may not be possible for the accused to mould his defence as it was likely that some of such material might either help him directly or afford him some clue whereby he could collect and produce evidence in refutation. Incidentally, I may observe that this contention goes beyond what was applied for by the petitioner by his application in the lower Court. Mr. Khandalawala objected on the ground that it amounts to prying into Prosecutor's brief. He contended that the prosecution had absolute discretion in the matter of examination of witnesses, the only obligation being to put before the Court all material evidence which was necessary for unfolding its case, and since the previous statement of a witness could only be used either for corroborating him or contradicting him, the petitioner and his co-accused could be and would be furnished with copies of the previous statements of such persons whom the prosecution actually examined in the case and it was neither necessary nor desirable to furnish copies of previous statements of all the persons including those whom the prosecution were not going to examine to the accused. Similarly, documents though seized during investigation on which prosecution was not going to rely could not be and need not be made available to the accused. In this behalf, he relied upon the observations of the Supreme Court in the recent decision in *Masalti v. State of Uttar Pradesh*.⁷

⁵ (1909) 11 Bom. L. R. 1153.

L.R. 452.

⁶ [1942] A.I.R. Bom. 214, S.C. 44 Bom.

⁷ [1965] A.I.R. S.C. 202.

The relevant observations run as follows:

"It is not unknown that where serious offences like murder are committed and a large number of accused persons are tried, attempts are made either to terrorise or win over prosecution witnesses, and if the prosecutor honestly and bonafide believes that some of his witnesses have been won over, it would be unreasonable to insist that he must tender such witnesses before the Court. It is undoubtedly the duty of the prosecution to lay before the Court all material evidence available to it which is necessary for unfolding its case; but it would be unsound to lay down as a general rule that every witness must be examined even though his evidence may not be very material or even if it is known that he has been won over or terrorized. In such a case, it is always open to the defence to examine such witnesses as their witnesses and the Court can also call such witnesses in the box in the interest of justice under S. 540."

Mr. Jethmalani did not dispute the position that it was in the discretion of the prosecution to decide how many witnesses it should examine and whether to examine a particular witness or not but he contended that it was not quite correct to say that a previous statement of a witness could only be used for the purpose of either corroborating him or contradicting him. He urged that during the course of investigation when several persons are interrogated and their statements recorded, such statements have some impact—either favourable or adverse—on each other and, therefore, unless these statements of all such persons who have been interrogated are made available to an accused person before the commencement of the inquiry or the trial, he would not be in a position to mould his defence properly. Elucidating his point further Mr. Jethmalani pointed out that in a given case it was quite possible that on a vital factual issue involved in the case the prosecution may have recorded statements of four persons say A, B, C and D and it was just possible, according to him that the statements of A, B and C might be corroborative of each other but the statement of D might be having an adverse impact upon the statements of A, B and C and the prosecution may not choose to call D as its witness at the trial.—In such a case, according to him, the non-furnishing of the statement of D to the accused would prejudice him in his defence at the trial, for he would be deprived of an opportunity for want of knowledge as to what D had stated during the investigation, to examine him as a defence witness, or to collect materials on the lines of the statement given by D and produce the same in refutation of the evidence that might be given by A, B and C on behalf of the prosecution. Similarly, he pointed out that it was possible that some of the documents seized by the prosecution during the investigation may have adverse effect on its case and these may never be produced or tendered at the trial. He, therefore, urged that it was in the interest of fair trial that copies of the statements of all the persons who had been interrogated by the prosecution, irrespective of whether they were going to be called as witnesses or not, and of all the documents seized, irrespective of whether they were going to be tendered in evidence or not, should be made available to an accused person inasmuch as a study of these statements and documents will be helpful to him in preparing his defence. In other words, according to him all material collected by the prosecution during the course of the investigation, irrespective of whether at the trial the prosecution was going to make use of it or rely upon it or not, must be made available to the accused, for it was likely that some of such material may have adverse impact on the prosecution case, and might be helpful to the accused in his defence. It is difficult to accept this contention of Mr. Jethmalani. In the first place, it is based upon an assumed possibility or likelihood of the prosecution having collected some materials having adverse impact on its case. Secondly, to grant the prayer for copies of all such statements and documents irrespective of whether the prosecution was going to make use of them or not in the hope or on the off chance that some of such material might turn out to be helpful to the accused in his defence or might proffer some clue to him to collect and produce materials in refutation, is nothing short of grant-

ing what may be called a roving discovery or a fishing inspection and I do not think that considerations of fair trial to an innocent accused could be so stretched as to grant such roving discovery or fishing inspection.

In this connection, I may refer to an American decision in the case of *People Ex. Rel. Lemon v. Supreme Court*,⁸ where a somewhat similar question was considered. The facts of the case as could be gathered from the observations of Cardozo C. J. which have been quoted *in extenso* in Wigmore on Evidence (3rd edn.), Vol. VI, at pages 395-397, were as follows: One Lucy Earley had been indicted for the murder of her husband by poisoning his food by the Grand Jury of Orange county. The effect of this indictment was to supersede an information, filed by the district attorney with the recorder of the city of Newburg, charging the same crime. The minutes of the Grand Jury had been inspected by the defendant under an order of the Court. One Wagley, an accomplice, had given testimony that the defendant had asked him for arsenic to enable her to kill her husband and had received the poison from his hands. Physicians who had examined the contents of the stomach gave testimony as to the quantity of arsenic disclosed by the analysis. Other witnesses gave testimony directed to the cause of death and to the methods and agencies through which the poison was administered. A transcript of all this testimony was given to the defendant and was embodied in the record. The defendant was not satisfied with this disclosure of the case against her. It was urged on her behalf that other evidences not submitted to the Grand Jury had been gathered by the district attorney and she prayed for an order that the same be submitted to her scrutiny. An order granting a very limited relief was passed in her favour. The defendant preferred an appeal and it was contended that criminal Courts had inherent power to compel discovery of documents in furtherance of justice and that the defendant's prayer that all the other material collected by the district attorney, which had not been submitted to the Grand Jury should be made available to her for her scrutiny to enable her to prepare her defence, should have been granted. Chief Justice Cardozo observed as follows:

"The decision of this case does not require us to affirm or deny the existence of an inherent power in Courts of criminal jurisdiction to compel the discovery of documents in furtherance of justice. The beginnings or at least the glimmerings of such a doctrine are to be found, as we have seen, in Courts other than our own. A search of precedents in this State yields results that are largely negative, if our scrutiny is confined to criminal prosecutions. On the other hand, the tendency is unmistakable in the field of civil causes to limit the power strictly within the statutory schedules. Whether apart from statute and beyond it there is a supervisory jurisdiction, as yet unplumbed and unexhausted, in respect of criminal prosecutions, is something that can best be determined at the call of particular exigencies in the setting of the concrete instance. The Courts are properly reluctant to abjure the power in advance, or to confine in predetermined formulas the occasions of its exercise. We have a statute to the effect that the rules of evidence shall be the same in criminal as in civil causes. (Code Crim. Proc. Ss. 392). The provisions of the Civil Codes for the discovery of documents are not rules of evidence in the strict sense. They are closely akin, however, to such rules, for they govern and define the remedies whereby evidence is made available. Those remedies are now so inveterate and established that they form part of the warp and woof of the procedural system of the State. The time has arrived, so it is argued, when they should be taken over by the Criminal Courts, and applied to criminal actions by a process of analogy. The appropriation is justified, we are told, by the germinal developments of a like power in the Courts of other States, by the public policy implicit in the rule of uniformity of evidence, and by the necessities of justice.

We leave the question open; for, if the power exists at all, this case is not within it. The most that can be argued with any show of reason in behalf of the defendant is that the remedy of inspection in civil causes as now prescribed by statute is to be applied

“in consimili casu” to criminal prosecutions. The power in criminal prosecutions may not improbably be less. It surely can be no greater. But the defendant, if subjected to that test, fails to make out her title to the remedy. She does not ask, as did the defendant in *Commonwealth v. Jordan*, supra, that the body of the dead man or any part of it be submitted to her scrutiny or to that of her advisers. Her demand is that a prosecutor who has gathered statements from prospective witnesses shall place the statements in her hands that she may study and repel them. She does not ask that she inspect any confession made in her name and admissible against her. Conceivably such inspection may be necessary at times, as, for instance, to enable a defendant to prove a forgery of a signature. She asks that she examine the incriminating statements of a conspirator whose confessions will not be evidence except against himself. So far as the record shows, he has not even been indicted. If indicted, his trial will be separate from hers. The reason why she asks for a disclosure of the statements of the physicians and the chemist is her belief that their statements to the prosecutor were fuller in all probability than their statements to the grand jury already in her possession. A like reason explains her request for confessions. In a word, statements and memoranda collected by the prosecutor are to be exhibited to the defendant, though none of them will be admissible either for her or against her if offered at the trial. She makes no claim that they will be. She takes the ground that she should have them because study of the evidence will be helpful in preparing her defence. This is to enlarge the remedy beyond anything permitted by analogy or precedent.”

It will thus be clear that the specific ground on which the defendant wanted the statements and memoranda collected by the district attorney and which had not been submitted to the Grand Jury, to be exhibited to her scrutiny viz. such statements made to the district attorney were in her belief, fuller in all probability than the statements to the Grand Jury (which were already in her possession) and that the study of these would be helpful to her in preparing her defence, was expressly negatived. Similarly, in the present case a request for roving discovery or fishing inspection of all the materials collected by the prosecution during investigation, irrespective of whether the prosecution was going to make use of such materials at the trial or not, on the ground that a study of such materials might be helpful to the accused in the preparation of his defence cannot be granted.

During the course of his arguments Mr. Jethmalani referred to and relied upon certain Articles in Wigmore on Evidence. Particularly he relied upon Article 1850, Sub-Articles 1, 2, 3 and 4, Article 1851, Article 1855(a), Article 1959(g) and Article 2224. It is not necessary for me to set out these Articles here. The first four Articles appear at pages 390, 399, 417 and 475 respectively in Vol. VI, while the last Article appears at page 206 in Vol. VIII of the third edition. So far as these Articles, on which reliance was placed by Mr. Jethmalani, are concerned, in the first place it will be clear that the learned author has in these Articles historically surveyed the legal position in the matter of furnishing names of witnesses, their testimonies and documents to the accused by first stating what the position was under the orthodox Common Law Rules and how the position changed from time to time under the several statutes in several jurisdictions. It may be stated that just as in other jurisdictions considerations of fairness to an innocent accused led to the passing of statutes making provisions in derogation of the orthodox Common Law practices in matters of furnishing to the accused names or testimony of witnesses or documents intended to be produced on behalf of the prosecution. There are statutory provisions contained in our Criminal Procedure Code which abjure the old Common Law Rules or practices; for instance s. 204(I)(a) of the Code provides that no summons or warrant shall be issued against the accused until a list of the prosecution witnesses has been filed; s. 173(4) itself is another instance in point, which however, is applicable to criminal cases where the investigation has been done by a police officer under Chap. XIV of the Code. Section 251A(I) is another instance in point which is applicable to warrant cases instituted on the basis of police reports. Secondly,

it is also clear that unless and to the extent to which the statute law has made a departure, the Courts have been inclined to follow the Common Law Rules in the matters like discovery and inspection in criminal cases. That this is so will appear clear from the observations of Chief Justice Cardozo, which I have quoted above. So far as our Indian statute is concerned, I have already indicated above that in the matter of furnishing testimonies of intended witnesses and of documents to the accused, the Parliament has been silent and has deliberately omitted to make a provision therefor while prescribing the procedure applicable to warrant cases instituted otherwise than on police reports. In my view, therefore, the Articles in Wigmore on Evidence relied upon by Mr. Jethmalani are of no avail to him. Having regard to the aforesaid discussion in my view the petitioner's prayer for furnishing of copies of statements of witnesses and of documents including notings etc. was rightly rejected.

Lastly, it was contended that the learned Magistrate ought to have exercised the discretion vested in him under s. 94 of the Criminal Procedure Code and ought to have issued a summons directing the Special Prosecutor or the Collector of Central Excise to produce in Court before the inquiry commenced all such statements of witnesses and documents on which the prosecution was going to rely. It was urged that if once the accused satisfied the Court that the documents (which would include the statements of witnesses) were relevant to the facts in issue, the production thereof would either be necessary or desirable and if once the accused satisfied the Court that the production of such documents was either necessary or desirable, the Court ought to exercise the discretion vested in it under that section. In this behalf it was pointed out that the previous statements of the witnesses, whom the prosecution was going to examine in the case and the documents on which the prosecution wanted to rely at the trial would obviously be statements and documents relevant to the facts in issue and therefore, their production was either necessary or desirable and as such it should have been held that the petitioner had made out a case for the exercise of the discretion by the learned Magistrate. Both Messrs. Gandhi and Jethmalani further contended that having regard to the language used therein, s. 94 could be invoked at any stage of an inquiry or trial and the same was not controlled by s. 257 of the Code, under which the accused is entitled to apply for issue of any process for compelling attendance of a witness or the production of any document only after he has entered upon his defence. In support of their contentions strong reliance was placed upon *Muhammed Rahim v. Emperor*⁹ and on *Hari Charan v. The State*.¹⁰

In the former case at the trial in the Court of the learned Magistrate it was suggested to one of the prosecution witnesses that he had made a certain statement before the police officer during the departmental inquiry; he denied it, whereupon an application was then made under s. 94 for an order of production of the previous statement recorded during the departmental inquiry. The learned Magistrate ruled that this request at that stage was premature but that it might be repeated after the framing of the charge. It appears that in due course after the charge was framed, the application was repeated but the learned Magistrate then ruled that the defence were not entitled to the statements they had asked for and he had not considered those statements necessary for the trial. The application was, therefore, rejected. It appears that in the view which he took on the earlier occasion while rejecting the application for production of documents under s. 94, the learned Magistrate was influenced by an earlier decision in *Tahilram v. Pitamberdas*,¹¹ where it had been held that the proper stage at which the accused could apply for production of documents was only after he had entered upon his defence

⁹ [1935] A.I.R. Sind 13, F.B.

¹⁰ [1955] A.I.R. Punjab 17.

¹¹ [1914] A.I.R. Sind 135.

under s. 257 of the Criminal Procedure Code. The Full Bench of the Sind Court took the view that s. 257 of the Criminal Procedure Code neither controlled nor imposed any limitations on the power of a Court to exercise its discretion in using the machinery provided by s. 94 of the Code. The relevant observations on which reliance has been placed by Messrs. Gandhi and Jethmalani run as follows (p. 17):

"In our opinion also there is nothing in S. 94, Criminal P. C., which restricts the use of the machinery provided therein to any particular stage of an investigation, inquiry, trial or other proceeding under the Code. On the contrary, the word 'when-ever' appearing at the very fore-front of the section excludes the idea of any such restriction."

The Court then considered the earlier decision reported in *Tahilram v. Pitamberdas* and then observed as follows (p. 18):

"In these circumstances it seems to us that the question at issue in the case of *Tahilram v. Pitamberdas*, was decided solely upon the provisions of S. 257, Criminal P. C., and it does not appear to have been the case of the accused that his application came within the terms of S. 94, Criminal P. C. In our opinion, S. 257, Criminal P. C., neither controls nor imposes any limitations on the power of a Court to exercise its discretion in using the machinery provided by S. 94, Criminal P. C. It is no bar to the exercise of that discretion in a trial under the provisions of Chap. 21 before that trial has reached the stage indicated by S. 257. No such restriction is indicated by the section itself or by any other section in Chap. 21..."

Sections 257 and 94, Criminal P. C., are not antagonistic, they are interdependent. S. 94, Criminal P. C., affords any party to an inquiry, trial or other proceeding under the Code, the facility of having documents and things produced at any stage of such inquiry, trial or proceeding. The facility is restricted. The restriction lies in the fact that the necessity or desirability of the production must be shown to the satisfaction of the Court. S. 257, Criminal P. C., gives an accused person a right, subject to another, but lesser restriction, to claim the same facility. The restriction consists in the accused having to satisfy the Court that his demand is not made for the purpose of vexation or delay or for defeating the ends of justice."

While considering the provisions of s. 94 in juxtaposition with the accused's right to cross-examine prosecution witnesses with reference to their previous statements under s. 145 the Court has observed as follows (p. 19):

"...To deny his claim to the production of such documents would be to deny the accused a right given to him in the procedure prescribed for the trial of his case. In our opinion a Court exercising its discretion under S. 94, Criminal P. C., not only may call for the production of such documents at the request of the accused, but ought to do so, as their production is obviously necessary and desirable for the purposes of the trial."

In the latter case of *Hari Charam v. The State* production of certain documents was prayed for by the accused, even before a charge had been framed against him by the Magistrate but the only order passed by the learned Magistrate was:

"There is no necessity for the prosecution to wait for the documents prayed for in the application. The prosecution shall proceed. These documents, if at all be needed in defence, they may be summoned. Prosecution need not wait."

Against this order a revisional application was preferred to the Punjab High Court. Following the Full Bench ruling of the Sind Court the Punjab High Court took the view that the learned Magistrate could not refuse to call these documents merely on the ground that these could be summoned in defence, if at all needed and directed the learned Magistrate to issue a summons for production of those documents.

According to Messrs. Gandhi and Jethmalani, these rulings clearly establish two propositions, first, that once the accused satisfied the Court that the statements and documents were relevant to the facts in issue and therefore, the production thereof was either necessary or desirable for the purposes of an in-

quiry or trial, the Court ought to exercise its discretion under the section and direct production thereof and secondly, the discretion vested in the Court under s. 94 could be invoked at any stage of an inquiry or trial and that s. 257 did not control the Court's power under s. 94. That is undoubtedly so. But the real question is whether relevancy of statements and documents is the sole criterion for determining the question whether the production thereof is either necessary or desirable? Similarly, though it is true that s. 94 is not controlled by s. 257 the question is whether the scope of s. 94 should be enlarged so as to incorporate a provision similar to s. 173(4) in the procedure applicable to warrant cases instituted upon private complaints? In fact at one stage it was contended that since s. 94 was there in the Code there was no necessity to make a provision similar to s. 173(4) in the procedure applicable to warrant cases instituted upon private complaints and s. 94 could be resorted to for the purposes of getting such statements and documents produced to enable the accused to inspect the same at any stage of an inquiry or trial. Of course, it is not possible to accept such contention for the simple reason that s. 94 has been there in the Code all along and even then it was felt necessary to introduce s. 173(4) in Chap. XIV dealing with criminal cases involving investigation into and trial of cognizable offences as also to introduce s. 251A in the procedure applicable to warrant cases instituted upon police reports by the amending Act XXVI of 1955.

On the other hand, Mr. Khandalawala, though he conceded that s. 94 could be invoked at any stage of any inquiry or trial, contended that the section did not confer any right upon the accused to the production of all such statements and documents, but that the section was merely an enabling section which conferred discretion upon the Court in the matter of issuing a summons directing production of documents or articles or things and that such discretion had to be judicially exercised. He further contended that no materials had been placed by the petitioner before the learned Magistrate enabling him to reach a conclusion that the production of all the statements and documents was either necessary or desirable and that, therefore, the learned Magistrate was right in refusing to exercise his discretion in the matter. He pointed out that the offer made in this case by the Special Prosecutor (of making copies of statements of witnesses available to the accused as and when the examination-in-chief of each was over and documents as and when the same were tendered) was invariably made in all customs prosecutions without exception and as such there was no question of the statements or documents being either withheld or suppressed from the accused. He, therefore, urged that the occasion for exercising the discretion vested in the learned Magistrate under s. 94, which occurs in Chap. VII, which deals with "processes to compel the production of documents and other movable property and for the discovery of persons wrongfully confined", did not arise, for when the Special Prosecutor had offered to make these statements and documents available to the accused, there was no necessity to resort to the compelling processes contained in Chap. VII of the Code.

In my view, there is considerable force in the submissions made by Mr. Khandalawala on this point. Section 94 so far as is material to the present case runs as follows:

"Whenever any Court...considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before such Court...such Court may issue a summons...to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it, or to produce it, at the time and place stated in the summons..."

In the first place, it is clear that no right is conferred upon any party to a criminal proceeding to obtain production of any document or thing under this section. Secondly, though it is clear that the provisions of the section could be invoked at any stage of any investigation, inquiry or trial as is indicated

by the expression 'whenever' used at the commencement of the section, the words 'such Court may issue' clearly show that the section confers discretion upon the Court enabling it to order production of any document or other thing. Thirdly, before the Court exercises its discretion and orders the production of any document or thing under this section, it must satisfy itself that such production of the document or the thing is either necessary or desirable for the purposes of the trial and, lastly, as has been held by the Sind Court, in deciding that question the Court has to exercise its discretion judicially, in the sense that it must satisfy itself that the document or the thing has a bearing upon and is relevant to the case. What was urged very strenuously by Mr. Gandhi was that since the previous statements of witnesses, whom the prosecution was going to examine and the documents on which the prosecution wanted to rely at the trial, would be statements and documents having a bearing upon and relevant to the issues involved in the case, their production was either necessary or desirable and as such their production ought to have been ordered by the learned Magistrate. In other words, for the exercise of judicial discretion vested in the Court under s. 94, all that was necessary for a party in a criminal proceeding to show to the Court was that the statements or documents of which production was sought were relevant to the issues involved in the case and if once that was shown, the discretion ought to be exercised. I am unable to accept this argument of Mr. Gandhi. It is no doubt true that while deciding whether production of a document or a thing is necessary or desirable or not, the Court must take into consideration the aspect of the relevancy of such document or thing to the issues involved in the case, but that is not the only consideration which would guide the Court for ordering production. In the first place, everything that is relevant to the facts in issue may not necessarily be either necessary or desirable for the purposes of a trial; for instance, it may be that during the course of prior investigation the prosecution may have interrogated and obtained statements of 4/5 persons on the same vital point and it is just possible that to avoid repetition of evidence, the prosecution may not think it necessary or desirable to examine all the 5 persons as its witnesses to prove the same point. In such a case, the previous statements of all the 5 persons would undoubtedly be relevant to the point in issue but it cannot be said that their production is either necessary or desirable. Therefore, the relevancy of a statement or a document or a thing of which production is sought would be one of the considerations which the Court will have to take into account, while deciding the question of the necessity or desirability of production of such statement, document or thing. Further, before ordering production of any such statement, document or thing the Court might consider whether such statement, document or thing is being suppressed or might be tampered with or destroyed by the party in whose possession it is or might be lost altogether or whether it would come before it in a normal way without resorting to the compelling processes contained in s. 94 or 96 of the Chap. VII of the Code. These considerations would also weigh with the Court in exercising its judicial discretion while deciding the question whether the production of a document or a thing is either necessary or desirable for the purposes of an inquiry or trial. It is in this connection that Mr. Khandalawala's point assumes some significance. He has pointed out that s. 94 occurs in Chap. VII of the Code, which deals with "processes to compel the production of documents and other movable property and for the discovery of persons wrongfully confined" and he has rightly urged that in view of the Special Prosecutor's offer to make these statements and documents available to the accused, no occasion for resorting to such compelling process by exercising the discretion under s. 94 arose. I can understand if the prosecution had either withheld or altogether refused to supply copies of statements of witnesses, whom they are going to examine or of documents on which they were going to rely to the petitioner or his co-accused, the learned Magistrate could have resorted to the compelling pro-

cesses contained in Chap. VII of the Code. In my view, therefore, the learned Magistrate was right in not granting the alternative prayer of the petitioner under s. 94 of the Criminal Procedure Code.

In the result, all the contentions urged by Messrs. Gandhi and Jethamalani fail and the rule is, therefore, discharged.

Rule discharged.

APPELLATE CIVIL.

Before Mr. Justice Naik.

MARUTI GURAPPA v. KRISHNA BALA.*

Civil Procedure Code (Act V of 1908), O. XXI, rr. 103, 63—Transfer of Property Act (IV of 1882), Secs. 53A, 54—Indian Registration Act (XVI of 1908), Sec. 49—Person in possession of property under agreement for sale—Whether such person can file suit under O. XXI, r. 103 of Code against auction purchaser of same property—Whether auction purchaser person claiming under transferor within s. 53A of Transfer of Property Act.

A suit filed under O. XXI, r. 103, of the Civil Procedure Code, 1908, by a person who has obtained possession of the property on the basis of a contract of sale for protecting that possession is maintainable on the basis of the doctrine of part performance under s. 53A of the Transfer of Property Act, 1882, inasmuch as such a suit is essentially of a defensive character.

Such a suit, however, is not maintainable against an auction purchaser of the same property, as the latter is not a person claiming under the transferor within the meaning of s. 53A of the Transfer of Property Act, 1882.

Ram Chander v. Maharaj Kunwar,¹ *Firdos Jahan v. Mohd. Yunus*,² *Achayya v. Venkata Subba Rao*,³ *Akram Mea v. Mucpl. Corpn., Secunderabad*⁴ and *Pakktirichi Umma v. Kalandan*,⁵ followed.

Padmalabha v. Appalanarasamma,⁶ not followed.

Audinarayudu v. Mangamma,⁷ dissented from.

Probodh Kumar Das v. Dantmara Tea Co. Ltd.,⁸ *Ramrao Nilkanth v. Purnanand Saraswati Swami*,⁹ *Ramlaxmi v. Bank of Baroda*,¹⁰ *Hanmantagouda Nagangouda v. Shinappa Dundappa*,¹¹ *District Local Board, Belgaum v. Shivappa Dundappa*,¹² *Gangadhar Dhanjishet v. Balwant Kashirao*,¹³ *Supdusing Daulatsing v. Balwant Kashirao*,¹⁴ *Narainbhat v. Bando Krishna*¹⁵ and *Annamalai Mudali v. Ramasami Mudali*,¹⁶ referred to.

THE facts are stated in the judgment.

C. H. Guttal, for *V. S. Deshpande*, for the appellants.

M. D. Pathak, for the respondents.

NAIK J. This appeal raises an interesting question of law namely whether the person who has obtained property on the basis of a contract of sale can maintain a suit against an auction purchaser of the same property. The material facts briefly stated are as follows:

The suit property (i.e. survey Nos. 162 and 177) (half share) originally

*Decided, March 11, 1965. Second Appeal No. 1047 of 1959, against the decision of B.M. Sapre, Extra Assistant Judge, at Osmanabad, in Civil Appeal No. 25/4 of 1955, reversing the decree passed by Vishvanathrao, Munsiff at Tuljapur, in Suit No. 42/1 of 1953-54.

1 [1939] A.I.R. All. 611.

2 [1940] A.I.R. Oudh 1.

3 [1957] A.I.R. Andhra Pradesh 854.

4 [1957] A.I.R. Andhra Pradesh 859.

5 [1954] A.I.R. Mad. 702.

6 [1952] A.I.R. Orissa 143.

7 [1943] A.I.R. Mad. 706.

8 (1939) 42 Bom. L.R. 199, p.c.

9 (1939) 42 Bom. L.R. 501.

10 [1953] A.I.R. Bom. 50, s.c. 54 Bom. L.R. 667.

11 (1937) 42 Bom. L.R. 1123.

12 (1939) 42 Bom. L.R. 367, s.c. [1940] A.I.R. Bom. 210.

13 (1918) I.L.R. 42 Bom. 411, s.c. 20 Bom. L.R. 495.

14 [1941] A.I.R. Mad. 161, p.b.

belonged to defendant No. 3 and two others. On April 12, 1949, defendant No. 3 and two others entered into an agreement for selling the said property to the plaintiff for a sum of Rs. 1,600. Part of the sale price i.e. Rs. 585 was paid on the date of the agreement and the plaintiff was put in possession of the property. In the month of May, 1949, defendant No. 2 obtained a decree against defendant No. 3. In execution of the said decree, the land in suit was sold in auction and purchased by defendant No. 1. Defendant No. 1 started proceedings for recovering possession of the property on the basis of the sale certificate. The plaintiff obstructed the delivery of possession. Proceedings were started by the auction purchaser for removing the obstruction under r. 99 of O. XXI of the Code of Civil Procedure. After summary enquiry, the Court came to the conclusion that the plaintiff was not entitled to continue in possession. The Court, therefore, directed him to remove his obstruction. On April 2, 1952, the plaintiff filed a suit under r. 103 of O. XXI of the Civil Procedure Code contending that he was a transferee under a contract of sale; that he was in possession of the property by virtue of that contract of sale; and that, therefore, he was entitled to protect his possession under s. 53A of the Transfer of Property Act.

Defendant No. 3 did not appear and the suit proceeded *ex parte* against her. Defendants Nos. 1 and 2 contended that the plaintiff cannot maintain any action for the enforcement of his claim under s. 53A of the Transfer of Property Act. The trial Court dismissed the plaintiff's suit. The plaintiff went in appeal to the District Court. The District Court allowed the appeal and decreed the plaintiff's claim. It is against that judgment defendants Nos. 1 and 2 have now come up in appeal.

Mr. Guttal for defendants Nos. 1 and 2 urged two contentions before me. Firstly, that the plaintiff who bases his claim on the doctrine of part performance of the contract, embodied in s. 53A cannot maintain an action for protecting his possession. At best he can use the part performance of the contract as a shield. He can never use it as a weapon of offence. Secondly, it is argued that neither the judgment-creditor (defendant No. 2) nor the auction-purchaser (defendant No. 1) could be said to be claiming under defendant No. 3, the judgment-debtor. It is only the transferor or persons claiming under him who are debarred from proceeding to evict the transferee claiming under a contract of sale. Mr. Guttal contended that since the auction-purchaser could not be said to have derived title from the judgment-debtor, the bar imposed by s. 53A cannot apply to him.

On the other hand, Mr. Pathak maintains that a suit under r. 103 of O. XXI of the Civil Procedure Code is in the nature of a defensive action. Therefore when the plaintiff maintains an action under r. 103, he is resisting, in substance, the claim of the auction purchaser to evict him on the basis of the auction sale. In regard to the second point, Mr. Pathak argues that in a broader sense the auction purchaser must be treated as claiming from the transferor within the meaning of that expression in s. 53A of the Transfer of Property Act.

Before considering the authorities cited, it is necessary to refer to the provisions of s. 53A of the Transfer of Property Act itself. The first para. of that section runs thus:

"Where any person contracts to transfer for consideration any immoveable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,

and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract".

It is not disputed that there is a valid contract of transfer. Nor it is disputed that the transferee is in possession on the basis of that contract. The

third para. of s. 53A provides:

"and the transferee has performed or is willing to perform his part of the contract".

The transferee has expressed his willingness to perform his part of the contract in the course of his deposition. It is conceded that the plaintiff's suit for specific performance was barred by limitation at the time of the suit. It is, however, well settled that even if the plaintiff's remedy for specific performance is barred by limitation he has still the right to invoke the protection of s. 53A of the Transfer of Property Act. The fourth para. is relevant and runs thus:

"then, notwithstanding that the contract, though required to be registered, has not been registered, or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract."

Then there is a proviso:

"Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof".

The first question that arises for consideration is what is the nature of the claim put forward by the transferee under s. 53A of the Transfer of Property Act. In *Probodh Kumar Das v. Dantmara Tea Co. Ltd.*,¹ their Lordships of the Privy Council held that s. 53A confers no right of action on a transferee in possession under an unregistered contract of sale and that the right conferred by s. 53A is a right available only to a defendant to protect his possession. The section imposes a statutory bar on the transferor. It does not confer any active title on the transferee. This view was followed by the Bombay High Court in *Ramrao Nilkanth v. Purnanand Saraswati Swami*.² The principle laid down by the Privy Council in *Probodh Kumar's* case has been followed by other High Courts in India and is now well settled. There is, however, a sharp conflict of opinion as to whether a suit instituted under r. 103 of O. XXI of the Civil Procedure Code is in the nature of a defensive action or not. In other words the question for consideration is whether such a suit based as it is on the doctrine of part-performance is maintainable. The Privy Council specifically stated that s. 53A does not confer any title on the transferee. It also stated that it does not confer any right of action on a transferee in possession and the only right available to him is to protect his possession as a defendant.

The Allahabad High Court had occasion to consider the scope of the Privy Council decision. The facts were as follows in *Ram Chander v. Maharaj Kunwar*.³

The plaintiff was a lessee of certain properties under a deed of lease which was duly registered but was not signed by either the lessor or the lessee in accordance with the provisions of s. 107 of the Transfer of Property Act. Nevertheless, the plaintiff had obtained possession of the subjects leased. While the plaintiff was thus enjoying the possession, defendants demolished part of the property. Plaintiff brought a suit for injunction restraining the defendants from interfering with any of the right of the plaintiff as lessee of those properties. It was contended by the plaintiff that as he had entered into possession of the properties in terms of the lease executed in his favour and was willing to perform his part of the contract of the lease though it was not completed in accordance with law the defendants were not entitled to eject him otherwise than by due process of law. Upon a question whether plaintiff could rely upon the provision of s. 53A, Held that

"It was defendants who were seeking to enforce their rights under the contract of

1 (1939) 42 Bom. L.R. 199, P.C.

2 (1939) 42 Bom. L.R. 501.

3 [1939] A.I.R. All. 611.

lease. The plaintiff was only seeking to debar them from doing so and was thus merely protecting his rights. There was therefore nothing in the terms of Sec. 53-A which disentitled the plaintiff from maintaining the suit".

The learned Judges observed that the case before the Privy Council was different from the case on their hands because there (in *Probodh Kumar's* case), the transferee sought a direct relief in support to his title.

The Allahabad view was followed by the Chief Court of Oudh in *Firdos Jahan v. Mohd. Yunus*.⁴ In that case a suit was brought by the plaintiff under O. XXI, r. 103 of the Civil Procedure Code, in the following circumstances:

Mt. Firdos Jehan's husband, Sheikh Habibullah, was the tenant of a house in Lucknow which was owned by Dr. Mohamed Yunus, a sub-assistant surgeon in Gonda. In 1936 Dr. Yunus sued Habibullah for ejectment and arrears of rent. In May 1936, a compromise decree was passed according to which Habibullah was to vacate the house by August 31. He did not vacate and on September 17, Dr. Yunus applied for execution of his decree for ejectment. At this stage, Mt. Firdos Jehan, who was living with her husband in the house, appeared on the scene. Her story was that she came to know that Dr. Yunus wanted to sell the house and she got into touch with Dr. Yunus through one Hakim and negotiations were started for purchase of the house. It was eventually agreed that Mt. Firdos Jehan should buy the house for Rs. 7,800, Rs. 500 were paid to Dr. Yunus as earnest money and the receipt was obtained. She continued in possession under the contract of sale. Dr. Yunus thereafter sold the house to a man named Evas Malli on September 30. He did not inform Evas about the previous agreement. Mt. Firdos having failed in the resistance proceedings, filed a suit under O. XXI, r. 103, of the Civil Procedure Code. It was contended that the suit was not maintainable inasmuch as it was based under s. 53A and s. 53A could only be used by way of defence. This contention was negatived and it was held that although it is a settled law that s. 53A is available by way of defence only, that principle is not applicable to a suit brought by a vendee under O. XXI, r. 103, because the vendee in substance is merely seeking to protect the rights to which he is entitled under s. 53A.

A similar case arose before the Andhra Pradesh High Court in *Achayya v. Venkata Subba Rao*⁵ and the Division Bench comprising Subba Rao C. J. and Viswanatha Sastri, J. held:

"Section 53-A does not either expressly or by necessary implication indicate that the rights conferred on the transferee thereunder can only be invoked as a defendant and not as a plaintiff. Under the section no title passes to a transferee. He cannot file a suit for a declaration of his title to the property or seek to recover possession of the same on the basis of any title conferred to him.

But, if the conditions laid down in the section are complied with, it enables the transferee to defend his possession if the transferor seeks to enforce his rights against the property. This statutory right he can avail himself both as a plaintiff and as defendant provided he is using his right as a shield and not as a sword. Or to put it in other words, he cannot seek to enforce his title but he can resist the attack made by a transferor".

This decision was reiterated by the same Court in the case of *Akram Mea v. Mucpl. Corpn., Secunderabad*.⁶

The Madras High Court in the case of *Pakkirichi Umma v. Kalandan*⁷ have also taken the view that in respect of suits filed under r. 63 or r. 103, it cannot be said that the plaintiff is using s. 53A as a weapon of offence. At page 703, Ramaswami J. observes:

"The only exception in form, though not in substance, is in cases under the Civil P.C, O. 21, R. 63 or R. 103. In such cases the plaintiff will not be necessarily debarred

4 [1940] A.I.R. Oudh 1.

5 [1957] A.I.R. Andhra Pradesh 854.

6 [1957] A.I.R. Andhra Pradesh 859.

7 [1954] A.I.R. Mad. 702.

from the benefit of the rule because where by the nature of the case, as disclosed by the pleadings or otherwise, it is apparent that the transferee comes to the Court to defend his possession against invasion of it by the transferor, he is entitled to invoke the doctrine of part performance. The mere position of a party in the heading of a suit would not determine whether he is or is not entitled to the benefits of the section. Since the object of a suit under O. 21, R. 103, Civil P.C. would be to protect possession and the capacity in which the plaintiff comes to the Court is in reality a defence and the suit would in reality be part of the same proceedings as those in which the transferee's rights are attacked, the plaintiff can take advantage of S. 53A."

Although there is no direct ruling of the Bombay High Court on this question, this Court has discussed the scope of the provisions of r. 103 of O. XXI, Civil Procedure Code, in a number of decisions. In the case of *Ramlaxmi v. Bank of Baroda*,⁸ the division bench observed:

"A suit under O. 21, R. 103 is evidently for the purpose of establishing the right which the plaintiff claims to the present possession of the property...The question is what is the plaintiff's claim to the present possession of the property, not whether he is the sole owner of the property".

It is thus clear that the only right which the plaintiff puts forward in a suit under O. XXI, r. 103, Civil Procedure Code is the right to maintain his present possession. The suit, therefore, is essentially for the purpose of preserving that right. The objective is to maintain his possession undisturbed.

As against this preponderance of authorities Mr. Guttal relied upon the solitary ruling of the Orissa High Court in *Padmalabha v. Appalanarasamma*.⁹ The decision was taken by a division bench comprising Ray, C. J. and Jagannathadas J. They were considering the nature of the suit under O. XXI, r. 63, Civil Procedure Code on the basis of s. 53A of the Transfer of Property Act. The learned Judges posed the question whether it is open to the transferee under a contract of sale to bring a suit based on s. 53A. The learned Judges observed:

"The section can never be availed of as founding a cause of action; and it cannot, therefore, be urged that what is available to the transferee as a defence in a suit in ejectment by the transferee is available to him as a weapon of attack in an action which takes its rise from an invasion of the transferee's rights under the contract. Moreover, a suit by the transferee against an attaching creditor of the transferor under O. 21, R. 63, Civil P.C., is not one between him and the transferor or anybody claiming under the transferor. Hence the transferee as a plaintiff cannot avail himself of the benefits of the doctrine of part performance of contract for sale as against an invasion in his rights by attaching creditor of the transferor."

The learned Judges repelled the argument that the action under O. XXI, r. 63 is in the nature of a defensive action by pointing out that (p. 145):

"...if this were permissible, it would amount to creating an enforceable right or title to immovable property by means of an unregistered contract-deed and thus to reduce to nullity the effect of Section 49, Indian Registration Act..."

Thereafter the learned Judges referred to decisions of various High Courts which had held that a suit under r. 63 or r. 103 of the Civil Procedure Code substantially is a defensive action, and observed: (p. 147).

"...while purporting to give effect to S. 53-A, T.P. Act, they do, in effect, make use of the 'doctrine of part performance' as the basis of an action on the analogy of the practice on the equity side in England."

With respect, I am unable to accept the view taken by the Orissa High Court for the simple reason that the learned Judges have not examined s. 53A of the Transfer of Property Act in the context of O. XXI, r. 103 of the Civil Procedure Code and have laid emphasis upon the provisions of s. 49 of the

8 [1953] A.I.R. Bom. 50, s.c. 54 Bom. L.R. 667.

9 [1952] A.I.R. Orissa 143.

Indian Registration Act and s. 54 of the Transfer of Property Act which have relevance only on the question of the title. The transfer immoveable properties the value of which is Rs. 100 or more can only be effected, by a registered instrument under s. 54 of the Transfer of Property Act. Section 49 of the Indian Registration Act provides that documents which required compulsory registration are not admissible in evidence in any suit or proceedings for any purpose. The rigour of s. 49 of the Indian Registration Act and s. 54 of the Transfer of Property Act has been partially relieved by the provisions of s. 53A. In the case of a suit filed under r. 103 all that the plaintiff can claim is that he has a right to present possession of the property and the question of title is not relevant. In essence such a suit is defensive in character. I, therefore, prefer to follow the view taken by the Allahabad, Oudh, Madras and Andhra Pradesh High Courts to the view taken by the Orissa High Court on this point.

The next and more important point for consideration is whether the auction purchaser can be regarded as a person claiming under the transferor. I have already cited all the relevant clauses of s. 53A of the Transfer of Property Act. The relevant portion of the fourth clause, on the interpretation of which the decision of this turns, runs thus:

"...the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession."

The short question for consideration is whether the auction purchaser in execution can be treated as a person claiming under the transferor within the meaning of that expression as used in fourth clause of s. 53A. There was considerable controversy prior to the amendment of s. 47 in the Civil Procedure Code as to whether the auction purchaser could be regarded as a representative either of the judgment-debtor or of the judgment-creditor. The Bombay High Court had consistently taken the view that the auction purchaser is neither the representative of the judgment-debtor nor of the judgment-creditor. Section 47 provides that all questions arising between the parties to the suit in which the decree was passed or their representatives shall be determined by the Court executing the decree and not by a separate suit. The Explanation to s. 47 before it was amended ran thus:

"For the purposes of this section, a plaintiff whose suit has been dismissed, a defendant against whom a suit has been dismissed are parties to the suit".

In *Hanmantagouda Nagangouda v. Shivappa Dundappa*: District Local Board, Belgaum v. Shivappa Dundappa,¹⁰ this Court held:

"A purchaser at an auction held by Court in execution of a decree who is a stranger is not a representative of either the judgment-debtor or the decree-holder [judgment-creditor]."

This view followed earlier decisions of the Bombay High Court in *Gangadhar Dhanjishet v. Balwant Kashirao*; *Supdusing Daulatsing v. Balwant Kashirao*¹¹ and in *Narsinhbhat v. Bando Krishna*.¹² The view taken by some of the other High Courts was to the contrary and it was held that the auction purchaser must be treated as a representative of the judgment-debtor. In order to put the matter beyond the pale of controversy, the Legislature amended the Explanation to s. 47 of the Civil Procedure Code and substituted the following explanation by Act No. LXVI of 1956:

"For the purposes of this section, a plaintiff whose suit has been dismissed, a defendant against whom a suit has been dismissed and a purchaser at a sale in execution of the decree are parties to the suit.

It is pertinent to note that the Legislature, by this explanation did not constitute the auction purchaser as the representative of the judgment-debtor.

10 (1937) 42 Bom. L.R. 1123.

12 (1918) I.L.R. 42 Bom. 411, s.c. 20

11 (1939) 42 Bom. L.R. 367, s.c. [1940] Bom. L.R. 495.

A.I.R. Bom. 210.

On the other hand they chose the less controversial line by making the auction purchaser in execution as equivalent to a party to the suit. It is difficult, on general principles, to hold the auction purchaser as in any way the representative of the judgment-debtor or a person claiming under the judgment-debtor. It is true that the auction purchaser gets the right, title and interest of the judgment-debtor. But he does not get it by virtue of an act of parties. He does not get the title as a result of an agreement with the transferor. He does not obtain his right in accordance with the wishes of the transferor but contrary to his wishes. In the first place it is clear that the decree holder or the judgment-creditor makes a claim against the judgment-debtor and obtains a decree. After obtaining the decree he gets the property attached in execution. In so far as he proceeds to attach the property in execution he takes a step contrary to the interest of the judgment-debtor and against his consent. When the property is brought to sale, the judgment-creditor himself may purchase the property after securing permission of the Court or a third person may purchase the same. Whether it is the judgment-creditor or a third person who is purchasing the property, it is difficult to hold that either of them steps into the shoes of the judgment-debtor.

On this point strong reliance was placed by Mr. Pathak on the decision by King J. in *Audinarayudu v. Mangamma*.¹³ The facts of the case were that the decree-holder had certain property allegedly belonging to his judgment-debtors attached. Defendant No. 4 intervened with a claim petition in which it was asserted that defendants Nos. 1 and 2 had contracted to sell the property to her and had duly put her in possession. There was thus, what was in effect a plea under s. 53A of the Transfer of Property Act. The District Munsiff dismissed the claim. An appeal was preferred in the District Court and the learned District Judge allowed the plaintiff's claim. Then a second appeal was preferred before the Madras High Court which was decided by King J. sitting singly. The main question that came up for consideration was whether the judgment-creditor could be regarded as claiming under the judgment-debtor. After conceding that the interest of the judgment-debtor and that of the judgment-creditor are distinctly adverse and also after conceding that the judgment-creditor cannot be called a legal representative of the judgment-debtor at the stage in which he is proceeding to attach the judgment-debtor's property, the learned Judge proceeded to consider the eventuality of the property having been sold in auction and on that basis posed the question whether the auction purchaser can be regarded as claiming under the transferor. At p. 707 the learned Judge asserted in somewhat categorical terms: "it can now no longer be denied that the auction purchaser is the legal representative of the judgment-debtor". This statement is justified on the basis of the view that prevailed in the Madras High Court viz. that the auction purchaser is a representative of the judgment-debtor under s. 47 of the Civil Procedure Code. (Vide *Annamalai Mudali v. Ramasami Mudali*.)¹⁴ According to the learned Judge, as soon as the sale is held, the rights of the judgment-creditor revives with irresistible force. The learned Judge then proceeded to observe (p. 707):

"...In these circumstances, I prefer to hold that the expression 'claiming under the transferor' is wide enough in S. 53A to include a judgment-creditor in the situation in which the appellant in this appeal now stands".

With respect, I cannot accept the view taken by King J. The learned Judge took up the hypothetical case of the proceedings culminating in the sale of the property and on that assumption considered the position of the auction purchaser. On the analogy of the position of the auction purchaser, the learned Judge held that the judgment-creditor also will be included in the expression "claiming under the transferor". This view is based on the assumption that

13 [1943] A.I.R. Mad. 706.

14 [1941] A.I.R. Mad. 161, F.B.

the auction purchaser is the legal representative of the judgment-debtor, a position which has never been accepted in this Court.

The Orissa High Court had occasion to consider this aspect of the matter in the very case to which reference has already been made by me (*Padmala-bha v. Appalanarasamma*). I have already set out the facts of the case and it is not necessary to repeat them. At para. 30, the learned Judges observed (p. 149):

"There is another reason equally fatal to the plaintiff's suit. His suit is not one between him and the transferor or anybody claiming under him (the transferor). The attaching creditor derives nothing from the judgment-debtors by way of any right to purchase or charge upon the property. He wants to attach the property against the will and consent of the judgment-debtors."

After citing the relevant passage from the judgment of King J. in *Audinayudu v. Mangamma* the learned Judge proceeded to observe:

"With great respect, I cannot place myself in the same position as his Lordship, King, J. At the time of attachment, the attaching creditor's purchase, and the sale following it, would be mere expectation. I shall not be understood to accept, without reservation, the view that an auction purchaser in execution of a money decree is in general, a representative of the judgment-debtor."

In my opinion the auction purchaser is not a person claiming under the transferor within the meaning of that expression in para. 4 of s. 53A of the Transfer of Property Act. The result, therefore, is that the appeal succeeds.

Appeal allowed. The decree of the appellate Court is set aside and that of the trial Court is restored. There will be no orders as to costs.

Appeal allowed.

Before Mr. Justice Naik.

SAHEBRAO ANNA RITPURE

v.

DATTATRAYA KRISHNAJEE PATEL.*

Hyderabad Tenancy and Agricultural Lands Act, 1950 (Hyd. Act XXI of 1950), Secs. 38(6), 38E(1)—Indian Registration Act (XVI of 1908), Secs. 17(1), 49—Certificate issued under s. 38(6)(a) of Hyderabad Tenancy Act whether admissible in evidence—Whether such certificate requires registration.

A certificate issued under s. 38(6)(a) of the Hyderabad Tenancy and Agricultural Lands Act, 1950, operates as a legal transfer and it does not require registration. It is, therefore, admissible in evidence.

Narayan Laxman v. Keshav Bhimji,¹ referred to.

THE facts appear in the judgment.

M. L. Dudhat, for *R. W. Adik*, for the applicant.

M. G. Choudhary, for opponent No. 1.

P. R. Mukhedkar, for opponent No. 2.

NAIK J. This Revision Application raises a somewhat ticklish point under the Hyderabad Tenancy and Agricultural Lands Act, 1950. Respondent No. 1, who is hereinafter described as the plaintiff, filed a suit in ejectment against the petitioner, who is hereinafter described as defendant No. 2, in respect of survey No. 292/D and No. 293/D at village Mangrul, Taluka Kallam. The plaintiff contended that while he was enjoying the land as owner, the husband of defendant No. 1, Sahebrao, forcibly dispossessed him. According to him the date of dispossession is March 15, 1950. It is common ground that Sahebrao

*Decided, March 23, 1965. Civil Revision 1 (1960) 62 Bom. L.R. 889. Application No. 921 of 1963.

died on September 19, 1950, leaving his widow as the only heir. The plaintiff alleges that defendant No. 2, in collusion with defendant No. 1, entered into possession of the land in suit. The plaintiff has, therefore, claimed possession and mesne profits from both the defendants.

Defendant No. 1 appeared and admitted the plaintiff's claim. Defendant No. 2 contended that the land in dispute was gifted to Sahebrao by Krishnaji on the ground that Sahebrao happened to be an illegitimate son of Krishnaji. According to defendant No. 2, he started cultivating the land as tenant of defendant No. 1 since 1955. Defendant No. 2 alleged that defendant No. 1 entered into a deed agreeing to sell the land for a sum of Rs. 2,500. A deed of agreement was executed and Rs. 2,000 were paid under the agreement. The remaining amount was stipulated to be paid at the time of the execution of the sale-deed. Since defendant No. 1 did not fulfil the contract, he filed a suit for specific performance (Suit No. 24 of 1958) and on admission by defendant No. 1, the suit has also been decreed. Defendant No. 1 did not execute the sale-deed in pursuance of the decree for specific performance. Therefore defendant No. 1 applied to the Agricultural Lands Tribunal under s. 38(3). The Tribunal determined the price and defendant No. 2 deposited the amount before the Tribunal. It appears that after the written statement, a certificate was issued under s. 38(6) of the Hyderabad Tenancy Act. Before the framing of the issues defendant No. 2 tendered the certificate in evidence. The plaintiff objected to the admissibility of the document. The trial Court held that the document required registration under s. 17(1) and inasmuch as it has not been registered it is not admissible under s. 49 of the Indian Registration Act. It is against that decision that defendant No. 2 has come up in revision. The only point for consideration is whether the certificate is admissible in evidence or not.

Before considering the question of the admissibility or otherwise, it is necessary to refer to the provisions contained in Chapter 4, relating to protected tenants. Section 34 defines a protected tenant to mean a tenant in respect of land if he—

(a) has held such land as a tenant continuously—

(i) for a period of not less than six years, being a period wholly included in the Fasli years 1342 to 1352 (both years inclusive), or

(ii) for a period of not less than six years immediately preceding the 1st day of January 1948, or

(iii) for a period of not less than six years commencing not earlier than the 1st day of the Fasli Year 1353 (6th October 1943), and completed before the commencement of this Act, and

(b) has cultivated such land personally during such period.

Section 35 relates to decisions on claims and s. 36 relates to the recovery of possession by a protected tenant. They are not relevant for the present discussion. Section 37 embodies the definition of 'deemed tenant' and provides that

"Every person who at the commencement of this Act holds as tenant any land in respect of which no person is deemed to be a protected tenant under section 34, shall, on the expiration of one year from such commencement or, the final rejection of all claims by any other person to be deemed under section 34 to be a protected tenant in respect of such land..."

Section 37 also relates to another category of deemed tenant and provides that every person who at the commencement of the Hyderabad Tenancy and Agricultural Lands Act, 1950, holds as tenant any land in respect of which he is not deemed to be protected tenant under this Act, shall be deemed to be a protected tenant if the total area of the land owned by the landholder including the land under the cultivation of his tenants is more than three times the area of a family holding. It is not disputed that defendant No. 2 is not a protected tenant either within the meaning of s. 34, 37 or 37A. Defendant

No. 1 has himself admitted that defendant No. 2 was his tenant. It is thus clear that defendant No. 2 is an ordinary tenant as distinguished from a protected tenant.

That takes me to the consideration of the provisions of s. 38. Sub-section (1) provides that a protected tenant or an ordinary tenant shall at any time after the commencement of the Hyderabad Tenancy and Agricultural Lands (Amendment) Act, 1954, be entitled to purchase the landholder's interest in the land held by the former as a protected tenant or an ordinary tenant. Sub-section (1), therefore, speaks of the right of a protected tenant or an ordinary tenant, as the case may be, to get the land sold in his favour. Sub-section (2) relates to a protected tenant and provides that a protected tenant who desires to exercise the right conferred by sub-s. (1) shall make an offer to the land-holder stating the price which he is prepared to pay for the landholder's interest in the land. Sub-section (2a)(a) relates to an ordinary tenant and in effect assimilates his position to that of a protected tenant in sub-s. (2). It is clear that in pursuance of his right to purchase the land, it is open to the protected tenant or an ordinary tenant to make an offer about the price on which he is prepared to purchase the land. Sub-section (3) takes into account the contingency of the landholder refusing to accept the offer within a period of 3 months and provides that in that eventuality the protected tenant or the ordinary tenant may apply to the Tribunal for determination of a reasonable price for the land. Sub-section (4) relates to the procedure to be followed by the Tribunal in determining the price of the land. After the amount is determined sub-s. (5) provides that the protected tenant or the ordinary tenant, as the case may be, shall deposit with the Tribunal the amount of the price determined by the Tribunal either in lump sum or in instalments. Sub-section (6)(a) is the most relevant portion for our consideration and it runs thus: (H. T. & A. L. Act) (p. 19):

"On deposit or recovery of the entire amount of the reasonable price (fixed by the tribunal) being made, the tribunal shall issue a certificate in the prescribed form to the protected tenant or the ordinary tenant, as the case may be, *declaring him to be the purchaser of the land and such certificate shall be conclusive evidence of the sale as against the land-holder and all persons interested therein.*"

The scheme laid down by s. 38 runs into different stages. The first stage recognises the right of the protected tenant to have the land sold to him. At the second stage the tenant (protected or otherwise) is to make an offer to the landholder regarding the price, of the land. The third stage is reached when the landholder refuses or fails to accept the offer within a period of 3 months. The fourth stage relates to the fixation of the price according to the mode prescribed in sub-s. (4). At the fifth stage the tenant is expected to deposit the amount of the price with the Tribunal either in lump sum or in instalments. After all these stages have been crossed, the final stage is reached and that has been explained in sub-s. (6). Sub-section (6) in effect provides that on the deposit of the entire amount, the Tribunal shall issue a certificate declaring the tenant to be the purchaser and such certificate shall be conclusive evidence of the sale. The form of the certificate is in form 13 of the Rules which runs thus:

"Whereas Shri... is the protected/ordinary tenant of the land specified below belonging to the land-holder Shri... and whereas under the provisions of sub-section (5) of Section 38 of the Tenancy Act, the tenant was required to deposit and has deposited as the price Rs..., it is hereby declared that the said tenant Shri... was deemed to be the purchaser of the land under provisions of sub-section (6) of section 38 of the said Act."

The effect of the certificate has been stated in sub-s. (6) itself namely that "such certificate shall be conclusive evidence of the sale as against the landholder and all persons interested therein."

Mr. Choudhari contended that s. 38 envisages the execution of the sale-deed

by the landholder, in case an agreement is reached about the price of the land. When such an agreement is not forthcoming then the price is fixed by the Tribunal and after the amount determined by the Tribunal is deposited, a certificate is issued. According to Mr. Choudhari, a certificate does not and cannot stand on higher footing than a sale-deed. He argued that such a sale-deed would not confer any title in the absence of a registered sale-deed. He carried the argument a step further by referring to s. 38E of the same Act. Section 38E(1) runs thus:

“...the Government may, by notification (in the Official Gazette) declare in respect of any area and from such date as may be specified therein that ownership of all lands held by protected tenants which they are entitled to purchase from their landholders in such area under any provision of this chapter shall stand transferred to and vest in the protected tenants holding them and from such date the protected tenants shall be deemed to be the full owners of such lands.”

Sub-section (2) speaks of the certificate which again is to be issued in the prescribed form. Sub-section (2) also lays down that such certificate shall be conclusive evidence of the protected tenant having become the owner of the land with effect from the date of the certificate. Sub-section (3) reserved the right of the tenant to apply to the Tribunal for determination of reasonable price of the land and the price so fixed can be recovered as arrears of land revenue from the defaulting tenant. It will be at once clear that s. 38-E is confined to a case of protected tenant whereas s. 38 applies to the case of a protected as well as an ordinary tenant. Mr. Choudhari referred to the wording of s. 38-E(1) namely “that the land shall stand transferred to and vest in the protected tenants holding them and from such date the protected tenants shall be deemed to be the full owners of such lands”.

It is true that there is difference in the language of s. 38(6) and s. 38E of the Hyderabad Tenancy Act. All that s. 38(6) provides is that the certificate shall declare the tenant as the purchaser and such certificate shall be a conclusive evidence of the sale as against the land-holder and all persons interested therein. The wording of s. 38-E goes a step further and says “that the ownership of the land shall stand transferred and vest in the protected tenant”. Mr. Choudhari argued that the transfer under s. 38-E(1) is statutory transfer and would not require any registration. This question was considered by me in *Narayan Lazman v. Keshav Bhimji*¹ wherein I observed (p. 891):

“...Section 38-E applies when the Government issues a notification that the same may be applicable in respect of a particular area. Section 38-E provides for a statutory transfer of ownership and it does not contemplate the execution of a sale-deed by the vendor in favour of the vendee. A protected tenant becomes the owner of the land by virtue of the provisions of s. 38-E of the Act, when all the conditions laid down in that section have been fulfilled notwithstanding that a regular sale-deed has not been passed. There is nothing to suggest in the wording of s. 38-E of the Act that it allows a sort of option to the tenant”.

Then I have discussed the scheme of s. 38E of the Act. The mere fact that the wording of s. 38-E(1) is different from the wording of s. 38(6) is no ground for holding that s. 38-E(1) brings about the effect of a statutory transfer and s. 38(6) does not do so but merely contemplates the execution of a further document or the registration of the certificate. It is significant to note that under s. 38(6) the determination of the price and its payment precede the issue of the certificate whereas under s. 38E(1) the statutory transfer takes place as soon as a notification is issued; and then, if the protected tenant fails to pay the amount within 90 days, the amount becomes recoverable as land revenue arrears. It is clear that s. 38-E is intended to confer higher rights because it relates to protected tenant. In the case of a protected tenant as soon as the notification is issued statutory transfer takes place notwith-

standing that the price has not been determined and has not been paid. On the other hand under s. 38, the tenant must in the first instance exhaust all his remedies of making an offer and getting the price determined and then make a deposit in accordance with the decision of the Tribunal. The position of the tenant under s. 38(6) is inferior to that of the protected tenant under s. 38E, but once the tenant has gone through the procedures of making the offer and getting the price determined and depositing the said amount, I fail to understand why there should be any difference in his position and that of protected tenant. Section 38(6) clearly says that the certificate shall declare the tenant to be the purchaser of the land. This declaration will have the same effect as a regular deed of sale or gift as the case may be. But the section does not stop at this declaration. It goes further and says that the certificate shall be conclusive evidence of the sale as against the land-holder and all persons interested therein. Similar effect is given to a statutory transfer under s. 38-E, sub-s. (2). Sub-section (2) also says that the certificate shall declare the protected tenant to be owner and such certificate shall be conclusive evidence of the protected tenant having become the owner of the land. The difference between the two is only of a terminological character. Section 38(6) (a) says that the certificate shall be conclusive evidence of the sale whereas s. 38-E(2) speaks of the certificate affording a conclusive evidence of the tenant having become the owner of the land. I think that the difference is only in form and has no significance in substance. As soon as the certificate is issued under s. 38(6) the person holding the certificate will be assimilated to the position of a person in whose favour declaration of ownership is made under s. 38-E. There is nothing to indicate that the Legislature contemplated the need of registering the certificate. Much less the need of execution of another document. I am unable to understand how another document of sale could be obtained by the holder of the certificate. Ordinarily there is no agreement of sale in his favour, and he cannot seek specific performance of the agreement of sale. Of course in the present case there was an agreement of sale, and defendant No. 2 has obtained a decree for specific performance; but that is neither here nor there. I am unable to see how ordinarily the land-holder can be compelled to pass a sale deed voluntarily. All that can be urged is that the certificate should be got registered. But the difficulty will be that the certificate is not an 'instrument' within the meaning of that word in s. 17 of the Registration Act. Apart from this I do not think that the Legislature has contemplated that the certificate needs to be registered. In my view, therefore, as soon as the certificate is issued under s. 38(6), it operates as legal transfer and there is no need of registration of the document. In that view of the case I hold that the document is admissible in evidence and ought to have been allowed to be produced in evidence. I should hasten to add that I am not deciding the question as to whether the certificate would be conclusive so far as the plaintiff is concerned. The question is whether defendant No. 2 who claims to be the tenant of defendant No. 1 acquires any rights of ownership as against the plaintiff and if so what will be the effect of that acquisition upon the plaintiff's rights. This judgment is intended to decide the simple point raised before me namely as to whether the certificate is admissible in evidence or not. The application succeeds. The decision of the trial Court is set aside. It is directed that the certificate should be admitted in evidence. No orders as to costs.

Order accordingly.

SUPREME COURT.

Present: Mr. Justice A. K. Sarkar and Mr. Justice R. S. Bachawat.

RAMKARANDAS RADHAVALLABH

v.

BHAGWANDAS DWARKADAS.*

Civil Procedure Code (Act V of 1908), O. XXXVII; Sec. 151—Bombay Rents, Hotel and Lodging House Rates Control Rules, 1948. Rule 8—Decree passed under O. XXXVII—Application to set aside decree under O. XXXVII, r. 4. dismissed as no special ground made out—Whether resort to s. 151 to set aside decree permissible—Validity of r. 8.

Express provision is made by O. XXXVII, r. 4, of the Civil Procedure Code, 1908, for setting aside a decree passed under O. XXXVII of the Code and, therefore, if a case does not come within the provisions of that rule, there is no scope to resort to s. 151 of the Code for setting aside such a decree.

Rule 8 of the Bombay Rents, Hotel and Lodging House Rates Control Rules, 1948, is not *ultra vires*.

THE facts appear in the judgment.

D. R. Dhanuka, K. Rajendra Chaudhuri and K. R. Chaudhuri, for the appellant.

Purnushottam Tricumdas, with S. T. Tejoriwala, J. B. Dadacharji, O. C. Mathur and Ravinder Narain, for the respondent.

SARKAR J. The appellant was the tenant of the respondent of a third floor flat in Bombay. The tenancy was governed by the Bombay Rents, Hotel and Lodging House Rates (Control) Act, 1947, hereafter referred to as the Rents Act. We will refer to the appellant as the tenant and the respondent as the landlord.

The landlord obtained a decree in ejectment against the tenant in a suit filed under O. XXXVII of the Code of Civil Procedure and the present appeal arises out of an application made by the tenant to set aside that decree under r. 4 of that Order. The question is, should the decree be set aside?

There were various proceedings between the parties before the judgment under appeal came to be passed but it will be unnecessary to refer to all of them. The suit was filed in the Court of Small Causes, Bombay, on November 1, 1960 for ejectment on two grounds, namely, (1) a certain default in payment of rent and (2) unlawful sub-letting of the demised premises. The Rents Act permits ejectment if these grounds are proved. The tenant entered an appearance to the suit on December 3, 1960. On March 23, 1961, the landlord took out a summons for judgement under O. XXXVII, r. 2 and the tenant opposed that summons by an affidavit, setting out various defences to the claim for ejectment to the details of which it is unnecessary to refer. On May 2, 1961, an order was made by consent of parties on that summons directing the tenant to deposit moneys in Court by certain instalments on account of the arrears of rent and providing that if it made a default in making the payments on the dates mentioned, the suit was to be set down for disposal in accordance with law. The effect of this order clearly was to give a conditional leave to defend so that on failure to perform the conditions the tenant would, under the provisions of O. XXXVII, r. 2, no longer have the right to defend the action.

Now the first instalment under the consent order was payable on June 1, 1961. It was not however paid. The tenant thereafter made an application for extension of time and this was rejected on June 22, 1961. It filed an appeal against the order refusing extension of time but this was rejected. The

*Decided, November 20, 1964. Civil Appeal No. 851 of 1964.

tenant then appealed against the consent order of May 2, 1961 but this also failed. Thereafter the suit was placed on the list on June 28, 1961, and a decree in ejectment was passed on that date under the provisions of O. XXXVII on the basis of the statements made in the plaint and without permitting the tenant to appear and oppose. This is the decree which the tenant sought to set aside. These are all the proceedings between the parties that need be mentioned for the purpose of this judgment.

On September 12, 1961, the application under r. 4 of O. XXXVII to set aside the ejectment decree was made to the trial Court. The trial Court dismissed the application holding that no special ground had been made out by the tenant as required by r. 4, O. XXXVII to set aside the decree. The tenant then appealed from this Order to a bench of the Court of Small Causes under s. 29 of the Rents Act which is said to have treated the appeal as a revision. That bench agreed with the trial Court that no special circumstances as required under r. 4 of O. XXXVII had been made out to justify the setting aside of the decree, but it observed that that Court had not considered whether relief could be given to the tenant under s. 151 of the Code and itself set aside the decree acting under that section. The landlord appealed to the High Court from the judgment of the bench. The High Court agreed with the Courts below that no special circumstances justifying the setting aside of the decree existed. It, however, held that there was no scope for applying s. 151 to the present case as r. 4 of O. XXXVII of the Code had made special provision for it. It also rejected the other contentions raised by the tenant, to one of which we will refer later. In the result the High Court allowed the appeal and hence the present appeal to this Court.

Learned advocate for the tenant contended that the High Court was wrong in its view that s. 151 had no application to the present case. We are unable to accept this contention. It has been observed by this Court in *Manohar Lal v. Seth Hirakal*,¹ "The inherent powers are to be exercised by the Court in very exceptional circumstances, for which the Code lays down no procedure." This is a well-recognised principle. Rule 4 of O. XXXVII expressly gives power to a Court to set aside a decree passed under the provisions of that Order. Express provision is thus made for setting aside a decree passed under O. XXXVII, and hence if a case does not come within the provisions of that rule, there is no scope to resort to s. 151 for setting aside such a decree. We, therefore, agree with the High Court that the appellate bench of the Court of Small Causes was in error in setting aside the *ex parte* decree in exercise of powers under s. 151. Again all the Courts have taken the view, and we think rightly, that no circumstances justifying the setting aside of the decree under r. 4 of O. XXXVII existed in the present case. We did not also understand learned advocate for the tenant to rely on any such circumstances in this Court. No question of setting aside the decree under that Order, therefore, arises.

The next point argued by learned advocate for the tenant was that O. XXXVII was not applicable to a decree in ejectment in view of the provisions of the Rents Act in terms of which alone such a decree could be passed. Now s. 49 of the Act gives the Government power to make rules for the purpose of giving effect to its provisions. The Government made certain rules under these powers and r. 8 of these rules provides that suits under the Act may be instituted in accordance with the procedure laid down in O. XXXVII. It is by virtue of this rule that the landlord filed his suit for ejectment under the procedure laid down in O. XXXVII. The High Court of Bombay had made certain amendments to the provisions of O. XXXVII as contained in the Code. Rule 2 of that Order as so amended and so far as relevant, is in these terms:

Rule 2.—(1) "Suits in which the landlord seeks to recover possession of immovable property... may, in case the plaintiff desires to proceed hereunder, be instituted by

presenting a plaint in the form prescribed but the summons shall be in Form No. 4 in Appendix B, or in such other form as may be from time to time prescribed.

(2) In any case in which the plaint and summons are in such forms respectively, the defendant shall not defend the suit unless he enters an appearance and obtains leave from a judge as hereinafter provided so to defend; and in default of his entering an appearance and of his obtaining such leave to defend, the allegations in the plaint shall be deemed to be admitted, and the plaintiff shall be entitled to a decree for possession...."

It is by virtue of this rule that the decree in the present case was passed without permitting the tenant to be heard. This was because the tenant had been given leave to defend on May 2, 1961, on a condition that it paid the arrears of rent by instalments as prescribed in the order. This order had been made by consent and the tenant had failed to perform that condition, the result of which was to deprive him of the leave to defend earlier granted; the case became one as if no leave to defend had been given to the tenant and upon which the landlord became entitled to a decree under sub-r. (2) of r. 2 of O. XXXVII.

The contention of learned advocate for the tenant is that under the provisions of the Rents Act the landlord is not entitled to a decree as a matter of right; the Court has to consider the position of the tenant and has a discretion to pass or not to pass a decree. Therefore, to a suit governed by the Act the provisions of r. 2 of O. XXXVII, which make it incumbent on the Court to pass a decree in circumstances coming within that sub-rule, are inapplicable. It is on this ground that it is said that r. 8 of the Rules made under the Rents Act is *ultra vires* and void.

The first difficulty that appears to us to arise on this line of argument is that even if the contention is right, we cannot in the present appeal make an order setting aside the decree. The appeal has come to us out of an application originally filed in a Court of Small Causes under the provisions of O. XXXVII, r. 4, by the tenant itself. If the present contention is right, then the tenant's application was wholly incompetent. The result of that however would not be to set aside the decree; it would only cause the dismissal of the tenant's application. The tenant has to take other appropriate proceedings to show that the decree was ineffective in case it wants to contend that the suit had not been brought according to the procedure permissible in law, and that it had been illegally deprived of a hearing. It itself having resorted to O. XXXVII, it scarcely lies in it now to contend that that Order is wholly inapplicable. Furthermore, by consenting to the Order of May 2, 1961, it had in this case clearly agreed that the suit had been rightly brought under O. XXXVII. It cannot be allowed to change its position in the proceedings arising out of that very suit. For that reason alone we think no relief can be granted to it in this appeal based on the present contention.

On the merits too, we think that the contention is fallacious. It proceeds on the basis that when leave to defend has been refused to a defendant, the Court is bound to pass a decree. It seems to us that what sub-r. (2) of r. 2 of O. XXXVII contemplates is that the Court will accept the statements in the plaint as correct and on those statements pass such decree as the plaintiff may in law be entitled to. If, for example, the plaint discloses no cause of action, the Court cannot pass any decree in favour of the plaintiff. If this were not so, the words "allegations in the plaint shall be deemed to be admitted" in sub-r. (2) of r. 2 of O. XXXVII would have been unnecessary. The Court in making a decree under sub-r. (2), r. 2 of O. XXXVII has to keep the law in mind. If the law requires the Court to exercise a discretion on the facts deemed to be admitted, it will have to do so.

In the procedure laid down under O. XXXVII the defendant may not be allowed at the hearing to place his side of the case for assisting the Court in the exercise of that discretion, but that does not create any conflict with the Rents Act. A rule can be made quite consistently with the Act that the defendant will have to adopt a certain procedure and to act within a certain time in order to be heard in that matter. Suppose a defendant does not put

in an appearance in a suit for ejectment not brought under O. XXXVII, can he say that the Act gave him a right to appear at the hearing and place his case before the Judge? We feel no doubt that such a thing is not contemplated by the Act and cannot be permitted. Rules of procedure may be framed for the exercise of rights and such rules are not *ultra vires* only because the right has to be exercised in accordance with them. Therefore we do not think that r. 8 is *ultra vires*.

In what we have said in the preceding paragraph we have proceeded on the assumption that the Court has a discretion. Certain provisions in ss. 12 and 13 of the Rents Act had been read to us and it had been contended that they conferred that discretion on the Court. In the view that we have taken, it is unnecessary to express any opinion on that contention and we do not do so.

In the result this appeal fails and it is dismissed with costs.

Appeal dismissed.

Present: The Hon'ble Mr. P. B. Gajendragadkar, Chief Justice, Mr. Justice K. N. Wanchoo, Mr. Justice M. Hidayatullah, Mr. Justice Raghubar Dayal and Mr. Justice J. R. Mudholkar.

THE MUNICIPAL CORPORATION OF GREATER BOMBAY

v.

LALA PANCHAM.*

Bombay Municipal Corporation Act (Bom. III of 1888), Secs. 354R, 354RA; Schedule GG. Clause 2—Constitution of India, Art. 19(1)(f) & (g)—Civil Procedure Code (Act V of 1908), O. XLI, r. 27—Sections 354R & 354RA whether constitutional—Person aggrieved by clearance order under s. 354RA not preferring appeal under cl. 2, Sch. GG or his appeal dismissed—Whether remedy by suit available to such person—Expression “any person aggrieved” in Sch. GG, cl. 2 whether includes tenant or occupant of building likely to be dishoused as result of clearance order—Whether open to such tenant to lodge objection to order under s. 354RA(4).

The restrictions on the tenants' right to hold property enacted by ss. 354R and 354RA of the Bombay Municipal Corporation Act are not unreasonable and the provisions of the sections are valid.

Finality is given to a clearance order under s. 354RA of the Act after its confirmation by the Government and its publication in the manner prescribed in clause (1) of Schedule GG to the Act, subject only to the result of an appeal preferred under clause (2) of Schedule GG by a person aggrieved. If no such appeal is preferred or if such appeal is filed and dismissed no remedy by suit is available to a person like a tenant who contends that he is aggrieved.

The words “and specifying the time within and the manner in which objections thereto can be made to the Commissioner” occurring at the end of clause (b) of s. 354RA(4) of the Bombay Municipal Corporation Act should be read as governing not only the rest of clause (b) of s. 354RA(4) but also clause (a) of s. 354RA(4).

The expression “any person aggrieved” in clause 2 of Schedule GG to the Bombay Municipal Corporation Act is sufficiently wide to include not only a tenant but also an occupant of a building who is likely to be dishoused as a result of the action taken under a clearance order.

It is open to a tenant of the building included in the area to which a clearance order made under s. 354RA of the Act relates, to lodge an objection to the proposed order under s. 354RA(4).

Ex parte Sidebotham. In re Sidebotham¹ and Md. Sharfuddin v. R. P. Singh,² referred to.

Order XLI, r. 27(1)(b) of the Civil Procedure Code, 1908, does not entitle the High Court to let in fresh evidence at the appellate stage where even without such

*Decided, October 1, 1964. Civil Appeal No. 134 of 1964.

1 [1880] 14 Ch. D. 458.

2 [1957] A.I.R. Pat. 235.

evidence it can pronounce judgment in a case. It does not entitle the appellate Court to let in fresh evidence only for the purpose of pronouncing judgment in a particular way. It is only for removing a lacuna in the evidence that the appellate Court is empowered to admit additional evidence.

It is not open to a Court to compel a party to make a particular kind of pleading or to amend his pleading and it is also beyond its competence to virtually oblige a party to examine any particular witness.

THE facts appear in the judgment.

M. C. Setalvad, with *J. B. Dadachanji*, for the appellant.

S. V. Gupte, Additional Solicitor General of India, with *G. A. Pandya* and *M. I. Khowaja*, for respondents Nos. 7, 8 and 9.

I. N. Shroff, for respondent No. 4.

MUDHOLKAR J. The question which falls for decision in this appeal from the judgment of the High Court of Bombay is whether the suit instituted by the plaintiffs in the City Civil Court, Bombay, was maintainable. The plaintiffs are some of the tenants occupying different rooms in a group of buildings known as Dhobi Chawls (and also known as the Colaba Land Mill Chawls) situate on Lala Nigam Road, Colaba, Bombay. There are a large number of other tenants also who reside or carry on business in these Chawls and the plaintiffs instituted a suit in a representative capacity on behalf of all the tenants. Defendant No. 1 to the suit is the Municipal Corporation of Greater Bombay and the remaining defendants Nos 2 to 4 are landlords of the plaintiffs.

The buildings and the land on which they stand belong to the Colaba Land Mill Co., Ltd., Bombay. Under an agreement dated May 16, 1956, called the Demolition Agreement defendants Nos. 2 to 4 undertook for a certain consideration to demolish the buildings which are admittedly in a dilapidated condition after taking the permission of the Rent Controller, Bombay. Under cl. 7 of that agreement defendants Nos. 2 to 4 were to be put in possession of the buildings and land on which they stand, with leave and licence of the Company and were liable to pay Rs. 20,221-8-0 p.a. to the Company till the demolition of the buildings and thereafter they were to hold the land as tenants at will of the Company. Until the demolition of the buildings, defendants Nos. 2 to 4 were entitled to the rents payable by the tenants occupying the buildings and were liable to pay monthly taxes, insurance premia and other dues payable in respect of the buildings. After the demolition of the buildings defendants Nos. 2 to 4 were entitled to all the materials and debris but had to pay Rs. 40,000 as the price thereof to the Company. Out of this amount these defendants had to pay and had actually paid Rs. 10,000 at the time of the agreement.

The plaintiffs' contention is that the buildings were in a dilapidated condition for a number of years and that between August 1951 and May 1956 as many as 138 notices were served on the Company for effecting repairs to the buildings but they took no action whatsoever in this regard. The plaintiffs further say that between November 1956 and January 29, 1960, eleven notices were served on defendants Nos. 2 to 4 for the same purpose but no action was taken by them either on those notices. Further the Company and defendants Nos 2 to 4 were prosecuted 71 times for not complying with the notices but even these prosecutions proved ineffective. Their contention is that the Company as also defendants Nos. 2 to 4 deliberately refrained from carrying out the repairs because they wanted to demolish the buildings and in order to facilitate the attainment of this object they invited various notices issued by the Corporation and the prosecutions launched by it.

The plaintiffs admit that the Corporation, in exercise of the powers conferred by s. 354R of the Bombay Municipal Corporation Act, 1888, (hereafter referred to as the Act) have declared the area in which the buildings stand as a clearance area and under s. 354RA of that Act made a clearance order which has

been duly confirmed by the State Government. According to them, however, these provisions are *ultra vires* of arts. 19(1)(f) and (g) of the Constitution. Further, according to them defendant No. 1 has abused the provisions of the Act and that the action taken by it is *mala fide*. No particulars of *mala fides* have, however, been set out in the plaint.

The defendants denied that the aforesaid provisions are *ultra vires* and also denied that the Order was made *mala fide*. They further contended that the present suit was barred by virtue of the provisions of cl. (2) of Schedules GG to the Act and was also barred by time.

The trial Court dismissed the suit mainly upon the ground that it was not tenable. An appeal was taken by the plaintiffs to the High Court which was dismissed summarily by Datar J., on August 25, 1961. On the same day the plaintiffs preferred an appeal under the Letters Patent which went up before a Division Bench consisting of Patel and Palekar JJ. The learned Judges permitted the plaintiffs to amend the plaint over-ruling the objections of the defendants. In their judgment the learned Judges held that the suit was not barred. Then they proceeded to consider the question of *mala fides*. According to them the plaintiffs had pleaded *mala fides* but that they had omitted to give particulars. They also observed that it was true that no evidence was led by the plaintiffs before the trial Court and ordinarily they would not have been entitled to lead fresh evidence at that stage, much less so at the stage of the appeal under Letters Patent. According to them, however, it is not possible to dispose of the case on the material on record, that there are certain documents on record which, if unexplained,

"support in a large measure the contention of the plaintiffs that defendants 2, 3 and 4 obtained an order by fraud and also that the order was *mala fide*."

After referring to some of these documents they observed:

"Though therefore no evidence is led on the question of *mala fides* or fraud committed upon them, it *prima facie* leads to such an inference, and it would not be proper to decide the question without requiring further evidence."

This observations was followed by another which, we think, is a very unusual one. It is this:

"We particularly want the Commissioner and the City Engineer and the defendants to be examined on this question."

Eventually, the learned Judges remitted the case to the City Civil Court for recording additional evidence and directed that Court to certify the evidence and its findings by the end of November, 1962. After the grant of special leave to the appellants the proceedings before the City Civil Court have been stayed.

We must first address ourselves to the question as to whether the High Court was justified in permitting the amendment to the plaint. By that amendment the plaintiffs have added para. 8A to the plaint. There they have purported to summarise the correspondence which took place between the plaintiffs and the officers of the Corporation and between the landlords and the Corporation. Then they have stated as follows:

"In the premises the plaintiffs say that the Defendants 2, 3 and 4 have fraudulently and wrongfully induced the 1st defendant to make the said order. In the alternative and in any event plaintiffs say that as defendants 2, 3 and 4 have desired (*sic*) their responsibility to provide accommodation to all the tenants in the new buildings intended to be constructed on the site, the plaintiffs will submit that the approval of the Improvement Committee to the said Order and the subsequent confirmation thereof by the Municipal Corporation and Government was given under a mistake of fact and under circumstances not warranted by the provisions of section 354R and of the law. In the circumstances the plaintiffs submit that the said orders passed by the 1st defendant under section 354R have been passed in utter disregard and in violation of the strict provisions of the said section. The plaintiffs submit that the 1st defendant failed and neglected before making the said order to take any measures whether by arrangement

of the programme or otherwise to ensure that as little hardship as possible was inflicted on the tenants. The plaintiffs accordingly submit that the said orders are illegal, invalid and void."

In the plaint as originally filed, in para. 9 they have said the following on the question of *mala fides*:

"The plaintiffs submit that the action sought to be taken is a clear abuse of the provisions of the Bombay Municipal Corporation Act and as such *ultra vires* the powers conferred upon the defendant No. 1 by the said Act. The plaintiffs, therefore, submit that the action of the defendant No. 1 is *mala fide*."

In the earlier paragraph the plaintiffs have challenged the validity of s. 354R, and 354RA on the grounds that they confer untrammelled and uncontrolled executive discretion upon the Corporation and its officers and also upon the ground that they are violative of the plaintiffs' rights under art. 19(1)(f) and (g) of the Constitution. They have not indicated why the making of the clearance order by the Corporation was an abuse of the provisions of the Act. No doubt, later in para. 9 they say that the Corporation failed to give a hearing to the plaintiffs and that had they been given an opportunity they would have satisfied the Corporation that the premises in question did not require to be pulled down. While, therefore, it is true that the plaintiffs have characterised the action of the Corporation as "*mala fide*" the grounds upon which the action is characterised as *mala fide* appear to be (a) the unconstitutionality of the provisions of ss. 354R and 354RA and (b) failure of the Corporation to give an opportunity to the plaintiffs to satisfy its officers that the premises did not require to be demolished. By the amendment made by them in pursuance of the order of the High Court they have shifted their ground by saying that the landlords have fraudulently and wrongfully induced the Corporation to make the order and plead alternatively that as the landlords have denied their responsibility to provide accommodation to all the tenants in the new building intended to be constructed on the site, a clearance order could not properly be made by the Corporation.

It was urged before us by Mr. Setalvad that an entirely new case has been made out in the amendment and that the plaintiffs did so at the suggestion of the Court. In support of his contention he also referred to the objection of Mr. S. V. Gupte before the High Court to the effect that the plaintiffs had not made an application for the amendment of the plaint. He further, relying upon a reference in the judgment, said that the amendment proposed by the plaintiffs was not found by the Court to be adequate and that it was at the instance of the Court that the plaintiffs proposed the amendment which now actually finds place as para. 8A of the plaint. There appears to be good foundation for what Mr. Setalvad says but merely because an amendment was sought by the plaintiffs at the suggestion of the Court it would not be proper for us to disallow it unless there are grounds for holding that it was forced upon an unwilling party. That is, however, not the suggestion. For, the Court wanting to do justice may invite the attention of the parties to defects in pleadings so that they could be remedied and the real issue between the parties tried. There is, however, another ground and a stronger one which impels us to hold that the amendment should never have been allowed. That ground is that the plaintiffs are now making out a case of fraud for which there is not the slightest basis in the plaint as it originally stood. The mere use of the word *mala fide* in the plaint cannot afford any basis for permitting an amendment. The context in which the word *mala fide* is used in the plaint clearly shows that what the plaintiffs meant was that the order of the Corporation having been made in exercise of arbitrary powers and having the result of adversely affecting the plaintiffs' right under art. 19(1)(f) and (g) of the Constitution amounted to an abuse of the provisions of the Act and was thus made *mala fide*.

The High Court was quite alive to the requirement of law that a party should not be allowed to make out a new case by way of an amendment to the pleading.

Dealing with this matter the High Court has observed:

"This brings us to the course which we must adopt in the present case and the amendment application. In the plaint, the plaintiff alleged that the order was *mala fide* and that it was obtained for collateral purposes."

The learned Judges were not correct in observing that it was the plaintiffs' case in the plaint that the landlords had obtained the clearance order or that the Corporation had made order for a collateral purpose. This impression of the High Court seems to be the basis of the rather curious procedure which it chose to follow in this case. Then the High Court referred to the fact that no evidence whatsoever had been led by the plaintiffs before the City Civil Court to the effect that the order was passed fraudulently or for a collateral purpose. It was alive to the fact that in such a case a party should not be allowed to adduce fresh evidence at the appellate stage and much less so at the stage of letters patent appeal. Then it observed:

"If the case had rested thus the matter would have been very simple apart from the amendment application. It seems to us however that it is not possible to dispose of this case satisfactorily on the material on record. There are some documents on record which if unexplained support in a large measure the contention of the plaintiffs that defendants 2, 3 and 4 obtained the order by fraud and also that the order was *mala fide*." If the High Court, in making these observations, was referring to the provisions of O. XLI, r. 27, Code of Civil Procedure, it ought not to have overlooked the mandatory provisions of cl. (b) of sub-r. (1) of r. 27. No doubt, under r. 27 the High Court has the power to allow a document to be produced and a witness to be examined. But the requirement of the High Court must be limited to those cases where it found it necessary to obtain such evidence for enabling it to pronounce judgment. This provision does not entitle the High Court to let in fresh evidence at the appellate stage where even without such evidence it can pronounce judgment in a case. It does not entitle the appellate Court to let in fresh evidence only for the purpose of pronouncing judgment in a particular way. In other words, it is only for removing a lacuna in the evidence that the appellate Court is empowered to admit additional evidence. The High Court does not say that there is any such lacuna in this case. On the other hand what it says is that certain documentary evidence on record supports "in a large measure" the plaintiffs' contention about fraud and *mala fides*. We shall deal with these documents presently but before that we must point out that the power under cl. (b) of sub-r. (1) of r. 27 cannot be exercised for adding to the evidence already on record except upon one of the grounds specified in the provision. If the documents on record are relevant on the issue of fraud the Court could well proceed to consider them and decide the issue. The observations of the High Court that certain documents would support the plaintiffs' contention of fraud only if they were not explained would show that according to it they furnish a *prima facie* evidence of fraud. There is nothing to show that the defendants or any of them wanted to be afforded an opportunity for explaining the documents. It would further appear that it was not merely for the limited purpose of affording the defendants an opportunity to explain the documents that the High Court remitted the case to the City Civil Court. For, in the concluding portion of its judgment the High Court has directed as follows:

"In the result, we remit the case to the City Civil Court for receiving additional evidence as directed by us in the judgment and also to allow evidence on the amendment. We direct that the defendants do file their written statement within three weeks from today, or at such earlier time as they can in answer to the amendment permitted to be made. Discovery and inspection forthwith within a week thereafter. And after this formality is over, the case to be on the Board for final hearing for taking evidence on the issue of *mala fide* and the issues that arise on the amended pleadings between the parties..."

This clearly shows that what the High Court has in substance done is to order

a fresh trial. Such a course is not permissible under O. XLI, r. 27, Code of Civil Procedure. The High Court has quite clearly not proceeded under O. XLI, r. 25, because it has not come to the conclusion that the City Civil Court had omitted to frame or try an issue or to determine the question of fact which was essential to the right decision of a suit. For, the High Court has not indicated which issue was not tried by the trial Court. If the High Court meant that the necessary issue had not been raised by the trial Court though such issue was called for in the light of the pleadings, the High Court is required under this rule to frame the additional issue and then remit it for trial to the City Civil Court. Finally, this is not a case which was decided by the trial Court on any preliminary point and, therefore, a general remand such as is permissible under r. 23 could not be ordered.

The only documents to which the High Court has referred to in its judgment as supporting the plaintiffs' allegations of fraud and *mala fides* are the letter dated September 3, 1959, which the City Engineer wrote to the Tenants' Association and the letter dated September 11, 1959 which the Commissioner wrote to the Improvements Committee. In the first of these letters the City Engineer had stated that the landlords had agreed to construct a building consisting of single room tenement for the purpose of letting out at standard rents and that the landlords were taking the responsibility for providing either alternative accommodation to *bona fide* residents by shifting them temporarily to other premises or by arranging a phased programme of demolition and construction as may be found convenient. How this letter can afford any evidence of fraud or *mala fides* it is difficult to appreciate. It is not disputed before us that the landlords had constructed some chawls at Kurla and that they had offered to house the tenants of the Dhobi Chawls in the Kurla Chawls temporarily. It was also not disputed that the landlords had agreed to construct, after the demolition work was over, new buildings in which the present tenants would be afforded accommodation at standard rents. Paragraph 3 of the letter of September 11, 1959, quoted by the High Court in its judgment mentions that a representation was received from the tenants to the effect that the landlord should construct a new structure near about the clearance area instead of asking the tenants to go to the Kurla Chawls. But their demand cannot be regarded as reasonable. The landlords are not shown to own any land in the neighbourhood. The correspondence through which we were taken by Mr. Setalvad abundantly shows that land values are very high in Colaba and range between Rs. 250 and Rs. 275 per sq. ft., and the landlords could not be reasonably expected to buy land for the purpose. Moreover, there is nothing to show that any vacant building site was available in the neighbourhood of Dhobi Chawls at the relevant time.

The High Court observed in its judgment that it was only after the scheme was finally approved by the Corporation, confirmed by the State Government and the final orders made by the City Civil Court became operative that the City Engineer wrote to the Tenants' Association stating that no undertaking was given by the landlord. The High Court had apparently in mind the letter dated April 1, 1960, sent by the City Engineer to the Tenants' Association which is described in the paper books as item no. 38. That letter reads thus:

"Gentlemen,

Reference: your letter no. nil dated 19-2-1960. The landlord of the abovementioned property has undertaken the responsibility of providing alternative accommodation to *bona fide* residential tenants at standard rent by constructing a building on one of the plots viz. plot No. 7 at the same site. The question of making the site available for the construction of the said building, either by the tenants shifting temporarily to other place or by the landlord arranging a phased programme of demolition and construction, it is a matter which should be mutually arranged by the landlords and the tenants. The Municipality would facilitate towards arriving at any such arrangement between the two parties as indicated by you, no undertaking has been obtained by the Municipality from the landlord for any phased programme of demolition of the Chawls. The landlord will

be required to demolish the chawls in compliance with the Clearance Order after the same becomes operative.

As there is no sufficient open space available at the above property, it does not seem feasible to provide temporary accommodation for the tenants at the same site. If the tenants are not in a position to make their own arrangement to shift from the place, they should temporarily shift to tenants (sic) at Kurla offered to them by the landlord with a view to facilitate speedy construction of the proposed building.

Yours faithfully,
Sd./_____”

This letter, far from showing that either the Corporation or the landlords had gone back on the assurance of providing the tenants alternative accommodation, reaffirms it. No doubt it says that no undertaking was obtained by the municipality from the landlords to the effect that a phased programme of demolition of the chawls would be followed. This, the City Engineer pointed out, was a matter of negotiation between the landlords on the one hand and the tenants on the other. Having made alternative arrangements for housing the tenants temporarily there was no further responsibility either on the Corporation or on the landlords to do anything more. The High Court, however, thought otherwise and observed:

“Though therefore no evidence is led on the question of *mala fides* or fraud it *prima facie* leads to such an inference and it is not proper to decide the question without further evidence.”

It will be repeating ourselves to say that in these circumstances the High Court had no powers to admit additional evidence or to direct additional evidence being taken.

Mr. Shroff, who appears for the plaintiffs, has referred us to two reports of architects in which the architects have stated that repairs to the buildings would cost Rs. 2 lacs whereas new buildings would cost Rs. 3 lacs and that, therefore, the best thing for the landlords to do was to approach the Corporation for making a clearance order so that they could eventually construct new buildings on the site. According to learned counsel this circumstance taken with the fact that there was deliberate avoidance by the landlords and the owners of the Colaba Land Mill Co. Ltd., to comply with the notice of the Corporation to undertake repairs, goes to show collusion between the landlords and the Corporation and that, therefore, it cannot be said that there was no material on record in support of the plea of fraud set out in para. 8A. Apart from the fact that the High Court has not referred to this material it is sufficient to observe that though the landlords may have deliberately allowed the buildings to become unfit for human occupation or a danger to the safety of the tenants occupying them, these matters do not indicate any collusion between the landlords and the Corporation.

We are, therefore, of the view that the High Court was in error in allowing the amendment to the plaint and in remitting the suit to the trial Court for a virtual retrial. The High Court, however, did not rest content with this order but further directed “we particularly want the Commissioner and the City Engineer and the defendants to be examined on this question”—the question being the breach of an assurance given to the tenants. In making this direction the High Court may have been actuated by a laudable motive but we think it ought to have borne in mind the limits which the law places upon the powers of the Court in dealing with a case before it. Just as it is not open to a Court to compel a party to make a particular kind of pleading or to amend his pleading so also it is beyond its competence to virtually oblige a party to examine any particular witness. No doubt, what the High Court has said is not in terms a peremptory order but the parties could possibly not take the risk of treating it otherwise. While, therefore, it is the duty of a Court of law not only to do justice but to ensure that justice is done it should bear in mind that it must act only according to law, not otherwise.

The question then is whether we should send back the matter to the High Court for deciding the question of the vires of ss. 354R and 354RA. It will be remembered that the High Court has not given a finding on this point. We would ordinarily have sent back the case to the High Court for deciding the point. But bearing in mind the fact that the clearance order was made by the Corporation as long ago as May 7, 1959, and confirmed by the State Government on January 23, 1960, and also the possibility of the appeal not being dealt with within a reasonable time by the High Court on account of the congestion of work there, we thought it appropriate to hear the parties on this point as well and to decide it ourselves.

The contention of Mr. Shroff is briefly this. The plaintiffs and those who are occupying the buildings have an interest in them by reason of the fact that they are tenants. As a result of the clearance order they are liable to be evicted from their respective tenements. Therefore, he contends, the Corporation could not make such an order without giving them an opportunity of showing cause against it. According to him, the provisions of ss. 354R and 354RA do not contemplate an opportunity to be given to the tenants before a clearance order is passed and, therefore, the provisions are *ultra vires*. Further, according to him, their suit is not barred by virtue of the provisions of cl. (2) of Schedule GG, because they cannot be said to be "persons aggrieved" by the clearance order. They, therefore, did not have a right to prefer an appeal before a Judge of the City Civil Court, Bombay, from that order. He also points out that the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, has placed restrictions on the right of a landlord of a house situated in an area like the city of Bombay to which the Act extends, to evict a tenant therefrom by enacting in s. 12 that a tenant shall not ordinarily be evicted as long as he pays the standard rent and permitted increases, whatever may have been the duration of his tenancy, under the original agreement. A right conferred by this provision on the tenant exists independently of the landlord's right to own and possess property and this right could not be interfered with or derogated from by the Corporation by making a clearance order behind the back of the tenant. He admits that under cl. (hh) of sub-s. (1) of s. 13 a landlord will be entitled to recover possession of the premises from the tenant on the ground that they are required by a local authority or other competent authority. But, he argues, this provision furnishes another reason for the tenant being afforded an opportunity by the Act to show cause against a proposed clearance scheme which affects or is likely to affect him inasmuch as he will be bound by the clearance order in a proceeding undertaken by the landlord under s. 13(1) of the Act for recovery of possession of the demised premises on the strength of that order.

We have no doubt that a tenant has both under the Transfer of Property Act and under s. 12 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, an interest in the demised premises which squarely falls within the expression property occurring in sub-cl. (f) of cl. (1) of art. 19 of the Constitution. The right which a tenant enjoys under this sub-clause is, however, subject to the provisions of cl. (5) of art. 19 which, among other things, provides that the right recognised by the sub-clause does not affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses in the interests of the general public. The Bombay Municipal Corporation Act was admittedly an existing law at the date of the commencement of the Constitution but ss. 354R to 354RA were substituted for the earlier provisos by s. 18 of Bombay Act XXXIV of 1954. So what we have to ascertain is whether the law as it stands imposes a reasonable restriction on the tenant's right to hold the demised premises. For this purpose we will have to examine the provisions of the Act which empower the Corporation to make a clearance order.

Sub-section (1) of s. 354R provides that if it shall appear to the Commissioner, among other things, (a) that residential buildings in any area are by

reason of disrepair unfit for human habitation or for like reason dangerous or injurious to the health of the inhabitants of the area and (b) that the conditions in the area can be effectually remedied by the demolition of all the buildings in the area without making an improvement scheme, the Commissioner can define the area and submit a draft clearance scheme for the approval of the Corporation. The Corporation can then pass a resolution declaring that the area as defined and approved by it to be clearance area. Sub-section (2) provides, among other things, that the Corporation should ascertain the number of persons who are likely to be dishoused in such area and thereafter take such measures as are practicable to ensure that as little hardship as possible is inflicted on those dishoused. The resolution is then required to be forwarded to the State Government.

Sub-section (4) provides as follows:

"As soon as may be after the Corporation have declared any area to be a clearance area, the Commissioner shall, in accordance with the appropriate provisions hereafter contained in this Act, proceed to secure the clearance of the area in one or other of the following ways, or partly in one of those ways, and partly in the other of them, that is to say—

- (a) by ordering the demolition of the buildings in the area; or
- (b) by acquiring on behalf of the Corporation land comprised in the area and undertaking or otherwise securing, the demolition of the buildings thereon."

Sub-section (1) of s. 354RA requires the Corporation to submit the clearance order to the State Government for confirmation. Sub-section (4) reads thus:

"Before submitting the order to the State Government, the Commissioner shall—

- (a) publish simultaneously in the *Official Gazette* and in three or more newspapers circulating within Greater Bombay, a notice stating the fact of such a clearance order having been made and describing the area comprised therein and naming a place where a copy of the order and of the plan referred to therein may be seen at all reasonable hours; and

- (b) serve on every person whose name appears in the Commissioner's assessment book as primarily liable for payment of property tax leviable under this Act, on any building included in the area to which the clearance order relates and, so far as it is reasonably practicable to ascertain such persons, on every mortgagee thereof, a notice stating the effect of the clearance order and that it is about to be submitted to the State Government for confirmation, and specifying the time within and the manner in which objections thereto can be made to the Commissioner."

Under sub-s. (5) objections, if any, received by the Commissioner are to be submitted to the Improvements Committee and that Committee is entitled under sub-s. (6) to make such modifications in respect of the order as it may think fit. The matter is then to go to the Corporation and thereafter to the State Government. Sub-section (7) provides that the provisions of Schedule GG to the Act shall have effect with respect to the validity and date of operation of a clearance order. We are not concerned with the rest of the provisions of s. 354RA. Clause (1) of Schedule GG provides that as soon as the clearance order is confirmed by the State Government the Commissioner has to publish, in the same manner as a notice under sub-s. (4) of s. 354RA, a notice stating that the order has been confirmed. Clause (2) is important and we would reproduce it. It runs thus:

"Any person aggrieved by such an order as aforesaid, or by the State Government's approval of a redevelopment plan or of a new plan may, within six weeks after the publication of notice of confirmation of the order, or of the approval of the plan, prefer an appeal to a Judge of the City Civil Court, Bombay, whose decision shall be final."

It is contended on behalf of the Corporation by Mr. Setalvad and also on behalf of the landlords by the Solicitor General that a tenant is entitled to raise an objection to the making of a clearance order not only under cl. (b) of sub-s. (4) of s. 354RA but also in his appeal under cl. (2) of Schedule GG. It is no doubt true that there is no express mention of tenants in either of these provisions

but from the fact that cl. (a) of sub-s. (4) of s. 354RA requires the publication of the clearance order it would be reasonable to infer that the object of doing so is to invite objections at the instance of persons who would be affected by the order. Since tenants would be affected by it, they fall in this class. It is true that cl. (b) of that provision contemplates actual service of notice only on the persons primarily liable to pay property tax and on the mortgagees of the property but not on others and also says that the time within and the manner in which objections to the order could be made to the Commissioner should also be specified but it does not say anything regarding the tenants. But if because of this we were to hold that it would not be open to a tenant or any other person who would be affected by the order, to lodge an objection to the proposed order it would be making the publication of notice practically meaningless. Undoubtedly tenants are persons who would be affected by the order. Sub-section (2) of s. 354R casts certain duties upon the Corporation with respect to the persons who are likely to be dishoused in consequence of the clearance order. It would, therefore, be legitimate to infer that a corresponding right was conferred upon the tenants to secure the performance of its duties towards them by the Corporation. This right would be in addition to their interest in the property itself. They must, therefore, be held to be persons who are entitled to lodge an objection to the proposed order. Mr. Shroff, however, contends that cl. (b) of sub-s. (4) of s. 354RA confines the right to lodge an objection only to the persons specified in that clause and that there is nothing in the language of cl. (a) from which a similar right can be deduced in favour of other persons. It seems to us that in order to give full effect to the provisions of both cls. (a) and (b) of sub-s. (4) the words "and specifying the time within and the manner in which objections thereto can be made to the Commissioner" occurring at the end of cl. (b) should be read as governing not only the rest of cl. (b) but also cl. (a). We would not be re-writing the section if we did so because if the object of the Legislature was to give a right to lodge objections only to the persons specified in cl. (4) (b), sub-s. (5) would not have said that the Commissioner shall submit to the Improvements Committee the objections received under sub-s. (4), but would have said instead "objections received under clause (b) of sub-section (4)".

That a right has been conferred upon a tenant to lodge an objection is made further clear by the provisions of cl. (2) of Schedule GG which we have earlier reproduced. The expression "any person aggrieved" is sufficiently wide to include not only a tenant but also an occupant of a building who is likely to be dishoused as a result of the action taken under a clearance order. The expression "person aggrieved" has not been defined in the Act and, therefore, we are entitled to give it its natural meaning. The natural meaning would certainly include a person whose interest is in any manner affected by the order. We are supported in this by the observations of James L. J., in *Ex parte Sidebotham*: In re *Sidebotham*.¹ A similar expression occurring in s. 24(1) of the Administration of Evacuee Property Act, 1950, was the subject of construction in *Md. Sharfuddin v. R. P. Singh*.² The learned Judges there held that these words are of the widest amplitude and are wide enough to include an Assistant Custodian of Evacuee Properties.

Since the right conferred by cl. (2) of Schedule GG upon an aggrieved person is a right to prefer an appeal against a clearance order, as confirmed by the Government, before a Judge of the City Civil Court, Mr. Shroff contends that the words "aggrieved person" therein must necessarily mean a person who was a party to the order. It is true that ordinarily a right of appeal is conferred on a person who is a party to the proceeding but that would be so only where the proceeding is between certain parties. A proceeding of the nature contemplated by s. 354R is not, strictly speaking, a proceeding between the parties ranged on opposite sides. What is contemplated is the exercise of cer-

1 (1880) 14 Ch.D. 458, at p. 465.

2 [1957] A.I.R. Pat. 235.

tain powers by the Corporation which will affect the interests of a variety of persons or a class or classes of persons and cl. (2) of Schedule GG gives a right to any of them to prefer an appeal if his legal right or interest is affected by any action of the Corporation taken in pursuance of its powers.

Upon a reasonable construction of s. 354RA and Schedule GG it must, therefore, be held that they afford opportunities to tenants to object to the clearance order. It follows from this that the restrictions on the tenants' right to hold property enacted by ss. 354R and 354RA are not unreasonable and that the provisions are valid. Mr. Shroff agrees that if the restrictions are reasonable his contention that these provisions are unconstitutional must fail.

Upon the view then that these provisions are valid it must further follow that it was open to the plaintiffs to prefer an appeal before a Judge of the Civil Court. Finality is given to a clearance order after its confirmation by the Government and its publication in the manner prescribed in cl. (1) of Schedule GG subject only to the result of an appeal preferred under cl. (2) of Schedule GG by a person aggrieved. If no such appeal is preferred or if such appeal is filed and dismissed no remedy by suit is available to a person like a tenant who contends that he is aggrieved. Agreeing with the learned City Civil Court Judge we hold that the plaintiff's suit was not maintainable.

Accordingly, we set aside the judgment of the High Court and allow this appeal. We, however, make no order as to costs.

Appeal allowed.

INCOME-TAX REFERENCE.

Before Mr. Justice Tambe and Mr. Justice V. S. Desai.

THE COMMISSIONER OF INCOME-TAX, BOMBAY CITY I

v.

M/S. CIBA PHARMA PRIVATE LIMITED.*

Indian Income-tax Act (XI of 1922), Secs. 10(2)(xii), 10(2)(xv)—Expenditure laid out on scientific research, what is—Amount paid by assessee to another merely to obtain knowledge whether allowable deduction—Whether necessary that research should be carried on by assessee.

In order to bring a case within s. 10(2)(xii) of the Indian Income-tax Act, 1922, it is incumbent on the assessee on whom the burden lies, to establish that the expenditure incurred by him was on a research carried on either by himself or on his behalf or at his instance for the purposes of his own business. The sum paid by an assessee to another merely to obtain the knowledge gained by him by carrying on research for himself cannot be said to be an expenditure incurred by the assessee on scientific research, because it is neither carried on by him, nor on his behalf, nor at his instance.

For an expenditure to be one laid out and expended on such scientific research, there must be some direct or at any rate proximate nexus or connection between the expenditure and the scientific research and the research and business of the assessee.

A company dealing in drugs, chemicals, pharmaceuticals etc. was in possession of very valuable technical knowledge and practical experience as a result of its long and extensive research in the pharmaceutical field. It had obtained patent rights in respect of certain products and had also registered its trade marks. Under an agreement the company granted to the assessee, which was one of its subsidiaries, the user of the patents and trade marks and gave the assessee the technical "know-how" and assistance. The use of the knowledge or the practical experience was limited only for the purpose of the conduct of the business during the period of the agreement which was of a duration of five years. The assessee in return agreed to give to the company a certain percentage of the sale price of the pharmaceutical pro-

*Decided, January 20/21, 1966. Income-tax Reference No. 67 of 1961.

ducts manufactured by it. On the question whether the payment so made by the assessee to the company was an allowable deduction under s. 10(2)(xv) of the Indian Income-tax Act, 1922:—

Held, that in the transaction between the company and the assessee there was no transfer of any property or asset, nor any capital element was involved therein and, therefore, the transaction was not “capital in nature”,

that the payment was laid out or expended wholly and exclusively for the purposes of the assessee's business, and

that, therefore, the assessee was entitled to the deduction under s. 10(2)(xv) of the Act in respect of this payment.

S. F. Engineer v. Commr., Inc.-Tax,¹ *Assam Bengal Cement Co. Ltd. v. Commr. of Inc.-tax*,² *State of Madras v. G. J. Coelho*,³ *Bombay Steam Navigation Co. Ltd. v. Commissioner of Income-tax, Bombay*,⁴ *British Sugar Manufacturers, Ltd. v. Harris (H. M. Inspector of Taxes)*⁵ and *Muskar v. English Electric Co., Ltd.*,⁶ referred to.

THE facts are stated in the judgment.

G. N. Joshi, with *R. J. Joshi*, instructed by *P. G. Gokhale*, for the applicant.
N. A. Palkhivala, with *F. N. Kaka*, for the respondents.

TAMBE J. This is a reference under sub-s. (1) of s. 66 of the Indian Income-tax Act and is in respect of the five reference applications made to the Tribunal relating to the assessment years 1949-50, 1950-51, 1951-52, 1952-53 and 1953-54: the accounting years being the respective previous calendar years. After consolidation of these five reference applications relating to the aforesaid assessment years, two questions of law have been referred to this Court. The first question is common for all the five years and the second question is common only for three assessment years, viz. 1950-51, 1951-52 and 1952-53. Facts giving rise to this reference in brief are:

The assessee company Messrs. Ciba Pharma Private Limited, Bombay, hereinafter referred to as the “Ciba Pharma” is a cent per cent Indian subsidiary of Ciba Limited, Basle (Switzerland), hereinafter referred to as “the Ciba Basle”. Ciba Basle deals in drugs, medicines, chemicals, pharmaceuticals and biological products. Ciba Pharma has been incorporated in India on December 13, 1947. Prior to incorporation of Ciba Pharma and for some little time after its incorporation, Ciba Basle was carrying on its business in India through a company called Ciba (India) Limited, which was also a cent per cent subsidiary company of Ciba Basle. The activities of the Ciba Basle carried on in India through Ciba (India) Ltd. consisted of dealings both in pharmaceuticals as well as dealings in dyes and chemicals. In the year 1948 the activities of Ciba (Basle) in India till then carried on through Ciba (India) Ltd. were bifurcated. The pharmaceutical section was carved out and given over to Ciba Pharma and rest of the activities in dyes and chemicals were being continued by Ciba (India) Ltd. under a changed name Ciba Dyes Ltd.

Now, with regard to the business in pharmaceuticals, which was handed over to Ciba Pharma, an agreement has been entered into between the Ciba Basle and Ciba Pharma. The agreement is of date December 17, 1947 and is annexure A to the Statement of the Case. The answer to the first question turns on the construction of this agreement. The preamble of this agreement consists of two paras. The first para. describes the various activities of Ciba Basle and the second para. sets out the business, which Ciba Pharma had installed for carrying on its business and the consideration it had agreed to pay to Ciba Basle for obtaining the necessary information for the conduct of its business. After the preamble, the operative part of the agreement consists of six articles. Articles 1 and 2 set out the obligations, which Ciba Basle had

1 (1965) 67 Bom. L.R. 394.

2 (1954) 27 I.T.R. 34, S.C.

3 (1964) 53 I.T.R. 186, S.C.

4 (1964) 54 I.T.R. 21 [Short Notes].

5 (1937) 21 T.C. 528.

6 (1964) 41 T.C. 556.

undertaken to perform or fulfil. Article 1 relates to the technical consultancy which Ciba Basle had agreed to give to Ciba Pharma and article 2 relates to the licence under Ciba Basle's Patent and Trade Mark rights, the use of which Ciba Basle had agreed to grant to Ciba Pharma. Article 3 describes the consideration, which Ciba Pharma had agreed to pay to Ciba Basle. Article 4 prohibits Ciba Pharma from assigning the benefit and the obligation of this agreement without the written consent of Ciba Basle. It similarly prohibits Ciba Pharma from granting any sub-licence under the Patents and/or Trade-marks of Ciba Basle without its previous written consent. Article 5 relates to the duration of the agreement and its termination. It provides that the agreement would come into force from January 1, 1948, and its duration was five years, but terminable on three months' notice in the event of default in the performance of its obligations by any party. Article 6 relates to the arbitration in the event of any dispute arising between the parties to the agreement. We are here concerned principally with the preamble and Articles 1 to 3.

The first para. of the preamble shows that Ciba Basle, at the material time, was engaged in the development, manufacture and sale of medical, pharmaceutical, biological and bacteriological preparations. These products have been referred to in this agreement as "the said products". For the purpose of the production or of the trade with the said products, Ciba Basle had established and was maintaining and continuously developing chemical, medical, biological, bacteriological and pharmaceutical research laboratories, factory laboratories, standardization departments, engineering departments and propaganda and patent departments. Ciba Basle, therefore, had acquired valuable scientific knowledge, research methods, data and material concerning its activities in the aforesaid sphere of development, manufacture and sale of medical, pharmaceutical, biological and bacteriological preparations. The preamble further states that the work, which had been allocated to these various departments essentially consisted of discovery of new pharmaceutical products, the introduction thereof into the clinical, medical and general use, as the case of each particular product may be, the elaboration of processes of production on factory scale and the improvement of already used processes, the drawing up and filing and supervising of patent applications as well as the continuous watch on patents, the standardization of processes and of new products; the design and construction of suitable engines for the production on laboratory and factory scale, the continuous entertainment of relations with the scientific and medical professions in order to secure their help as well as the results of their medical, clinical and scientific work. Paragraph 1 of the preamble further states that for these purposes Ciba Basle had employed and was employing in its various departments, chemists, physicians, druggists, lawyers, engineers and other scientific and technical experts. It had also secured the help of considerable number of famous University professors and other well-known scientific authorities. Ciba Basle was also engaged in training certain staff members in various departments with a view to sending them out to its affiliated and associated companies in order to give the benefit of the special knowledge acquired by these members of the staff in the various departments conducted by Ciba Basle. The concluding part of the first para. of the preamble is:

"The yearly amount of current costs, salaries and expenses incurred by Ciba Basle in the maintenance and the development of these departments as well as in new equipments forms part of Ciba Basle's general costs."

Paragraph 2 of the preamble provides:

"Ciba Pharma has installed its own tableting, ampoule filling and finishing work and has an organisation suited for the distribution and promotion of the said products. Ciba Pharma wishes to acquire the extensive knowledge and practical experience in the pharmaceutical field that Ciba Basle commands by reason of its long and extensive research work and scientific and practical experience. Therefore, the parties have agreed that Ciba Pharma shall pay to Ciba Basle a technical and research contribution

for the use of its Indian patents and/or Trade Marks referring to the said products. The technical and research contribution is at the same time a consideration for the scientific and technical assistance and will refund partly Ciba Basle's costs and expenses for the maintenance and development of the research work described in this Preamble." Article 1 consists of two paras. and para. 1, which is the material paragraph, reads:

"Ciba Basle will communicate currently and/or at request of Ciba Pharma all the results of its research work, insofar as they relate to the said products, which are already manufactured or processed or sold by Ciba Pharma or which shall hereafter with the prior approval of Ciba Basle be manufactured or processed or sold by Ciba Pharma. Whenever manufacture or processing of a preparation is taken up by Ciba Pharma with the prior approval of Ciba Basle, the pertaining patent rights and Trade Marks will be licensed to Ciba Pharma according to the terms of Articles II and III. In this case Ciba Basle undertakes to deliver to Ciba Pharma all processes, formulae, scientific data, working rules and prescription pertaining to the manufacture or processing of the said products, which have been discovered and developed in Ciba Basle's laboratories and will forward to Ciba Pharma as far as possible all scientific and bibliographic information, pamphlets or drafts, which might be useful to introduce licensed preparations and to promote their sale in India. All physical material shall be invoiced by Ciba Basle to Ciba Pharma at cost price."

Paragraph 2 of article 1 prohibits Ciba Pharma from divulging to third parties confidential information received by Ciba Pharma from Ciba Basle and requires Ciba Pharma to keep all data connected with the manufacturing processes under lock and key. Paragraph 1 of article 2, which relates to the licence under Ciba Basle's patent and trade-mark rights, states:

"Ciba Basle is registered or has applied for the registration as the case may be as the proprietor of several Letters Patent in India relating to the pharmaceutical products and listed in Schedule I of this Agreement. Furthermore, Ciba Basle is registered proprietor or has applied for the registration as the case may be of several trade marks relating to pharmaceutical products and giving protection in India, these Trade Marks being set out in Schedule II of this Agreement."

Under para. 2 of the said article II Ciba Basle granted to Ciba Pharma the full and sole right and licence under the Patents listed in Schedule I to make use of, exercise and vend the inventions referred to therein in India. It similarly granted Ciba Pharma the full and exclusive licence to use the Trade Marks set out in Schedule II. The other paragraphs of this article are not material for the purpose of this case. Paragraph 1 of article III is in following terms:

Technical Research Contributions.

"As consideration for Ciba Basle's obligations stipulated in Article I and II, Ciba Pharma agrees to pay to Ciba Basle half-yearly the following percentage contributions of the total of the net selling prices of all pharmaceutical products manufactured or processed and/or sold by Ciba Pharma:

(a) Contribution towards Technical Consultancy and technical service rendered and research work done.	5%
(b) Contribution towards cost of raw material used for experimental work.	3%
(c) Royalties on Trade Marks used by Ciba Pharma.	2%
Total	10%

The said technical research contribution of 10 per cent. was reduced to 6 per cent. with effect from January 1, 1949. It has been stated at the Bar by counsel for the parties that the reduction was from 5 per cent. to 1 per cent. in the aforesaid item (a). The other paragraphs of Article III are not material for the purposes of this case. Schedule I sets out the Indian Patents of which Ciba Basle had been registered as a proprietor or which had been applied for. It may be mentioned that it held a patent for a preparation known as "Cibazol".

Schedule II gives a list of these trade marks of which Ciba Basle was the proprietor or which had been applied for by Ciba Basle. It may be mentioned that it was also the proprietor of the Indian Trade Mark "Cibazol".

The first question relates to the payment made by Ciba Pharma to Ciba Basle under the aforesaid para. 1 of Article III of the said Agreement. Paragraph 6 of the Statement of the Case shows that under the certificate dated June 6, 1950, given by the Swiss Company, it is found that out of the total expenditure of 8,409,364 Swiss frs. incurred in 1948, on research, recoveries from several entities like the Ciba Pharma and others came only to 4,613,701 Swiss frs. It is not necessary for us to give the figures of all the five years of the contributions made by Ciba Pharma to Ciba Basle. Barring the difference in the figures and the amount paid, the facts are identical. We may, therefore, take the assessment figure of 1949-50.

Now, in the assessment year 1949-50 Ciba Pharma claimed deduction under s. 10 in respect of the payment of 10 per cent. of its net sale price made by it to Ciba Basle under para. 1 of article III of the Agreement. Two per cent. out of the said amount had been allowed by the Income-tax Officer being a payment towards royalties on Trade Marks used by Ciba Pharma. But the remaining 8 per cent. which amounted to Rs. 6,32,948 had been disallowed by the Income-tax Officer on the ground that the expenditure was incurred by the Swiss Company for its own business and that the assessee was not a manufacturing company so as to be eligible to get the benefit of research expenditure.

The assessee took an appeal to the Appellate Assistant Commissioner, who took the view that the said payment, which has been made under the agreement of December 17, 1947, was clearly in the nature of a purchase price paid for the permanent rights of acquisition conferred upon the appellant company under the agreement of the knowledge and the technical 'know-how' of the parent company for the enduring benefit of the undertaking of the appellant's business in pharmaceuticals, which is in the offing to be set up. The payment is clearly in the nature of a payment by annual instalment of a capital sum. In this view of the matter, the Appellate Assistant Commissioner held that the payment is in the nature of a capital expenditure. He, therefore, disallowed the claim of the Ciba Pharma that the said payment was an expenditure incurred on scientific research relating to its business. In this view of the matter the Appellate Assistant Commissioner dismissed the appeal. The assessee-company took a further appeal to the Tribunal. Before the Tribunal, the aforesaid amount was claimed as an allowable expenditure under s. 10(2)(xii) as well as under s. 10(2)(xv). The Tribunal accepted the contentions of the assessee and allowed the assessee's claim on the ground that the expenditure was incurred in connection with the research in the line of the assessee's business. It, therefore, came within the provisions of s. 10(2)(xii). There was nothing to show in s. 10(2)(xii) that the expenditure must be incurred by the assessee. The Tribunal also, in the alternative, held that the expenditure was laid out wholly and exclusively for the assessee's business and there was no capital element involved in the expenditure. The Tribunal, therefore, in the alternative held that the expenditure would be an allowable deduction under s. 10(2)(xv) of the Income-tax Act. At the instance of the Department, the following questions have been referred to us:

"Whether on the facts and in the circumstances of the case, the payment made by the assessee to Ciba Basle Ltd. in pursuance of the Agreement dated 17-12-1947 is an admissible deduction under the provisions of sec. 10(2)(xii) of the Income-tax Act and if not, under sec. 10(2)(xv) of the Act, either in part or whole?"

It would be convenient to deal with this question first before we proceed to deal with the second question. The first aspect of the question, therefore, that arises is whether the said payment, which admittedly is made in pursuance of the agreement dated December 17, 1947, is an expenditure laid out and expended on scientific research relating to the business within the meaning of s. 10(2)(xii) of the Indian Income-tax Act.

It is the contention of Mr. Joshi, learned counsel for the Revenue, that the payment is not an expenditure within the meaning of s. 10(2)(xii) of the Act. It is his argument that on a true construction of the said agreement of December 17, 1947, it is not an expenditure laid out or expended by Ciba Pharma on scientific research. On the other hand, it is a contribution made towards the expenditure incurred by Ciba Basle. The organisation or the research carried on by Ciba Basle is maintained by Ciba Basle for its own purpose and for the purpose of extending its own business. The research, which is carried on by Ciba Basle is not dependent on whether the contribution is made by Ciba Pharma or not. There is also no obligation on the Ciba Basle to carry on any research in a particular manner as such at the instance of Ciba Pharma. Ciba Pharma, therefore, has neither incurred any expenditure on scientific research nor has it incurred any expenditure on scientific research carried on on its behalf. On the other hand, it is the argument of Mr. Kaka, learned counsel for the assessee, that the expenditure falls under s. 10(2)(xii) of the Act. To attract the provisions of s. 10(2)(xii) it is sufficient to establish that it is an expenditure, not being in the nature of a capital expenditure, laid out and expended on scientific research relating to the business. It has not been held that the expenditure is in the nature of a capital expenditure. For an expenditure to be laid out or expended on scientific research, it is not necessary that an assessee himself must expend it on the research. If two or more persons agree to conduct for their mutual benefit research work and share the expenses, the contributions made by each would be an expenditure incurred, laid out or expended on such research. It will thus be an allowable deduction as an expenditure laid out or expended on scientific research relating to the business. Mr. Kaka also drew our attention to the following observation of the Tribunal in its order:

"There is no dispute that this expenditure relates to the appellant's business...." and contended that one of the conditions that the expenditure must relate to the business has been established. There is also no dispute that Ciba Basle was carrying on research and the research carried on by Ciba Basle was also in respect of the products in which Ciba Pharma was dealing. There could, therefore, be no doubt that the expenditure incurred by Ciba Pharma was an expenditure relating to its business. Mr. Kaka also further drew our attention to the first sentence in para. 10 of the Tribunal's order, which reads:

"The amount paid per Article III of the Agreement appears to us to be in the nature of a share of expenses incurred by the foreign company for conducting research for itself and also on behalf of the Indian company."

Relying on the aforesaid observation Mr. Kaka argued that the Tribunal has found as a fact that the research, which was carried on by Ciba Basle was on behalf of the assessee company. That being the position, it can hardly be said that the contribution made by Ciba Pharma towards the expenditure incurred by Ciba Basle was not an amount laid out or expended on scientific research.

We are unable to accept Mr. Kaka's contention that in the aforesaid observation on which reliance has been placed by Mr. Kaka, there is any finding of fact as such that the research carried on by Ciba Basle was a research carried on by itself and on behalf of Ciba Pharma. On the other hand, reading the judgment as a whole, it is clear that the said view taken by the Tribunal is on the construction of the Agreement. The Tribunal does not say that they so hold on consideration of the evidence, but, on the other hand, what is said by the Tribunal is "it appears to them" that the amount paid under article III of the Agreement to be "in the nature of a share of expenses incurred by the foreign company" for conducting research for itself and also on behalf of the Indian company. After setting out the facts upto para. 4, the Tribunal has set out article III of the agreement. In para. 5 the reduction in the percentage contributions is referred to. Paragraph 6 refers to the calculation of 8 per cent. and paras. 6A and 7 of the judgment the arguments advanced

on behalf of Ciba Pharma as well as the Department are summarised. The arguments advanced by Ciba Pharma as summarised in para. 6A show that the contentions raised before it were two-fold: in the first instance it was contended that the contribution made as per agreement represented a part of, or an addition to, the invoice cost of the goods and as such allowable under s. 10(I) on the principles of commercial accountancy. In the alternative, it was argued that it was allowable under s. 10(2)(xii), 10(2)(xiv) or 10(2)(xv). The arguments advanced related to the construction of the agreement. Paragraphs 8 and 9 deal with the first part of the argument as to whether it was a part of the sale price, and the sentence on which reliance is placed is the first sentence of para. 10 of the judgment. In our opinion, therefore, the observations on which reliance is placed are made on a construction of the agreement and the question to be considered is whether such a position emerges on the construction of the Agreement. Section 10(2)(xii) is in the following terms:

(1) "The tax shall be payable by an assessee under the head profits and gains of business, profession or vocation in respect of the profits or gains of any business, profession or vocation carried on by him.

(2) Such profits or gains shall be computed after making the following allowances, namely;...

(xii) any expenditure not being in the nature of capital expenditure laid out or expended on scientific research related to the business."

Clauses (i) and (ii) of the Explanation relating to cls. (xii) and (xiii) provide:

(i) "'Scientific research' means any activities in the fields of natural or applied science for the extension of knowledge.

(ii) references to expenditure incurred on scientific research do not include any expenditure incurred in the acquisition of rights in, or arising out of, scientific research, but, save as aforesaid, include all expenditure incurred for the prosecution of, or the provision of facilities for the prosecution of, scientific research."

Mr. Joshi, laying emphasis on the concluding words of sub-s. (1) "carried on by him" argued that the profits and gains on which tax is leviable are the profits and gains of the business, profession or vocation carried on by the assessee. It is from this amount that certain deductions in respect of certain expenditure under sub-s. (2) are allowed. It would necessarily follow that the allowable deduction is in respect of the expenditure incurred by the assessee on a research carried on by him in the conduct of his business. It is not in dispute that the Ciba Pharma itself had not carried on any activity in the field of natural or applied science for the extension of knowledge. It, therefore, cannot be said, and indeed it has not been said, that it is the Ciba Pharma who had carried on scientific research. Scientific research has been carried on by Ciba Basle. The payments made to Ciba Basle under article III of the Agreement, therefore, cannot be said to be an expenditure incurred by Ciba Pharma on any activity in the field of natural or applied science carried on by itself.

On the language used, it does not appear that to be an allowable deduction, the expenditure incurred must necessarily be on an activity in the field of natural or applied science, for extension of knowledge carried on by the assessee himself. All that is required to be established is that the expenditure incurred by the assessee was laid out or expended on scientific research related to the business. In other words, all that is required to be established is (1) that the expenditure was on scientific research and (2) the scientific research was one which related to the business of the assessee. It would necessarily follow that for an expenditure to be one laid out and expended on such scientific research, there must be some direct or at any rate proximate nexus or connection between the expenditure and the scientific research and the research and business of the assessee. The instance which Mr. Kaka gave is one where there is such a connection established. Two or more persons conducting business of a similar nature may not individually be in a position to carry on research for the purpose of

their business. They may join together, agreeing to share expenses and conduct scientific research for the purpose of their business. Here, though it cannot be said that each one of them is carrying on research himself, yet, there is a direct connection between expenditure incurred by each one of them and the scientific research which relates to their business. If we may give another instance, a business man may ask a research institution to conduct on his behalf a research on a particular subject or problem relating to his business, agreeing to pay its charges. Here again, there is a proximate connection between the expenditure incurred by the businessman and the research which relates to his business. In our opinion, therefore, in order to bring the case within the exemption cl. 10(2)(xi), it is incumbent on the assessee on whom the burden lies, to establish that the expenditure incurred by him was on a research carried on either by himself or on his behalf or at his instance, for the purposes of his own business. The sum paid by an assessee to another merely to obtain the knowledge gained by him by carrying on research for himself cannot be said to be an expenditure incurred by the assessee on scientific research, because it is neither carried on by him, nor on his behalf, nor at his instance. When cls. 10(2)(xi) and 10(2)(xii) are read together, it becomes apparent that the Legislature has distinguished between the two situations—one where the expenditure is laid out or expended by the assessee on scientific research, and the other where a sum is paid by the assessee to another who is carrying on scientific research relating to the class of business carried on by the assessee. No doubt, the expenditure relating to which exemption has been claimed has been described in the agreement as “Technical and Research Contribution”. But the description given by a party to the expenditure is not determinative of the issue. It is not in dispute that the scientific research is not carried on by the assessee itself, but by Ciba Basle. Of course, if on the construction of the agreement it emerges that the scientific research carried on by Ciba Basle was on its behalf or was at the instance of the assessee, the assessee would, none the less, be entitled to claim exemption under the said cl. 10(2)(xi).

We have already referred in detail to the preamble of the agreement, and when the preamble is read as a whole, there is no doubt that the research carried on by Ciba Basle is for the advancement of its own business, and not on behalf of the assessee or at the instance of the assessee. Paragraph 1 of the preamble discloses that Ciba Basle is engaged in the development, manufacture and sale of medical, pharmaceutical, biological and bacteriological preparations. These preparations have been referred in the agreement as “the said products”. It is for the purpose of the production or the trade with the “said products” that the Ciba Basle had established various laboratories, such as, Chemical, Medical, Biological, Bacteriological and Pharmaceutical laboratories in which research is carried on continuously for the purpose of its business. It has continuously maintained various departments for the purpose of the said business, such as Standardization department, Engineering department, Propaganda and Patent departments. For the purpose of carrying on activities in these laboratories and departments, Ciba Basle had employed chemists, physicians, druggists, lawyers, engineers and technical experts. The activities in these various laboratories and departments have been carried on continuously for a long time, and the work allocated to them consists essentially of “discovery of new pharmaceutical products, the introduction thereof into the clinical, medical and general use, as the case may be.” At the end of para. 1 of the preamble, it has been clearly stated that the expenditure incurred by it on the research “consisting of current costs, salaries and other expenses incurred in the maintenance and development of the various departments mentioned in para. 1 as well as in new equipments, form part of Ciba Basle’s general costs”. There is no ambiguity in the matter. It has not been said that the costs incurred by Ciba Basle are incurred for itself as well as on behalf of some other person or on behalf of Ciba Pharma or at its instance. There can hardly be any doubt that as a result of these activities carried on on a large

scale, Ciba Basle had acquired "valuable scientific knowledge, research method, data and material concerning the aforesaid sphere of activities."

Paragraph 2 of the preamble indicates the purposes for which Ciba Pharma had agreed to make the payment termed as "Technical and Research contribution". The first part of para. 2 of the preamble shows that Ciba Pharma had by then installed its own tableting, ampoule filling and finishing work and it had also built up its own organization suited for the distribution and promotion of the said products. It is for the conduct of this business of Ciba Pharma, it has been stated in para. 2:—

"Ciba Pharma wishes to acquire the extensive knowledge and practical experience in the pharmaceutical field that Ciba Basle commands by reason of its long and extensive research work and scientific and practical experience and it is, therefore, that Ciba Pharma had agreed to pay to Ciba Basle 'a technical and research contribution'."

"This technical and research contribution has been divided under different heads in para. 1 of article III of the agreement. Paragraph 2 further provides that the technical and research contribution, which it had agreed to pay was by way of consideration:—

(i) for the use of Indian patents and/or Trade Marks referring to the "said products."

(ii) for the scientific and technical assistance;

Concluding part of para. 2 provides that Ciba Pharma had also agreed to refund part of Ciba Basle's costs and expenses for the maintenance and development of the research work described in this preamble. Reading the preamble as a whole, it becomes patently clear that for the purpose of its own business, Ciba Basle has maintained laboratories and departments in which activity on a large scale is continuously going on. The costs incurred by Ciba Basle are its own costs. As a result of these activities, very valuable knowledge is in possession of Ciba Basle. The assessee company which is a 100 per cent. subsidiary company of Ciba Basle, had by then installed its own tableting, ampoule filling and finishing work, and had also built its own organization suited for the distribution and promotion of certain products relating to which Ciba Basle had patents and had registered trade marks. Use of Indian patents and/or trade marks relating to these products was allowed by Ciba Basle to the assessee. The assessee wanted to obtain from Ciba Basle scientific and technical knowledge. Ciba Basle had agreed to give that knowledge to Ciba Pharma. In consideration thereof, Ciba Pharma had agreed to make certain payments which are referred to in the agreement as "technical and research contribution" as well as to "refund partly of Ciba Basle's costs and expenses for the maintenance and development of research work" described in the preamble.

For the reasons stated above, it is not possible to hold that the consideration paid for the use of patents and trade marks or for obtaining scientific and technical 'know-how' or an amount paid by way of refund of costs of research carried on by Ciba Basle on its own behalf is an amount expended by the assessee on technical research. The view taken by the Tribunal that the payment of Rs. 6,32,948 representing the 8 per cent. of the net sale price is primarily an allowable deduction under s. 10(2)(xii) does not appear to be in consonance with the terms of the agreement.

Mr. Kaka in the course of his argument later admitted this position. He conceded that the contributions paid by Ciba Pharma towards technical consultancy and technical service rendered by Ciba Basle and the consideration paid for by Ciba Pharma to Ciba Basle for the use of patents and trade marks is not an expenditure allowable under s. 10(2)(xii). He, however, contended that part of the technical and research contribution, which is referable to "research work done" as mentioned in cl. (a) of para. 1 of article III and "contribution towards costs of raw material used for experimental work" as mentioned in cl. (b) of para. 1 of article III, is allowable as a deduction under s. 10(2)(xii) being an amount laid out or expended on scientific research.

It is true that the contribution as described in respect of these items and referable to cls. (a) and (b) gives an impression that it is an amount laid out or expended by Ciba Pharma on scientific research. But then it is a well settled principle that in construing an agreement, it is to be read as a whole and when so read, in our opinion, for reasons which we have already stated, it appears to us that the scientific and research work done by Ciba Basle was on its own behalf and not on behalf of itself and somebody else, much less on behalf of Ciba Pharma or at its instance. Reason, which Ciba Pharma has given in para. 2 of the preamble for making the research contribution, is also not that Ciba Basle had agreed to carry on any scientific and research work at the instance of Ciba Pharma. On the contrary, what has been said in para. 2 is that Ciba Pharma had agreed to make these payments, apart from the reason that use of the trade marks and patents were given to it, but wished to acquire the extensive knowledge and practical experience in the pharmaceutical field that Ciba Basle commands by reason of its long and extensive research work and scientific and practical experience. In other words, the object with which Ciba Pharma had agreed to make technical and research contribution was for the use of patents and trade marks and to obtain the know-how of the business it was then conducting. The consideration paid or the amount expended for the said purpose cannot be called an expenditure laid down or expended on scientific research. The view taken by us that one of the reasons why Ciba Pharma had agreed to pay these technical and research contribution was to obtain the technical '*know-how*' of the business from Ciba Basle, which Ciba Basle had acquired, receives support from certain other parts of the agreement itself.

Now, if really the research had been carried on by Ciba Basle on behalf of itself and at the instance of and/or on behalf of Ciba Pharma, Ciba Pharma would have equal rights in the results of the research as Ciba Basle would therein have. Such, however, is not the position. Clause (2) of article 1 provides:—

"Ciba Pharma agrees not at any time to divulge to third parties without Ciba Basle's consent any confidential information received under this Agreement from Ciba Basle and in particular to keep all data connected with the manufacturing processes under lock and key."

Similarly, para. 3 of article V provides:—

"Upon the termination of this Agreement for any cause Ciba Pharma shall cease to use the Patents and Trade Marks to which this Agreement refers except as to stocks then on hand and shall return to Ciba Basle or to such persons as they may appoint for that purpose all copies of information, scientific data or material sent to it by Ciba Basle under this agreement and then in its possession and shall expressly refrain from communicating any such information, scientific data or material received by it hereunder to any person, firm or company whomsoever other than Ciba Basle."

These two clauses leave no doubt that the result of scientific research was exclusively the property of Ciba Basle and its use only for the purpose of its business during the course of its business was allowed to Ciba Pharma, and the contribution made was for that purpose. In other words, the contribution made by Ciba Pharma or the payment made by Ciba Pharma was for the purpose of acquiring the extensive technical knowledge and practical experience in the pharmaceutical field, which Ciba Basle commanded by reason of its long and extensive research work and scientific and practical experience. The payment is nothing but a payment for acquiring the technical '*know-how*'.

Mr. Kaka in the course of his arguments laid some stress on the words "at the request of Ciba Pharma" appearing in the first sentence of para. 1 of article I. The sentence reads:—

"Ciba Basle will communicate currently and/or at request of Ciba Pharma all the results of its research work, insofar as they relate to the said products which are already manufactured or processed or sold by Ciba Pharma."

Laying emphasis on the words "at the request of Ciba Pharma" Mr. Kaka

argued that the obligation incurred by Ciba Basle was not only to communicate currently results of its research work but there was also an obligation to communicate to Ciba Pharma the result of its research work at the request of Ciba Pharma. This clause, according to Mr. Kaka, shows that the research work, which was carried on by Ciba Basle, was carried on at the instance and on behalf of Ciba Pharma.

We find it difficult to accept this argument of Mr. Kaka. The sentence, when read as a whole, itself shows that the research work carried on by Ciba Basle was not on behalf of Ciba Basle and Ciba Pharma. On the other hand, the sentence itself shows that the research work of Ciba Basle was its own. What Ciba Basle had promised was to communicate to Ciba Pharma, at the request of Ciba Pharma, results of *its* research work. In our judgment, therefore, no part of the payment of 8 per cent. can be said to be an expenditure laid out or expended by Ciba Pharma on scientific research. The said payment, therefore, is not an allowable deduction under s. 10(2)(xii) of the Act.

The question next to be considered is whether the said payment of 8 per cent. of the sale price is an allowable deduction under s. 10(2)(xv). That clause reads:—

(xv). "any expenditure (not being an allowance of the nature described in any of the clauses (i) to (xiv) inclusive, and not being in the nature of capital expenditure or personal expenses of the assessee) laid out or expended wholly and exclusively for the purpose of such business, profession or vocation."

It has not been contended on behalf of the Department that it is an expenditure falling under any of the clauses (i) to (xiv), nor has it been contended that it is in the nature of personal expenses of the assessee. The question to be considered is whether the said payment or any part thereof is laid out or expended wholly and exclusively for the purposes of the business of Ciba Pharma or whether the expenditure incurred is in the nature of a capital expenditure.

It is the contention of Mr. Joshi that save and except the payment attributable to "technical services" rendered by Ciba Basle referred to in cl. (a) of para. 1 of article III of the agreement, the rest of the payment must be disallowed because it is of capital nature. Mr. Joshi, in the course of his argument, drew our attention to the observations made by the Tribunal for holding that the expenditure was not of capital nature. The reasons given in para. 12 of the judgment are in the following terms:—

"The Departmental Representative's next contention was that even assuming that any portion of the expenditure was of a revenue nature, the whole of it cannot be treated as such and that he would require the expenditure being apportioned suitably between capital and revenue. As we have already stated the certificate given by the foreign company has been accepted as such. That clearly states that no capital expenditure has been incurred by the foreign company. Nor has the appellant acquired any asset of enduring benefit."

It is the argument of Mr. Joshi that whether the foreign company has incurred any capital expenditure or not is not relevant for the purpose of deciding whether the expenditure incurred by Ciba Pharma was of capital nature or not. This part of the argument undoubtedly is well-made. But the decision of the Tribunal is not based solely on that observation. The other reason given by the Tribunal is that in its opinion by incurring this expenditure, Ciba Pharma had not acquired any asset of enduring benefit and the expenditure incurred by Ciba Pharma, therefore, is not of a capital nature.

We have recently in *S. F. Engineer v. Commr. of Inc-Tax*¹ elaborately discussed what is a capital expenditure and what is a revenue expenditure. Therein we have also referred to three decisions of their Lordships of the Supreme Court. The first decision of their Lordships is in *Assam Bengal Cement Co. Ltd. v. Commr. of Inc-tax*.² Bhagawati, J., who spoke for the Court, after discussing the various decisions and after referring to the Full Bench decision

of the Lahore High Court and enumerating the three tests laid down in the Full Bench of the Lahore High Court, observed as follows (p. 45):

"This synthesis attempted by the Full Bench of the Lahore High Court truly enunciates the principles which emerge from the authorities. In cases where the expenditure is made for the initial outlay or for extension of a business or a substantial replacement of the equipment, there is no doubt that it is capital expenditure. A capital asset of the business is either acquired or extended or substantially replaced and that outlay whatever be its source whether it is drawn from the capital or the income of the concern is certainly in the nature of capital expenditure. The question however arises for consideration where expenditure is incurred while the business is going on and is not incurred either for extension of the business or for the substantial replacement of its equipment. Such expenditure can be looked at either from the point of view of what is acquired or from the point of view of what is the source from which the expenditure is incurred. If the expenditure is made for acquiring or bringing into existence an asset or advantage for the enduring benefit of the business it is properly attributable to capital and is of the nature of capital expenditure. If on the other hand it is made not for the purpose of bringing into existence any such asset or advantage but for running the business or working it with a view to produce the profits it is a revenue expenditure. If any such asset or advantage for the enduring benefit of the business is thus acquired or brought into existence it would be immaterial whether the source of the payment was the capital or the income of the concern or whether the payment was made once and for all or was made periodically. The aim and object of the expenditure would determine the character of the expenditure whether it is a capital expenditure or a revenue expenditure. The source or the manner of the payment would then be of no consequence. It is only in those cases where this test is of no avail that one may go to the test of fixed or circulating capital and consider whether the expenditure incurred was part of the fixed capital of the business or part of its circulating capital. If it was part of the fixed capital of the business it would be of the nature of capital expenditure and if it was part of its circulating capital it would be of the nature of revenue expenditure. These tests are thus mutually exclusive and have to be applied to the facts of each particular case in the manner above indicated.... One has therefore got to apply these criteria one after the other from the business point of view and come to the conclusion whether on a fair appreciation of the whole situation the expenditure incurred in a particular case is of the nature of capital expenditure or revenue expenditure in which latter event only it would be a deductible allowance under section 10(2) (xv) of the Income-tax Act."

These tests have again been referred to as principles formulated in determining the question as to whether a given item of expenditure is a capital or a revenue expenditure in *State of Madras v. G. J. Coelho*³ and in a still more recent decision of their Lordships of the Supreme Court given in the case of *Bombay Steam Navigation Co. Ltd. v. Commissioner of Income-tax, Bombay*⁴ decided on October 21, 1964 (not yet fully reported), it has been observed:—

"The question whether a particular expenditure is revenue expenditure incurred for the purpose of the business must be viewed in the larger context of business necessity or expediency. If the outgoing or expenditure is so related to the carrying on or conduct of the business that it may be regarded as an integral part of the profit-making process and not for acquisition of an asset or a right of a permanent character, the possession of which is a condition to the carrying on of the business, the expenditure may be regarded as revenue expenditure."

In the light of these tests and the observations of their Lordships of the Supreme Court, the facts of the present case will have to be considered in the larger context of the business necessity or expediency of Ciba Pharma.

The contention of the Department, as raised before the Tribunal, was that part of the said expenditure was of capital nature, because it brought in asset of an enduring benefit. The same argument also has been advanced before us. We have already discussed the various clauses of the agreement and, in our

opinion, the payment of 8 per cent. of its net sales, which has been made by Ciba Pharma is by way of consideration:

- (1) for the use of the rights under the Patents of Ciba Basle, and
- (2) for acquiring the extensive knowledge and practical experience in the pharmaceutical field that Ciba Basle commands by reason of its long and extensive research work and scientific and practical experience in so far as it relates to the products which were manufactured or processed or sold by Ciba Pharma.
- (3) for obtaining Scientific and technical assistance.

It is indeed true that the payment of 8 per cent. of the net sale price, though referred to under various heads in cls. (a) and (b) of para. 1 of article III as contributions, is on an analysis of the agreement, a consideration paid for the aforesaid objects. It is not in dispute that consideration paid or payment made for the use of rights in patents of Ciba Basle is a revenue expenditure. The question to be considered is whether the consideration paid for acquiring the extensive knowledge and practical experience of Ciba Basle constitutes acquisition of an asset of an enduring nature. In other words, whether by the expenditure incurred for acquiring the technical *know-how* of the business, Ciba Pharma had acquired an asset of an enduring benefit. Having regard to para. 2 of article I and para. 5 of article V of the agreement, there can hardly be any doubt that Ciba Pharma had acquired no asset in obtaining the 'know-how' of the business. No right in the results of the scientific research has been acquired by Ciba Pharma. These two paragraphs make it clear that the confidential information received by Ciba Pharma from Ciba Basle about the conduct of the business and all data connected with the manufacturing processes was not to be divulged by Ciba Pharma during the currency of the agreement. On the termination of the agreement, Ciba Pharma is required to return to Ciba Basle or to such other persons as Ciba Basle may appoint, all copies of information, scientific data or material sent to it by Ciba Basle under this agreement. Further, Ciba Pharma is expressly refrained from communicating such information, scientific data or material received by it hereunder to any person, firm or company whomsoever, other than Ciba Basle. The use of the knowledge or the practical experience, which Ciba Pharma gets by knowing the technical 'know-how' is thus limited only for the purpose of the conduct of the business during the period of the agreement, which is of a duration of five years. Payments made for acquiring the said knowledge cannot, in our opinion, be said to have brought into existence an asset of an enduring nature. On the other hand, payment has been made to get the technical 'know-how' only for the purpose of running the business during the period of the agreement with a view to earn profits. In the payment, therefore, in our opinion, no expenditure of a capital nature is involved.

It is next argued by Mr. Joshi that on a true construction of para. 1 of article I, the expenditure incurred or the payment made cannot be said to be an expenditure wholly and exclusively laid out or expended for the purposes of Ciba Pharma's business in the year of account. According to Mr. Joshi, the consideration paid is for all the obligations of Ciba Basle, which it had stipulated in articles 1 and 2. The obligation stipulated by Ciba Basle in para. 1 of article I is not confined to convey to Ciba Pharma the 'know-how' in respect of the products in which Ciba Basle was then dealing. The obligation stipulated by Ciba Basle in these clauses was also to convey to Ciba Pharma the technical 'know-how' in respect of certain other products also as and when Ciba Pharma would undertake the manufacture or processing of these products. It is the argument of Mr. Joshi that the payment made or the expenditure incurred also relates to both the things: for obtaining the 'know-how' in respect of the products in which Ciba Pharma was already dealing as well as in respect of the right to acquire the technical 'know-how' in respect of the other products as and when Ciba Pharma would undertake the manufacture or processing of those products.

In our opinion, the argument is not well-founded. The consideration, which Ciba Pharma had agreed to pay to Ciba Basle, is not for a fixed sum. On the other hand, the consideration it had agreed to pay was a certain percentage of the net sale price of all pharmaceutical products manufactured, processed and/or sold by Ciba Pharma. The later part of para. 1 of article I is merely an agreement to enter into another agreement on the same terms and conditions as are mentioned in articles II and III of this agreement, as and when the occasion would arise, viz. "Whenever manufacture or processing of a preparation is taken up by Ciba Pharma with the prior approval of Ciba Basle". It is only when such an occasion would arise Ciba Basle had promised that it would licence the pertaining patent rights and trade marks to Ciba Pharma according to the terms of articles II and III. Ciba Basle further promised that it would in that event deliver to Ciba Pharma all processes, formulae, scientific data, working rules and prescriptions pertaining to the manufacture or processing of those products, which have been discovered and developed in Ciba Basle's laboratories. The further promise is that in that event Ciba Basle would forward to Ciba Pharma as far as possible all scientific and bibliographic information, pamphlets or drafts, which might be useful to introduce licenced preparations and to promote their sale in India. These being the terms of the later part of para. 1 of article I, in our opinion, there was no present obligation incurred thereunder by Ciba Basle. On the other hand, as we have already said, the later part contains only an agreement to enter into another agreement for a fresh consideration. The consideration stipulated in article III relates only to the obligations that had already been incurred by Ciba Basle under the agreement. Reading the agreement as a whole, it would be noticed that the consideration, which Ciba Pharma had agreed to pay, was not a fixed sum but was proportionate to the advantage received by it from Ciba Basle. The agreement in short is that Ciba Pharma agreed to pay to Ciba Basle 10 per cent. of the net selling price of the products manufactured, processed and/or sold by Ciba Pharma in consideration of the user of the technical and scientific knowledge of research conducted by Ciba Basle, technical assistance and for the user of trade marks and patents pertaining to those products. The later part of article I further provides that as and when Ciba Pharma would undertake manufacture or processing of some other products, which would by then have been discovered by Ciba Basle, Ciba Pharma would also be required to pay 10 per cent. of the net sale price of those products in lieu of the user of the knowledge of the research conducted by Ciba Basle pertaining to those products as well as for the user of the Trade Marks and Patents pertaining to those products. In our opinion, therefore, there was no payment made by Ciba Pharma to Ciba Basle in respect of any obligation stipulated by Ciba Basle, which had no concern with the relevant assessment years. The entire expenditure, therefore, was an expenditure incurred in respect of matters pertaining to the year of account. We have already said that the expenditure incurred, viz. the payment of 8 per cent. or 4 per cent., as the case may be, of the net selling price, was for acquiring the technical knowledge of the research conducted by Ciba Basle and for the user of patents pertaining to the products manufactured, processed or sold by Ciba Pharma in the years of account. It is not in dispute that the expenditure incurred pertaining to the user of the patents is a revenue expenditure. We have also said that the expenditure incurred for the user of the knowledge of the research conducted by Ciba Basle also is a revenue expenditure and that therein no element of capital nature is involved inasmuch as by incurring the expenditure, Ciba Pharma had not acquired any asset of an enduring nature. Before the Tribunal it was not in dispute that the expenditure related to Ciba Pharma's business. The expenditure thus would be an expenditure wholly and exclusively laid out or expended for the purpose of business. In our judgment, therefore, the expenditure would be an allowable deduction under s. 10(2)(xv) of the Act. The view taken by us finds support in a decision of King's Bench Division in *British Sugar Manu-*

*facturers, Ltd. v. Harris (H. M. Inspector of Taxes).*⁵ Facts in that case were that the assessee company, which was the appellant, had agreed to pay to two other companies a certain percentage of its net annual profits "in consideration of their giving to the company (assessee-company) the full benefit of their technical and financial knowledge and experience". The question to be considered was whether the payment made under this agreement by the assessee company to the other companies was an allowable deduction. The contention of the assessee-company was that payment under the agreement was a payment for the services rendered; that it was a sum expended in earning its profits and not expended for capital purposes; that it was not a distribution of its profits and, therefore, the expenditure should be allowed as a deduction in computing the assessee-company's profits. The contentions of the assessee-company were upheld by the Appeal Court and it held that the payments made under the aforesaid agreement were admissible deductions in computing the appellant-company's profits.

Our attention has been also drawn, to another case reported in *Musker v. English Electric Co., Ltd.*⁶ Though the case is distinguishable on facts and the question considered there related to the income of the assessee-company and not to its expenditure, it throws considerable light on the point to be considered. Facts in this case were: the assessee-company in the course of carrying on its trade of engineering manufacturers, had acquired a fund of specialised information and technique in engineering processes. It has not been the practice of the assessee-company to turn this information and technique to account by imparting it to others. However, at the request of the Admiralty, the assessee-company had entered into an agreement to design and develop a marine turbine and to license its manufacture by a limited number of companies in the United Kingdom, Australia and Canada. The agreement, which the assessee-company had entered into with these companies, provided for imparting of manufacturing technique to the licensee-companies and in consideration of this, the assessee-company received specified lump sum payments. The claim made by the assessee-company was that the amount received by it under the agreement was not the income of its business, but capital receipt and, therefore, was not taxable. The claim of the assessee-company was negatived by the House of Lords. Viscount Radcliffe in his speech observed (p. 585):

"In my opinion, there are two considerations which govern cases of this kind and which go a long way towards destroying the force of the analogies by which the Appellant's argument seeks to prove that the transactions under review were sales of fixed assets, and that receipts arising from them ought to be treated as receipts on capital account. One is that in reality no sale takes place. The Appellant had after the transaction what it had before it. There is no property right in 'know-how' that can be transferred, even in the limited sense that there is a legally protected property interest in a secret process. Special knowledge or skill can indeed ripen into a form of property in the fields of commerce and industry, as in copyright, trade-marks and designs and patents, and where such property is parted with for money what is received can be, but will not necessarily be, a receipt on capital account. But imparting 'know-how' for reward is not like this, any more than a teacher sells his knowledge or skill to his pupil."

The position here is more or less the same. As a result of its extensive and valuable research Ciba Basle is in possession of very valuable technical knowledge and practical experience. They had also obtained certain patent rights in respect of certain products and have also registered their trade marks. Under the agreement Ciba Basle have parted with their rights and trade marks. All what has been agreed to under the agreement is to grant the user of the patents and trade marks to Ciba Pharma and to give Ciba Pharma the technical 'know-how' and assistance. In the transaction, there is no transfer of any property or asset nor any capital element is therein involved. The transaction, therefore, is not "capital in nature".

⁵ (1937) 21 T.C. 528.

⁶ (1964) 41 T.C. 556.

[His Lordship after dealing with the second question, concluded.]

For reasons stated above, our answer to the first question is that the payment made by the assessee to Ciba Basle in pursuance of the agreement of December 17, 1947, is not an admissible deduction under the provisions of s. 10(2)(xii) of the Income-tax Act, but the whole of the amount is an admissible deduction under s. 10(2)(xv).

Our answer to the second question is in the negative. In the circumstances of the case we make no order as to costs.

Answer accordingly.

SUPREME COURT.

Present: Mr. Justice K. Subba Rao, Mr. Justice Raghubar Dayal and
Mr. Justice R. S. Bachawat.

HUKUMCHAND GULABCHAND JAIN

v.

FULCHAND LAKHMICHAND JAIN.*

Damdupat—Applicability of rule of damdupat to interest payable by trustee on breach of trust with respect to trust fund—Rate of interest payable.

The rule of Damdupat does not apply with respect to the interest adjudged payable by a trustee on his committing breach of trust with respect to the trust funds in his hands.

Though a trustee who has custody of trust funds, has a pecuniary liability to make good those funds if he has used them and may, on the basis of such a liability, be said to be a debtor of a trust, yet he, as an individual, is not a borrower of the funds from the trust and cannot be said to have taken a loan from himself as a trustee in charge of the trust funds. His liability to pay interest, when ordered by the Court on equitable grounds, does not come within the provisions dealing with interest in Hindu Law, as mentioned in Colebrooke's Digest.

Dhondo Jugonath v. Narayan Ramchunder,¹ approved.

*Sharp v. Jackson*² and *Lake, In re: Dyer, Ex parte*,³ referred to.

When a trustee in breach of his duty retains the trust money in his own hands uninvested or mixes it with his own money or property he is liable to pay interest on it. There is no fixed rate of interest which a trustee is liable to pay but in general he is charged simple interest at the rate of 4 per cent. per annum.

THE facts are stated at 62 *Bombay Law Reporter* p. 308.

A. V. Viswanatha Sastri, with Rameshwar Nath, S. N. Andley and P. L. Vohra, for the appellant.

S. N. Pershad, M. H. Chhatrapati, J. B. Dadachanji, O. C. Mathur and Ravinder Narain, for respondents Nos. 1 and 2.

K. L. Hathi and R. H. Dhebar, for respondent No. 3.

RAGHUBAR DAYAL J. There is a temple known as Shri Chandraprabhu Khandelwal Jain Temple at Dhulia. Gulabchand Hirālāl, father of appellant Hukumchand Gulabchand Jain, a leading member of the Khandelwal Jain community at Dhulia, looked after the temple for over 40 years till his death sometime in 1950. The appellant looked after it after his father's death. Two members of the community interested in the temple, held to be a public temple, instituted the suit against the appellant and the Charity Commissioner, Bombay, praying for the removal of the appellant from possession of the trust

*Decided, February 16, 1965. Civil Appeal No. 216 of 1962. 2 [1899] A.C. 419.

3 [1901] 1 K.B. 710.

¹ (1863) 1 Bom. H.C.R. 47.

properties, for the rendering of true and faithful accounts of all the assets and income of the trust property and for the framing of the scheme for the administration of the trust. It was alleged in the plaint that the appellant's father was maintaining all accounts of income and expenditure concerning the temple and that the funds of the temple were many times advanced at interest and that the temple had come to hold large properties, moveable and immovable. It was further alleged that the temple had a large income from offerings, house-rent etc., but the appellant and his deceased father had not been maintaining the accounts properly and that the funds of the temple were being advanced at interest, though no such income was shown as received recently by the appellant.

The appellant, in his written statement, denied that the amount was so advanced at interest as alleged by the plaintiffs and stated that his father had been keeping a ledger in the name of the temple in the accounts in which its income and expenditure had been duly entered since over 40 years and that the appellant himself had kept separate account books for the temple since October 30, 1951. He denied that any income recently received had not been shown in the accounts.

The trial Court held that the appellant had committed minor irregularities in the maintenance of the accounts, that he was liable to render accounts and that the Commissioner was to ascertain the amount due from the appellant on taking the accounts. It definitely held it not established that income, if any, derived by way of interest on loans advanced out of the funds of the temple had not been credited to the account of the temple and that no instance of fraudulent or dishonest misappropriation of temple funds on the part of defendant No. 1 or his father had been established. It found that the meeting of the community had passed a resolution on August 22, 1958, by an overwhelming majority, sanctioning the accounts submitted by the appellant and that only two persons who opposed against the resolution were the two plaintiffs of the suit.

The Commissioner found that on the date of the institution of the suit, i.e. on February 17, 1954, Rs. 10,088-10-3 were due for principal and Rs. 16,853-6-0 were due for interest, from the appellant. The plaintiffs admitted the report to be correct but the appellant contended that under the rule of *damdupat* interest exceeding the amount of principal could not be allowed. The appellant's contention was accepted and the trial Court passed a decree on April 23, 1955, for Rs. 20,177-4-6 against the appellant, with future interest at 6 per cent. per annum. We are not now concerned with the other items of the decree and, therefore, we make no reference to them.

The appellant deposited the amount due under the decree on July 18, 1955. The plaintiffs appealed and claimed a larger amount on various grounds, including the one that the principle of *damdupat* should not have been applied and that interest on the balance of the trust fund should have been calculated and compound interest allowed in place of simple interest on the amount of the trust fund in the hands of the defendant or his father.

The appellant filed a cross-objection against the allowing of interest on the balance of the trust funds with his father and himself.

The High Court agreed with the plaintiffs that the principle of *damdupat* could not be applied in the circumstances of the case and that compound interest should have been charged against the appellant. It, therefore, set aside the decree passed by the trial Court in so far as it determined the amount due to the temple and referred the case back to the trial Court for re-assessment of the amount due to the temple having due regard to the observations made in its judgment. On an application by the appellant, certificate under art. 133(1) of the Constitution was granted.

The appellant has then filed this appeal and questioned the correctness of the order of the High Court holding him liable to pay compound interest and holding that the principle of *damdupat* was not applicable in this case.

The High Court said in its judgment that it was the contention of the plaintiffs that the appellant's father and the appellant used the funds of the temple in their business and that they were, therefore, liable to account on that footing. There was no such allegation in the plaint or in the memorandum of appeal to the High Court. The High Court referred to the *khulasa* submitted to the Commissioner by the plaintiffs and stated that it was specifically alleged therein that the amount was being used by the defendant and his father in business. Support for such an allegation was found in the statement exh. 24 of the appellant's father in 1931. Reference was also made to the fact that the appellant had nowhere denied the fact of the moneys of the temple being used for the purpose of the business and to the non-production of certain books of account by the appellant. His statement that they were not available was not accepted. The High Court recorded the finding in this form (at p. 43 of the appeal record):

"Under these circumstances it would not be an unreasonable inference to draw that the amounts belonging to the temple were being utilised by Defendant No. 1 (the appellant) and before him by his father in their business."

Having come to this conclusion and to the view that the position of the appellant's father and the appellant *vis-a-vis* the temple funds was that of a trustee, the High Court considered whether the plaintiffs could claim interest on equitable grounds and held that they could claim compound interest with yearly rests, as the money had been used in the business or had been so mixed up with their own funds that it was impossible to say that they had not so used it. The High Court did not apply the rule of *damdupat* as the liability of the appellant was not founded on loans or on any contract.

It is contended for the appellant that there was neither an allegation nor evidence to the effect that the trust funds had been used in his business by the appellant's father or the appellant and that, therefore, the appellant was not liable to pay compound interest on the trust funds in his hands or in the hands of his father. It was further urged that if interest was payable by the appellant's father or the appellant on the balance of trust funds, it should be simple interest and the amount of interest could not be more than the amount of principal due on the date of the institution of the suit on the principle of *damdupat*.

[His Lordship then considered the question whether the trust funds with the appellant or his father were used in their trade or business and proceeded:]

In view of the shaky finding of the High Court about the funds being used in business by the appellant's father or the appellant and in view of what we have said above, we hold that it has not been proved that these funds had been used in business and that, therefore, the appellant is not liable to pay compound interest on the balance of the trust funds with his father or himself.

We may now consider whether the appellant is liable to pay simple interest on the balance of trust money with his father or himself.

Two questions arise for consideration and they are whether the trustee is liable to pay simple interest on the trust capital in his hands and if he is so liable what rate of interest be charged from him in the present case. Interest can be allowed on equitable grounds only as no statutes in force during the period in suit and dealing with public charitable trusts made the trustee liable to pay interest. The Indian Trusts Act does not apply to public or private religious or charitable endowments and, therefore, the provisions of s. 23 thereof cannot be used for charging interest from the appellant trustee. The Charitable and Religious Trusts Act has no provision which provides for charging the trustee with interest.

Reference may, therefore, be made in this connection to what is stated in para. 1691 of Halsbury's Laws of England, 3rd edn., vol. 38:

"Subject to this, or unless a trustee is expressly otherwise authorised or required under the terms of his trust, he must duly and promptly invest all capital trust money

coming to his hands, and all income which cannot be immediately applied for the purposes of the trust; and he is liable for any loss which may result from its being improperly invested or being left uninvested for an unreasonable length of time, and for interest during the period of its being so left."

This is so because the trustee has to conduct the affairs of the trust in the same manner as an ordinary prudent man of business would conduct his own affairs. In para. 1812 are set out the circumstances in which a trustee, besides being required to account for the principal trust money, can also be charged with interest on it and one of the circumstances is when the Court considers that the trustee ought to have received interest. Such could be the case when the trustee, in breach of his duty, retains the trust money in his own hands uninvested or mixes it with his own money or property.

It appears from the Commissioner's report that the trustee in this case had over Rs. 10,000 in his hands from samvat year 1988 commencing from November 10, 1931, upto February 17, 1954, when this suit was instituted. The trustee kept such a large sum uninvested for a long time extending over 22 years. The accounts show that reasonably he could not have expected to require this amount for any current purpose of the trust during these years. He should have invested the amount. His failure to do so makes him liable to pay interest.

It appears from what is said in para. 1814 of Halsbury's vol. 38 that where a trustee simply fails to invest trust money which he ought to have invested or there are no other special circumstances in the case, he is in general charged simple interest at the rate of 4 per cent. per annum. We consider it reasonable to charge interest at 4 per cent. per annum in this case.

[His Lordship then proceeded to decide what had been the amount of trust funds in the hands of the appellant's father at different times and what would be the amount due from the appellant on the date of the institution of the suit, both for principal amount of trust money and for accumulated interest with him.]

According to the report of the Commissioner, the amount of interest on the principal amount of trust money in the hands of the trustee worked out to Rs. 16,853-6-0 upto February 17, 1954 at 6 per cent. per annum. We have held that the interest be calculated at 4 per cent. per annum. It follows that at this rate the amount of interest found due by the Commissioner would be reduced to Rs. 11,235-9-4. The principal due on that date was Rs. 10,088-10-3. The question now arises whether the amount of interest be limited to the amount of principal, on the basis of the principle of *damdapat*, or not. The High Court has held that the principle of *damdapat* will not apply in this case. We agree with that opinion.

The rule of *damdapat* applies to cases where a loan is advanced. This is clear from Colebrooke's Digest on Hindu Law.

Part I, Vol. I, of the Digest deals with Contracts. Book I of this Part deals with Loans and Payment. Section I of Chapter I of Book I deals with Loans in General and describes what may or may not be loaned by whom, to whom and in what form, with the rules for delivery and receipt. These matters are comprised under the title 'loans delivered (rinadana)', which means the complete delivery of a loan or debt, by whom, where and to whom made. Chapter II deals with interest and states at the commencement of Section I:

"Such interest, as may be taken without a breach of duty on the part of the creditor, is a rule (dharma) for delivery by the creditor. Or... for it is the nature of a loan, that it should produce to the lender the principal sum advanced, and interest in addition thereto."

The various Articles in this Section use the expressions 'creditor', 'lender', 'loan', 'principal', 'lent', 'borrowers' and thus make it amply clear that it deals with interest on the amounts advanced by a creditor to a debtor. Section I

deals with the rates of interest to be charged. Section II deals with Special Forms of Interest. Paragraph 53 thereof states:

"Interest on money, received at once, not year by year, month by month, or day by day, as it ought, must never be more than enough to double the debt, that is, more than the amount of the principal paid at the same time."

This is what is known by the rule of *damdupat* and has been rightly construed, as long ago as 1863, by the Bombay High Court in *Dhondo Jugonath v. Narayen Ramchunder*.¹ Section III deals with Interest Specially Authorized and Specially Prohibited. Article II of this Section deals with Limits of Interest. Paragraph 59 thereof states:

"The principal can only be doubled by length of time, after which interest ceases."

The limit of interest is different under other paragraphs for loans advanced in different circumstances. Paragraph 61 repeats what has been stated in para. 53 of Section II and adds a special rule to the effect:

"On grain, on fruit, on wool or hair, on beasts of burden, lent to be paid in the same kind of equal value, it must not be more than enough to make the debt quintuple." It is, therefore, clear, as stated earlier, that the rule of *damdupat* applies in respect of interest due on amounts lent by a creditor to the borrower, the debtor. The question then is whether the funds in the hands of a trustee can be said to be such loans notionally advanced by the trustee to himself as an individual. If their character can be deemed to be such, there may be a case for applying the rule of *damdupat* to the interest on such funds and that if it is not so, this rule of *damdupat* will not apply to the interest ordered to be paid on such funds.

It has been urged for the appellant that the trustee is a debtor with respect to the trust money in his hands. Reference has been made to Halsbury's Laws of England, 3rd edn., vol. 38, p. 1044 where it is stated at para. 1801:

"A breach of trust is, in equity, regarded as giving rise to a simple contract debt." In the foot-note is stated:

"Strictly speaking, the relation of debtor and creditor does not subsist between a trustee and his *cestui que trust* (per Lindely, L. J. in *Ex parte Taylor: In re Goldsmid*)."² Lewin on 'Trusts', 15th edn., states at p. 745:

"The debt constituted by a breach of trust is, even after it has been established by a decree, an equitable debt only, and until the Bankruptcy Act, 1869, would not have supported a petition in bankruptcy."

It was said by the Earl of Halsbury, L.C., in *Sharp v. Jackson*³:

"...It has been suggested that there was a proposition which could be maintained, as to which I confess I entertain grave doubts whether any decision goes to that extent, namely, that the relation between a *cestui que trust* and a trustee who has misappropriated the trust fund is not that of debtor and creditor. That it may be something more than that is true, but that it is that of debtor and creditor I can entertain no doubt. As that question has been mooted and brought before your Lordships' House as one question for decision here, I certainly have no hesitation in saying that in my opinion no such proposition can properly be maintained, and that although there are other and peculiar elements in the relation between a *cestui que trust* and a trustee, undoubtedly the relation of debtor and creditor can and does exist."

No other Lord expressed an opinion on this point.

The correctness of this expression of the Earl of Halsbury has been doubted in *Lake, In re: Dyer, Ex parte*⁴ by Rigby L. J., who remarked at the hearing:

"How is a trustee a debtor? Can he be sued at common law? I do not see how he can be a 'debtor', for the money he is fraudulently dealing with is, at law, his own money. No doubt he can be called upon to replace the money, but that must be by a suit in equity, not at law. Notwithstanding the high authority of the statement that has been referred to, I confess I do not understand it."

¹ (1863) 1 Bom. H.C. R. 47, at p. 49.

² (1886) 18 Q.B.D. 295.

³ [1899] A.C. 419, at p. 426.

⁴ [1901] 1 K.B. 710, at p. 715.

We are of opinion that though a trustee, who has custody of trust funds, has a pecuniary liability to make good those funds if he has used them and may, on the basis of such a liability, be said to be a debtor of the trust, yet he, as an individual, is not a borrower of the funds from the trust and cannot be said to have taken a loan from himself as a trustee in charge of the trust funds. His liability to pay interest, when ordered by the Court on equitable grounds, does not come within the provisions dealing with interest in Hindu law, as mentioned in Colebrooke's Digest.

There is no fixed rate of interest which a trustee is liable to pay as there is no contract between him as a trustee and as an individual to pay interest. He simply uses the money in his custody. It is only when the Court determines his liability to pay interest that interest is to be calculated on the principal amount due from him. It is not the case of a creditor letting interest accumulate and thus make the debtor pay interest much more than what he had borrowed as principal.

The principle of *damdupat* was evolved both as an inducement to the debtor to pay the entire principal and interest thereon at one and the same time in order to save interest in excess of the principal and as a warning to the creditor to take effective steps for realising the debt from the borrower within reasonable time so that there be not such accumulation of interest as would be in excess of the principal amount due, as in that case he would have to forego the excess amount. There may be justification for the principle of *damdupat* applying in the case of an ordinary creditor and a debtor, but there seems no justification for extending that principle to the case of a trustee who has to pay interest on the funds in his hand with respect to which on certain grounds he is held liable to pay interest. We, therefore, hold that the rule of *damdupat* will not apply with respect to the interest adjudged payable by a trustee on his committing breach of trust with respect to the trust funds in his hands.

The result then is that the appellant is liable to pay Rs. 10,088-10-3 for principal and Rs. 11,235-9-4 as interest, upto the date of the institution of the suit, i.e. upto February 17, 1954.

We, therefore, allow the appeal, set aside the decree of the High Court and modify and decree of the trial Court accordingly. The result will be that the suit temple will be entitled to get from defendant No. 1 a sum of Rs. 21,324-3-7 upto the date of the suit, together with future interest at 4 per cent. per annum on Rs. 10,088-10-3 from the date of the suit till the date of payment. The appellant will bear his costs throughout. The costs of the respondents will come out of the estate.

Appeal allowed.

Present: The Hon'ble Mr. P. B. Gajendragadkar, Chief Justice, Mr. Justice K. N. Wanchoo, Mr. Justice M. Hidayatullah, Mr. Justice Raghubar Dayal and Mr. Justice J. R. Mudholkar.

PUNJABRAO v. DR. D. P. MESHAM.*

Constitution (Scheduled Castes) Order, 1950. Clause 3—Constitution of India, Art. 25—Word "profess" in cl. 3 of Order, meaning of—Definition of Hindu in Explanation II to art. 25.

The word "profess" in clause 3 of the Constitution (Scheduled Castes) Order, 1950, is used in the sense of an open declaration or practice by a person of the Hindu or the Sikh religion. Where, therefore, a person makes a public declaration that he has ceased to be a Hindu and has accepted the Buddhist religion he cannot derive any benefit from that Order and claim to be treated as one belonging to a Scheduled Caste.

In clause 3 of the Order the word "Hindu" is used in the narrower sense of the

*Decided, October 26, 1964. Civil Appeal No. 562 of 1964.

orthodox Hindu religion which recognises castes and contains injunctions based on caste distinctions.

The definition of Hindu contained in Explanation II to art. 25 of the Constitution of India is expanded for the special purposes of art. 25(2)(b) and for no other.

N. W. Karwadi v. P. H. Shambharkar,¹ referred to.

THE facts appear in the judgment.

M. C. Setalvad, with *N. L. Belekar*, *H. D. Awade* and *A. G. Ratnaparkhi*, for the appellant.

N. C. Chatterjee, with *V. S. Sawhney*, *S. S. Khanduja*, *S. K. Manchanda* and *Ganpat Rai*, for respondent No. 1.

MUDHOLKAR J. The question which arises for consideration in this appeal by special leave from the judgment of the Bombay High Court is whether respondent No. 1 Dr. D. P. Meshram was entitled to be a candidate for election to the Maharashtra Legislative Assembly from constituency No. 190 of Nagpur III, a constituency reserved for candidates from scheduled castes.

The appellant and respondents Nos. 1 to 4 were candidates duly nominated for election to the Assembly from the aforesaid constituency. The poll was taken on February 27, 1962, and respondent No. 1 who had polled the highest number of votes was declared elected. The appellant thereupon preferred an election petition before the Election Commission, the main allegations in which were (a) that respondent No. 1 having embraced Buddhism on March 17, 1957, had ceased to be a member of a Scheduled Caste within the meaning of the Constitution (Scheduled Castes) Order, 1950, and was thus disentitled from being a candidate for the particular seat and (b) that respondent No. 1 was guilty of several corrupt practices. The Tribunal held that the corrupt practices alleged against respondent No. 1 were not established. It, however, came to the conclusion that respondent No. 1 had embraced Buddhism as alleged by the appellant and was, therefore, not eligible for being a candidate for election from the reserved constituency. Upon this ground the Tribunal set aside the election of respondent No. 1. It may be mentioned that the appellant had made a further prayer to the effect that he should be declared elected to the seat; but this prayer was not granted by the Tribunal on the ground that he was not the only other candidate for election and, therefore, it cannot be said how the votes which respondent No. 1 had secured would have been distributed among the remaining candidates. Aggrieved by the decision of the Tribunal respondent No. 1 preferred an appeal before the High Court of Bombay. The only question which was urged before the High Court was regarding the alleged conversion of respondent No. 1 to Buddhism. On that question the High Court reversed the finding of the Tribunal and held that the fact had not been established by evidence. The High Court, therefore, upheld the election of respondent No. 1.

[His Lordship then considered the evidence whether respondent No. 1 was converted to Buddhism and held that he was so converted, and proceeded.]

What cl. (3) of the Constitution (Scheduled Castes) Order, 1950 contemplates is that for a person to be treated as one belonging to a Scheduled Caste within the meaning of that Order he must be one who professes either Hindu or Sikh religion. The High Court, following its earlier decision in *N. W. Karwadi v. P. H. Shambharkar*¹ has said that the meaning of the phrase "professes a religion" in the aforementioned provision is "to enter publicly into a religious state" and that for this purpose a mere declaration by a person that he has ceased to belong to a particular religion and embraced another religion would not be sufficient. The meanings of the word "profess" have been given thus in Webster's New World Dictionary: "to avow publicly; to make an open

¹ [1958] A.I.R. Bom. 296, s.c. 60 Bom. L.R. 776.

¹ [1958] A.I.R. Bom. 296, s.c. 60 Bom. L.R. 776.

declaration of; . . . to declare one's belief in: as, to profess Christ. To accept into a religious order". The meanings given in the Shorter Oxford Dictionary are more or less the same. It seems to us that the meaning "to declare one's belief in: as to profess Christ" is one which we have to bear in mind while construing the aforesaid order because it is this which bears upon religious belief and consequently also upon a change in religious belief. It would thus follow that a declaration of one's belief must necessarily mean a declaration in such a way that it would be known to those whom it may interest. Therefore, if a public declaration is made by a person that he has ceased to belong to his old religion and has accepted another religion he will be taken as professing the other religion. In the face of such an open declaration it would be idle to enquire further as to whether the conversion to another religion was efficacious. The word "profess" in the Presidential Order appears to have been used in the sense of an open declaration or practice by a person of the Hindu (or the Sikh) religion. Where, therefore, a person says, on the contrary, that he has ceased to be a Hindu he cannot derive any benefit from that Order.

Finally it is argued that the word Hindu is comprehensive enough to include a Buddhist and in this connection our attention is invited to Explanation II to cl. (2) of art. 25 of the Constitution. Clause (1) of art. 25 recognises, amongst other things, freedom to practise and propagate religion. Sub-clause (b) of cl. (2) runs thus:

"Nothing in this article shall affect the operation of any existing law or prevent the State from making any law—...

(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus."

Explanation II reads thus:

"In sub-clause (b) of clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly."

The definition of Hindu is expanded for the special purposes of sub-cl. (b) of cl. (2) of art. 25 and for no other. Paragraph 3 of the Constitution (Scheduled Castes) Order reads thus:

"Notwithstanding anything contained in paragraph 2, no person who professes a religion different from the Hindu or the Sikh religion shall be deemed to be a member of a scheduled caste."

If it was intended that the word "Hindu" used in this paragraph should have a wide meaning similar to that in Explanation II just quoted there would have been no need to make a mention of the Sikh religion. From the fact that a special mention is made of the Sikh religion it would follow that the word "Hindu" is used in the narrower sense of the orthodox Hindu religion which recognises castes and contains injunctions based on caste distinctions.

For the foregoing reasons we are satisfied that respondent No. 1 had ceased to be a Hindu at the date of his nomination and that consequently he was ineligible to be a candidate for election from a constituency reserved for members of scheduled castes. In the circumstances the Tribunal was right in setting aside his election. Accordingly we allow the appeal, set aside the judgment of the High Court and restore that of the Tribunal. Costs throughout will be borne by respondent No. 1.

Appeal allowed.

APPELLATE CIVIL.

Before the Hon'ble Mr. H. K. Chinnani, Chief Justice, and Mr. Justice Kotwal.

SHAIKH OMAR SHAIKHLAL v. MOHAMMADJI MADARJI.*

Hyderabad Abolition of Inams and Cash Grants Act (Hyd. Act VIII of 1955), Secs. 1(2) (2A), 2(1)

*—Lands granted as Inam to individuals for service of taking out Tazias during Mohurram—
Whether such Inam abolished under Act.*

Certain lands were granted as Inam to some individuals on condition of service which was specified as Taziadari, i.e., for taking out Tazias during the period of Mohurram. On the question whether this Inam was abolished by the Hyderabad Abolition of Inams and Cash Grants Act, as amended in 1959 :—

Held, that as the lands were granted as Inam not to any society or organization but to certain individuals, the Inam could not be said to have been held by or for the benefit of any charitable or religious institution within s. 1(2) of the Act,

that the service for rendering which the grant was made was a service to be rendered to a section of the Muslim community and, therefore, the Inam was a community service Inam within the meaning of the Act, and

that such an Inam was abolished with effect from July 1, 1960, under s. 1 (2A) of the Act.

Ram Charan Law v. Fatima Begum, distinguished.

THE facts appear in the judgment.

M. P. Kanade, for the petitioner.

S. G. Deshmukh, for opponent No. 1.

R. B. Kotwal, Government Pleader, for opponent No. 2.

CHANNANI C. J. The lands in dispute were granted as Inam on the condition of service which was specified as Taziadari, that is, for taking out Tazias during the period of Mohurram. After the coming into force of the Hyderabad Abolition of Inams and Cash Grants Act as amended in 1959, the question arose whether this Inam was abolished by this Act. The Deputy Collector held that the Inam was not abolished. That order was confirmed in appeal by Government. It is being challenged before us in this application.

Sub-section (2) of s. 1 of the Act states that it shall be applicable to all inams except (i) inams held by or for the benefit of charitable and religious institutions and (ii) inams held for rendering village service useful to the Government or to the village community including sethsendhi, neeradi and balutha inams. Sub-section (2A) provides that on the coming into force of the Hyderabad Abolition of Inams (Amendment) Act, 1959 (July 1, 1960) the Act shall apply also to cash grants and inams of the nature of community service inams and watans. The expression "community service inam" is defined in sub-s. (1) of s. 2 to mean an inam held for performing service useful to the village community and includes an inam held for such service even where such service has ceased to be demanded.

The Muntkhab which was issued about 1916 shows that the grant had been made to Saroji Kondaji and four other persons on condition of rendering service which is mentioned as Taziadari. The holders of the inam were, therefore, five individuals, who cannot be described as a charitable and religious institution. The grant was not made to any society or organisation. According to the Oxford English Dictionary the word "institution" means

"establishment; organization or association instituted for the promotion of some object, specially, one of public or general utility, religious, charitable, educational etc. e.g. a church, school, college, hospital, asylum, reformatory, mission or the like."

This is the ordinary meaning of the word. Another meaning is

"established law, custom, usage, practice, organization or other element in the political or social life of the people."

Colloquially it is some times used in the sense of something having fixity or importance of a social institution, e.g. in the sentence "He is one of the institutions

*Decided, April 9, 1965. Special Civil Ap- 1 (1915) I.L.R. 42 Cal. 933, at p. 935.
plication No. 1114 of 1964.

of the place." Ordinarily, therefore, an individual is not referred to as an institution. A grant to an individual would not, therefore, be a grant to an institution. The fact that the grant was made for the performance of service of a religious or charitable nature is immaterial. Every inam for a charitable or religious purpose is not for the benefit of a charitable or religious institution.

The Deputy Collector has referred to a casual observation in the judgment of Imam J. in *Ram Charan Law v. Fatima Begum*,¹ which is as follows :

"...but it is the keeping up of the Mohurum as an institution with all its moral effect on the general Mahomedan public."

The word "institution" here is obviously used in the sense of a custom or practice. It would be wrong to draw from this sentence an inference that a grant for performing religious service is a grant to a religious institution. The question, which the Calcutta High Court had to decide, was also quite different and that was whether a waqf was created where with the object of dedicating a house to the service of the Imams, Hassan and Hussain and for other religious purposes, the settlor had conveyed the house to his grand-children on trust for the proper observance of the objects mentioned in the deed.

As the lands in the present case were granted as inam not to any society or organization but to five individuals and as the present holders of the inam are also some individuals, the inam cannot be said to have been held by or for the benefit of any charitable or religious institution. The service for rendering which the grant was made was a service to be rendered to a section of the Muslim community. The Inam would, therefore, be a community service inam within the meaning of the Act. Such an inam was abolished with effect from July 1, 1960, under sub-s. (2A) of s. 1 of the Act.

In our opinion, therefore, the view taken by the Deputy Collector and by Government is not correct. We set aside the orders made by them and hold that the inam was a community service inam which was abolished with effect from July 1, 1960.

No order as to costs.

Orders set aside.

FULL BENCH.

[NAGPUR BENCH]

Before the Hon'ble Mr. H. K. Chaiyani, Chief Justice, Mr. Justice Tambe and Mr. Justice Abhyankar.

HAJARIMAL GIRDHARILALJI SHOP v. HARINARAYAN SHEONARAYAN MAHESHWARI.*

C. P. and Berar Moneylenders Act (XIII of 1934), Secs. 11-B, 11-H—Money-lender not registered under s. 11-B on date of loan—Whether money-lender's suit to recover loan liable to be dismissed.

A suit for the recovery of a loan advanced by a money-lender is not liable to be dismissed merely because the money-lender was not registered under s. 11-B of the C.P. and Berar Moneylenders Act, 1934, on the date of the transaction.

Section 11-H of the Act contemplates that if after the suit has been instituted, the Court finds that the plaintiff money-lender does not hold a valid registration certificate, it shall stay the suit for a reasonable time until a valid registration certificate is produced. If no such certificate is produced thereafter, the Court will not pass a decree in the plaintiff's favour.

Wasudeo Bhairulal v. Ramchandra,¹ overruled.

Mohd. Salem v. Umaji,² explained.

Janki Bai v. Ratan Melu,³ agreed with.

Pairam v. Baliram,⁴ referred to.

1 (1915) I.L.R. 42 Cal. 933, at p. 935.

*Decided, July 1, 1965. First Appeal No. 87 of 1959, against the decision of G. G. Bhojraj, District Judge at Buldana, in Civil Suit No. 2-B of 1958.

1 (1958) 60 Bom. L.R. 1247, s.c. [1958] N.L.J. 294.

2 [1955] A.I.R. Hyd. 113.

3 [1962] A.I.R. M.P. 117, F.B.

4 [1953] Nag. 997.

HAJARIMAL Girdharilalji Shop (plaintiff), who was a money-lender advanced Rs. 2,000 and Rs. 4,500 to Harinarayan (defendant) under two pro-notes of dates April 20, 1952, and June 29, 1952, respectively. On these dates the plaintiff did not hold a valid registration certificate as required under s. 11-F of the Central Provinces and Berar Money-lenders Act, 1934. Both these pro-notes were ultimately renewed on April 7, 1955. The amount found due on these two pro-notes together with interest thereon was found to be Rs. 8,500. The defendant on the said date i.e. on April 7, 1955, executed a fresh promissory note for the said amount of Rs. 8,500. Prior to this date, i.e. April 7, 1955, the plaintiff did hold a valid registration certificate under the said section of the Act. On April 7, 1958, plaintiff instituted this suit to recover from the defendant a sum of Rs. 11,500. The details of this sum were Rs. 8,500 the principal amount of pro-note dated April 7, 1955, plus Rs. 3,060 interest at the rate of one per cent per month from April 7, 1955 to April 7, 1958 on the said sum of Rs. 8,500. The total came to Rs. 11,560. Plaintiff gave up Rs. 60 and claimed a decree for Rs. 11,500 together with interest thereon from the date of the suit till the date of realisation and costs. The defendant *inter alia* contended that the plaintiff's suit was liable to be dismissed inasmuch as plaintiff had no money-lender's certificate under s. 11-F on the date of the original transactions of April 20, 1952, and June 20, 1952.

The trial Judge, following the decision in *Wasudeo Bhairulal v. Ramchandra*¹ held that the plaintiff not having held a money-lender's certificate under s. 11-F, his suit was liable to be dismissed. He, therefore, dismissed the suit.

The plaintiff appealed to the Nagpur Bench of the High Court. The appeal came on for hearing before Tambe and Deshmukh JJ., who referred it to a larger bench. In the course of his referring judgment, delivered on June 17, 1965, Tambe J., observed as follows :—

TAMBE J. Mr. Bobde, learned counsel for the appellant, stated that he was not disputing the finding of the trial Court on the minor issues as to interest and the appellant would accept that the amount due to him on the date of the suit was, as found by the learned Judge, Rs. 9,008. He, however, contends that the learned Judge was in error in holding that the plaintiff's suit was liable to be dismissed for the reason that the plaintiff did not hold money-lender's licence on the date of the original transactions, viz. April 20, 1952 and June 29, 1952. He has brought to our notice a decision of the Nagpur High Court supporting his view in *Patiram v. Baliram*². Mr. Bobde in the alternative contends that, at any rate, plaintiff having held the money-lender's licence on the date of the renewal, viz. April 7, 1955, the plaintiff was entitled to a decree for the full amount inasmuch as the renewal of the pro-note is a fresh transaction affording an altogether new cause of action to the plaintiff. The question whether plaintiff's failure to hold money-lender's licence under s. 11-F on the date of the original transactions is fatal to the suit or not, is of considerable importance. The section has been construed differently in two decisions of the Division Bench. In our opinion, it is necessary that the question is decided by a larger Bench. The papers be placed before My Lord the Chief Justice for constituting the larger bench.

The question was considered by a Full Bench composed of Chainani C. J. and Tambe and Abhyankar JJ.

A. S. Bobde, for the appellant.

B. A. Udhoji, for the respondent.

CHAINANI C. J. The question, which has been referred to the Full Bench, has been formulated as under :—

Whether a suit for the recovery of a loan advanced by a moneylender is liable to be dismissed, because the moneylender was not registered under s. 11-B of the C.P. and Berar Money-lenders Act, 1934 (No. XIII of 1934) on the date of the transaction?

The facts of the appeal, which has given rise to this reference, are that the appel-

1 (1958) 60 Bom. L. R. 1247, s. o. [1958] 2 [1953] Nag. 997.
N. L. J. 294.

lant-plaintiff is a money-lender. He advanced two loans of Rs. 2,000 and Rs. 4,500 to the defendant on April 20, 1952, and June 29, 1952, respectively. On these dates he did not hold a valid registration certificate. These promissory notes were renewed on April 7, 1955, on which date the defendant executed a fresh promissory note for Rs. 8,500 which represented the principal of the original two promissory notes and the interest thereon. In 1958, the plaintiff instituted a suit to recover the amount due from the defendant on the promissory note dated April 7, 1955. This suit was dismissed following the decision of this Court in *Wasudeo Bhairulal v. Ramchandra*¹. In that case, it was held that a suit to recover money advanced by a money-lender as defined in the C.P. and Berar Moneylenders Act, 1934 (hereinafter referred to as the Act) and who did not hold a registration certificate on the date of the transaction, cannot be instituted. Against that decision, the plaintiff filed an appeal. When the appeal came up for hearing, reliance was placed on behalf of the appellant on the decision of the Nagpur High Court in *Patiram v. Baliram*². In that case, the Nagpur High Court had held that s. 11-F of the Money-lenders Act applies to the business of money-lending and not to an individual transaction of lending money, that the individual transaction of money-lending made by a money-lender, who has not obtained a registration certificate, is not made invalid and that the only obstacle created in his way is that he cannot obtain a decree on his loan unless he possesses a valid registration certificate on the date on which a decree is to be passed. In view of these two conflicting decisions, the Division Bench decided to refer the matter to a larger Bench.

Section 11-A of the Act provides that every Sub-Registrar shall maintain a register of money-lenders. Sub-section (1) of s. 11-B states that every person, who carries on or intends to carry on the business of money-lending, shall get himself registered by an application made to the Sub-Registrar of any sub-district of the district or any one of the districts in which he carries or intends to carry on such business. Section 11-B provides that the registration certificate granted under s. 11-B shall not entitle the holder thereof to carry on the business of money-lending in any district other than the district or districts for which such certificate has been granted. Sub-section (1) of s. 11-F states that no person shall carry on the business of money-lending in any district unless he holds a valid registration certificate in respect of that district. Sub-section (2) of this section states that whoever contravenes the provisions of sub-s. (1) shall be punishable with the fine specified in the section. Section 11-H, and which is the section which is to be construed, is in the following terms :—

"11-H. No suit for the recovery of a loan advanced by a moneylender shall proceed in a civil court until the court is satisfied that he holds a valid registration certificate or that he is not required to have a registration certificate by reason of the fact that he does not carry on the business of money-lending in any of the districts of Madhya Pradesh.

Provided that this section shall not apply to a suit instituted before the 1st October 1940".

The language used in s. 11-H is very significant. The section does not say that no suit shall be instituted or entertained. What it states is that no suit shall proceed. The section does not therefore bar a suit for the recovery of a loan advanced by a money-lender, who did not hold a valid registration certificate. A suit can lie, but the Court is required not to proceed with the suit, that is, to hold any proceeding in the suit until it is satisfied that the plaintiff money-lender holds a valid registration certificate. There is also no total prohibition on the Court from proceeding with the suit. The prohibition is to operate "until" the Court is satisfied about the possession of a valid certificate by the plaintiff. The other important word to be noted is "holds". The word is used in the present tense. It suggests that the money-lender must possess a registration certificate at the time when the Court proposes to proceed with the suit. If at that time he does not possess a valid registration certificate the Court cannot proceed with the suit.

It has been urged that as under s. 11-F a money-lender cannot carry on money-lending business without a valid registration certificate, the words "holds a valid

¹ (1958) 60 Bom. L. R. 1247, s. c. [1958] N. L. J. 294. ² [1953] Nag. 997.

registration certificate" in s. 11-H imply that the certificate should have been held on the date of the transaction. The material word used however is "holds" and not 'held'. The section does not say that the money-lender should have held a valid registration certificate on the date of the transaction. The word "holds" considered along with the words "shall proceed" on the other hand indicate that the requirement about the certificate is to be satisfied at the time when the Court intends to proceed with the suit.

Section 11-H does not also lay down that the suit shall be dismissed if the certificate is not produced. It only prohibits a Court from proceeding with the suit until it is satisfied as stated in the section. What the section, therefore, contemplates is that if after the suit has been instituted, the Court finds that the plaintiff money-lender does not hold a valid registration certificate, it shall stay the suit for a reasonable time until a valid registration certificate is produced. If no such certificate is produced thereafter, the Court will not pass a decree in the plaintiff's favour.

A plain reading of the section, therefore, makes it clear that a suit cannot be dismissed only on the ground that the plaintiff did not possess a valid registration certificate on the date of the transaction.

The principal reason for the contrary view taken in *Wasudeo Bhairulal v. Ramchandra*, is that as s. 11-F prohibits a money-lender from carrying on the business of money-lending without a valid registration certificate and also provides a penalty for the contravention of this provision, a suit on a money-lending transaction entered into by an unregistered money-lender cannot be maintained. With respect, it may be pointed out that the Legislature itself has not barred a civil suit in respect of such a transaction. The only obstacle which it has placed in the way of a plaintiff in such a case is that the suit shall not proceed until a valid registration certificate has been produced. The Legislature has also in sub-s. (2) of s. 11-F specified the penalty for contravention of the provisions of sub-s. (1) of s. 11-F, that is, for carrying on money-lending business without a certificate. It has not prescribed any additional penalty such as that a suit to recover a loan advanced by an unregistered money-lender shall not lie or shall be dismissed. It is not open to a Court to subject a person to any penalty other than what the Legislature has prescribed.

Reliance has been placed in the above judgment on *Mohd. Saleem v. Umaji*³ in which a Full Bench of the Hyderabad High Court held that a suit should be dismissed if the money-lender did not possess a licence on the date of the transaction. It was observed that the object of the enactment was to serve a public purpose and the mischief it sought to secure was to protect borrowers from unscrupulous and usurious money-lenders by prohibiting them from lending monies without obtaining licences on pain of imprisonment as well as by empowering Courts to dismiss suits of such money-lenders. Section 9 (2) of the Hyderabad Money-lenders Act provides that if it is proved that the plaintiff is a money-lender as defined in sub-s. (7) of s. 2, but does not hold a licence granted under s. 3, the Court shall dismiss his suit. The object of the C.P. & Berar Act is also the same, to protect borrowers from unscrupulous money-lenders, but there is no provision in this Act empowering the Court to dismiss a suit on the ground that the money-lender did not possess a registration certificate. The wording of s. 11-H is materially different.

It has been urged that a transaction entered into by a money-lender in contravention of the provisions of s. 11-F is void and opposed to public policy. It is not necessary for us to decide this question in this reference. Assuming that the transaction is void, the plaintiff may be able to obtain relief under s. 65 of the Contract Act. It will be open to the respondent to urge this point at the hearing of the appeal.

In *Janki Bai v. Ratan Melu*,⁴ a Full Bench of the Madhya Pradesh High Court has taken the same view as we are inclined to take. It was held in that case that if a money-lender does not have, and cannot produce a registration certificate covering the date on which he advanced a loan, his suit for recovery of that loan is, for that reason alone, not liable to be dismissed, and that it will be sufficient compliance of s. 11-H if, during the pendency of the suit he produces a registration certificate which is valid at the time of its production.

In our opinion, therefore, *Wasudeo Bhairulal v. Ramchandra* was not correctly decided. Our reply to the question referred to the Full Bench will, therefore, be in the negative. The appeal may now be placed before a Division Bench for further orders.

Answer accordingly.

APPELLATE CIVIL.

[NAGPUR BENCH]

Before the Hon'ble Mr. H. K. Chainani, Chief Justice, and Mr. Justice Wagle.

THE INDIAN HUME PIPE COMPANY LTD. v. BHIMRAO BALIRAM
GAJBHIYE.*

*Industrial Disputes Act (XIV of 1947), Secs. 25-H, 25-F—Retrenched workman re-employed—
Whether such workman entitled to previous terms and conditions of service.*

Section 25-H of the Industrial Disputes Act, 1947, only gives a right to a worker to have preference in the matter of re-employment; it does not give him a right to secure employment on his previous terms and conditions of service.

*Indian Hume Pipe Co. v. Labour Court*¹, dissented from.

The facts appear in the judgment.

E. J. Moharir, for the petitioner.

S. G. Kukde, for respondent No. 1.

CHAINANI C. J. The facts giving rise to this application are that respondent No. 1, hereinafter referred to as the respondent, had been employed by the petitioners sometime in 1960. After about two years' service, he was retrenched on March 10, 1962, and was paid retrenchment compensation in accordance with the provisions of s. 25-F of the Industrial Disputes Act, 1947. At the time when the respondent was retrenched, a proceeding under s. 38A of the C.P. and Berar Industrial Disputes Settlement Act, 1947, was pending before the State Industrial Court. Under the award, which was made by that Court in that proceeding, the respondent became entitled to a basic wage of 86 nP. in addition to dearness allowance of Rs. 1.75 on the date of his retrenchment. The respondent was re-employed on October 1, 1962. According to the employment order issued to him, he was to be paid a basic wage of 62 nP. and dearness allowance of Rs. 1.75 nP. Under the award 62 nP. was the basic wage fixed for new entrants. The respondent subsequently made an application to the Labour Court under s. 33C (2) of the Industrial Disputes Act. He contended in that application that he was entitled to receive the same wages from the date of his re-employment as were being paid to him on the date of his retrenchment, that is, 86 nP. per day, apart from dearness allowance. He complained that he had been paid 24 nP. less per day and accordingly he claimed Rs. 65 from the petitioners. The petitioners resisted the application of the respondent and raised various contentions. The principal contention of the petitioners was that as the respondent had been paid retrenchment compensation, he was liable to be treated as a new entrant and accordingly entitled only to the basic wage of 62 nP, which is the wage fixed for new entrants by the award. This argument was not accepted by the Labour Court, which relied upon the decision of the Andhra Pradesh High Court in *Indian Hume Pipe Co. v. Labour Court*¹. The Labour Court, therefore, made an order directing the petitioner to pay Rs. 65 to the respondent. That order has been challenged before us in this application.

Section 25-H of the Industrial Disputes Act provides that where any workmen are retrenched, and the employer proposes to take into his employ any persons, he shall,

*Decided, July 7, 1965. Special Civil 1 [1963] 1 L.L.J. 770.
Application No. 317 of 1964. 1 [1963] 1 L.L.J. 770.

in such manner as may be prescribed, give an opportunity to the retrenched workmen to offer themselves for re-employment and retrenched workmen who offer themselves for re-employment shall have preference over other persons. This section, therefore, imposes an obligation on an employer to give first preference to retrenched workmen whenever he decides to increase the strength of his establishment and employ some additional persons. The employer must first offer the job to a retrenched workman before he can engage any other person. Under the section, an offer is to be made to retrenched workmen for re-employment. According to the Oxford Dictionary, "re-employ" means "employ again" or "take back into employment." Re-employment, therefore, means taking back in employment, but it does not necessarily imply that the taking back into employment or service must be on the same terms and conditions, to which the employee was entitled previously. Section 25 H only gives a right to a worker to have preference in the matter of re-employment, but we do not find anything in the section or any other provision in the Act which also gives him a right to secure employment on his previous terms and conditions of service. Under s. 25-F, when a worker is retrenched, he gets compensation for the loss of service. The amount of this compensation depends on the length of service put in by him. His previous service, is, therefore, taken into consideration when the retrenchment compensation is paid. Thereafter, the only right available to him by reason of his having been previously employed is that conferred on him by s. 25 H and that is of preference in securing the employment. If the argument that a worker is entitled to be re-employed on his previous terms and conditions of service is accepted, the position would be that if a worker is retrenched again, he would be entitled to have his previous service also taken into consideration for the purpose of determining the retrenchment compensation payable to him. It could not have been intended by the Legislature that the same period of service should be taken into consideration more than once for the purpose of paying retrenchment compensation.

It has been urged by Mr. Kukday that a distinction should be drawn between retrenchment compensation and the wages payable to a worker. He has in fairness conceded that previous service of a worker cannot be taken into consideration again if after being re-employed, he is retrenched, for the purpose of determining the compensation then payable to him. But he has argued that wages, which a worker is entitled to draw at any time, depend also upon the length of service put in by him. He has urged that there is no reason why the previous service of a worker should not be taken into consideration for the purpose of fixing his basic wage. In the absence of any provision to the contrary, it will, however, be difficult to accept the argument that while the previous service should be taken into consideration for one purpose, it should be ignored for another purpose.

Reference has been made to the decision of the Andhra Pradesh High Court in *Indian Hume Pipe Co. v. Labour Court*.¹ At page 775 it has been observed :

"... The word 're-employment', in our opinion, connotes employment on the same terms as before. The meaning given in the Oxford English Dictionary is 'to employ again, to take back into employment.' This implies employment on the same terms and conditions of service. In our considered judgment, the obligation to employ the workmen on the same condition as to emoluments, etc., is implicit in the concept of re-employment."

With respect, we find ourselves unable to agree that the word "re-employment" necessarily connotes employment on the same terms as before. All that s. 25-H provides for is preference to retrenched workmen in securing employment, but it does not say that the re-employment should be on the former terms and conditions of service. If that had been the intention of the Legislature, it would have made a specific provision to that effect.

In our opinion, therefore, the view taken by the Labour Court is not correct. Accordingly, we set aside the order made by the Labour Court and direct that the application made by the respondent to the Labour Court should be dismissed. No order as to costs.

Order set aside.

CRIMINAL APPELLATE.

Before the Hon'ble Mr. H. K. Chainani, Chief Justice.

KRISHNA GUNDU POTJALE v. STATE OF MAHARASHTRA.*

Criminal Procedure Code (Act V of 1898), Sec. 173—Police Manual. Vol. III. Para 219—Request for grant of summary on report to magistrate— Whether obligatory on magistrate to hear accused before granting summary.

On a report made to a magistrate under s. 173 of the Criminal Procedure Code, 1898, requesting grant of a summary, it is not obligatory on the magistrate to hear the accused before he decides as to which summary he should grant.

State v. Murlidhar¹, referred to.

THE facts appear in the judgment.

H. D. Gole, for the petitioners.

M. A. Rane, Assistant Government Pleader, for the State.

CHAINANI C. J. The petitioners are two police constables who were formerly attached to the Jaisingpur Outpost. On September 7, 1962, one Bhupal Anna Chougule was murdered. Two persons were prosecuted in connection with that offence, but they were acquitted. The allegation against the petitioners was that they had taken some illegal gratification and had tried to shield the culprits and that they had thereby committed offences under ss. 193, 201, 204 and 217, Indian Penal Code. They were arrested and released on bail. These offences were investigated by the police, but after the acquittal of the accused, who were tried on the charge of murder the police came to the conclusion that it would be difficult to obtain a conviction against the petitioners. They, therefore, sent a report to the Judicial Magistrate concerned under s. 173, Criminal Procedure Code, and asked for a non-cognizable summary in respect of the offences alleged against the petitioners. The learned Magistrate, however, granted "A" Summary. Being aggrieved by the order, the petitioners filed a revision application in the Sessions Court at Kolhapur. That was rejected. Thereafter they have filed the present revision application in this Court.

It appears that before the learned Magistrate passed orders on the report made to him under s. 173, the petitioners had made an application to him and requested that they should be heard before orders were passed. In *State v. Murlidhar¹*, it has been held that an order passed by a Magistrate on a report under s. 173, Criminal Procedure Code, requesting that Summary "A", "B" or "C" be issued is in its very nature a judicial order and not an administrative order. Mr. Gole, the learned advocate for the petitioners, has therefore contended that the Magistrate was bound to hear the petitioners before deciding as to which Summary he should grant. He has urged that a judicial order necessarily contemplates that there must be application of mind and that there can be proper application of mind only after the parties have been heard. There is no provision in the Code providing for classification of offences or for the issue of Summaries by the Magistrate to whom a report is made under s. 173 of the Code. The classification is made and the Summaries are granted under para. 219 in Vol. III of the Police Manual. Clause 3 of this paragraph states that a request should be made to the Magistrate to classify the case and to issue an appropriate Summary of his order, and the clause further provides that "A" Summary is to be issued when the complaint is true but undetected (where there is no clue whatsoever about the culprits or property or where the accused is known but there is no evidence to justify his being sent up to the Magistrate for trial), that "B" Summary is to be issued when the complaint is maliciously false, while "C" Summary is to be issued when the complaint is neither true nor false. These Summaries are asked for when the police do not propose to send a charge-sheet against the accused or when it is not proposed to prosecute him. A Magistrate has no doubt power to direct a prosecution, but if he decides not to do so, then he issues an appropriate summary.

*Decided, August 17, 1965. Criminal Revision Application No. 189 of 1965.

1 (1959) 61 Bom. L.R. 1656.

1 (1959) 61 Bom. L.R. 1656.

A summary is, therefore, issued only when it is not proposed to prosecute the accused. An order of the Magistrate granting one or the other summary does not, therefore, cause any prejudice to the accused. So far as he is concerned the proceeding under the Code commenced by the Police then comes to an end. Consequently it is not necessary to hear the accused for deciding which summary should be granted. There is also no provision either in the Code or in the Police Manual, which provides that the accused should be heard before the Magistrate decides as to which summary he should grant. I am, therefore, unable to accept Mr. Gole's argument that the Magistrate was under an obligation to hear the petitioners before he decided to grant "A" Summary.

It has, however, been urged by Mr. Gole that the consequence of the grant of "A" Summary may be that departmental proceedings may be instituted against the petitioners. Such proceedings could have been instituted against the petitioners even if the petitioners had been prosecuted and acquitted or if the Magistrate had issued "C" Summary. The order made by the Magistrate granting "A" Summary is based on the evidence collected by the police during the course of the police investigation. Such an order cannot prejudice an accused person in any departmental proceeding which may be held against him, because the finding in the departmental proceeding must necessarily be based on the evidence led in the course of the departmental inquiry. The order of the Magistrate granting "A" Summary made without hearing the petitioners cannot, therefore, prejudice the petitioners in any departmental inquiry which may be decided to be held against them.

[His Lordship after dealing with a point not material to this report, concluded.]

I, therefore, see no sufficient reason to interfere in this case. Rule discharged.

Rule discharged.

APPELLATE CIVIL.

Before Mr. Justice Naik.

THE LASALGAON MERCHANTS CO-OPERATIVE BANK LTD.

v.

M/S. PRABHUDAS HATHIBHAI.*

Bombay Land Revenue Code (Bom. V of 1879), Secs. 150, 154, 12—Indian Income-tax Act (XI of 1922). Sec. 46 (2)—Civil Procedure Code (Act V of 1908), O. XXI, rr. 43, 46—Constitution of India, Arts. 31 (1), 265—Income-tax Officer issuing certificate under s. 46(2) of Income-tax Act and revenue officers attaching goods of assessee pledged to and in possession of assessee's creditor—Goods damaged during subsistence of attachment—Suit against Government by creditor to recover amount of debt secured by pledge whether maintainable.

The defendants, who were constituents of the plaintiff-bank, took advances under an agreement from the plaintiff on the security of certain agricultural produce. A part of the produce was kept in the defendants' godown and the key of the same was handed over to the plaintiff, thus giving the goods in its possession. The defendants owed a sum towards income-tax dues and the Income-tax Officer issued a certificate under s. 46(2) of the Indian Income-tax Act, 1922, and forwarded it to the Collector and by a letter called upon him to make recoveries by attachment and sale of the goods lying in the defendants' godown. The Collector forwarded the letter to the Mamlatdar for taking necessary action. The Circle Officer under order from the Mamlatdar went to the godown and, notwithstanding the plaintiff's protest, attached the goods. During the subsistence of the attachment the goods were badly damaged as a result of rain water leaking

*Decided, March 15/16, 1965. Second Appeal No. 986 of 1959, against the decision of D. P. Shikhare, District Judge at Nasik, in Civil Appeal No. 115 of 1957, confirming

the decree passed by K. R. Pawar, Joint Civil Judge, Senior Division, at Nasik, in Regular Civil Suit No. 550 of 1955.

through the roof of the godown. The plaintiff filed a suit against the defendants, the State of Bombay, the Collector, the Mamlatdar, the Circle Officer and the Union of India, alleging that the attachment and seizure of goods from its possession was illegal and claimed the amount of the debt secured by the pledge. It was contended *inter alia* by the Government that it was not responsible for the illegal attachment as it had not ratified the act of officers attaching the goods:—

Held, that crown debt such as e.g. income-tax dues, cannot have priority over secured debts,

That the question of special authorisation or of subsequent ratification did not arise in the circumstances of the case, as the Circle Officer had exercised powers delegated to him under the provisions of law when he proceeded to attach the goods, that in seizing the goods he had acted in excess of the powers and the seizure of the goods was, therefore, illegal and unconstitutional, and

that, therefore, the plaintiff was entitled to a decree against all the defendants.

*Secretary of State for India v. Hari Bhanji*¹, applied

Prem Lal v. U. P. Govt.,² *Ross v. Secretary of State*³, *Gurucharan Kaur v. Province of Madras*⁴, *Shivabhanjan v. Secretary of State for India*⁵, *Ram Gulam v. U. P. Government*⁶, *Md. Murad v. U. P. Govt.*,⁷ *State of M. P. v. Singhai Kapoorchand*⁸ and *State of Rajasthan v. Mst. Vidhyawati*⁹, referred to.

The immunity of the State in respect of the acts of its subordinates in the exercise of its sovereign powers cannot be treated as a dogma or a *mantra* and will have to be considered on the facts of each case. Immunity cannot be claimed for acts which are either illegal or unconstitutional.

The distinction between rr. 43 and 46 of O. XXI of the Civil Procedure Code, 1908 is of prime importance. When the goods are in possession of a pledgee, the seizure of the goods amounts to wrongful deprivation of the goods which the pledgee is entitled to retain in his possession.

THE facts are stated in the judgment.

V. M. Limaye and *V. J. Thaveri*, for the appellant.

K. J. Abhyankar, Assistant Government Pleader, for respondents Nos. 3 to 7.

NAIK J. The suit giving rise to this appeal was filed by the plaintiff against ten defendants for recovery of a sum of Rs. 3,455-1-0 in the following circumstances: The plaintiff is the Lasalgaon Merchants Co-operative Bank Ltd., Lasalgaon. Defendants Nos. 1 and 2 were the constituents of the Bank and had entered into an agreement with the plaintiff to the effect that the plaintiff-Bank should make advances to defendants Nos. 1 and 2 on the security of agricultural produce such as, groundnuts, jaggery, tobacco etc. This agreement took place on November 20, 1952. The plaintiff was to make advances to defendants Nos. 1 and 2 upto sixty per cent. of the value of the goods pledged. The upper limit of the credit was fixed at Rs. 5,000. Certain advances were made on the basis of this agreement. On November 16, 1953, the agreement was renewed and was to remain in force till September 30, 1954. In about December 1953 defendant No. 1, which is the firm of which defendant No. 2 is a partner, owed a sum of about Rs. 2,332 towards the income-tax dues. Defendants Nos. 1 and 2 had kept certain packages of tobacco in their own godown and handed over the key of the same to the plaintiff, thus giving the property in possession of the plaintiff. On August 23, 1954, defendants Nos. 1 and 2 were indebted to the plaintiff to the tune of Rs. 3,181. On December 16, 1952, the Income-tax Officer, Nasik, issued a certificate (exh. 68) under s. 46(2) of the Income-tax Act, 1922, and forwarded the same to the Collector, Nasik. He wrote a letter on December 11, 1953 (exh. 69) to the Collector calling upon the latter to make recoveries by attachment and sale

1 (1882) I.L.R. 5 Mad. 273.

2 [1902] A.I.R. All. 233.

3 (1913) I.L.R. 37 Mad. 55.

4 [1944] A.I.R. F.C. 41.

5 (1904) I.L.R. 28 Bom. 314, s.c. 6 Bom.

L.R. 65.

6 [1950] A.I.R. All. 206.

7 [1956] A.I.R. All. 75.

8 [1961] A.I.R. M.P. 310.

9 [1962] A.I.R. S.C. 933.

of the stock of tobacco or by the attachment and sale of the open plot belonging to defendants Nos. 1 and 2. As already stated, on August 23, 1954, the liability of defendants Nos. 1 and 2 towards the plaintiff would have worked out to a sum of Rs. 3,181 with future interest. At that time, ninety-seven packages of tobacco were in plaintiff's custody. On December 24, 1953, the Collector, Nasik, forwarded the letter to the Mamlatdar, Niphad, for taking necessary action. On August 23, 1954, the Circle Officer went to the godown of the plaintiff, made valuation of the packages of tobacco kept therein under a Panchnama and sought to attach the same. The plaintiff gave a writing (exh. 52) protesting against the proposed attachment. The Circle Officer without giving heed to the protest proceeded to attach the goods. He kept the goods in the same godown, locked it and handed over the key to the police patil of the village. The same day, he made a report (exh. 75) of what he had done, to the Mamlatdar. In this report, the Circle Officer stated:

"In accordance with the orders given by you (Mamlatdar) personally, the tobacco had been attached and kept in the same godown handing over possession to the police patil".

It may be mentioned at this stage that the letter written by the Mamlatdar to the Circle Officer has not been placed on record on behalf of the defendants. The Circle Officer in his report also mentioned the fact that the plaintiff-Bank was claiming that the goods were secured for its dues. He forwarded the protest letter of the Plaintiff to the Mamlatdar for his perusal. In reply to the protest letter, the Circle Officer informed the plaintiff on August 24, 1954, that the goods were attached in pursuance of the orders of the superior officers. It appears that on September 29 or 30, 1954, there were heavy rains and the roof of the godown where the goods were stocked leaked heavily and as a result of the leakage, the tobacco was damaged. On October 1, 1954, the Collector sent a telegram to the Mamlatdar stating that the goods be returned to the plaintiff. Unfortunately, the telegram has not been placed on the record of the case, nor has any evidence been led on behalf of the defendants to show as to why the Collector thought of returning the goods to the plaintiff on this particular day. It appears to have been assumed in the Courts below that this action was taken by the Collector, because the latter realised that the attachment was not regular. In the absence of evidence on the point, it is difficult to say whether this action was taken by the Collector on account of realisation of irregularity, impropriety or illegality of the attachment or because of the fact that the goods have been heavily damaged on account of rains and the Collector felt it imprudent to continue to keep the goods under his custody thereafter. On October 3, 1954, the Circle Officer submitted a report to the Mamlatdar stating that the goods have been heavily damaged on account of heavy rains and also by reason of the fact that the door of the godown was not open. He also stated that defendants Nos. 1 and 2 though informed three or four times were avoiding to accept delivery of the goods. The Mamlatdar informed the Collector about what had happened. On October 8, 1954, the Mamlatdar directed the plaintiff to accept delivery of the goods. On October 14, 1954, the plaintiff replied that it was not going to accept delivery of the goods inasmuch as the goods had been damaged. In this letter it was pointed that the authorities had committed an illegality in attaching the goods. It also stated that it was unable to take delivery of the goods which were wrongfully attached and damaged while in custody. It further stated that it would hold the Government responsible for the dues for which the attached goods were pledged by defendants Nos. 1 and 2. On April 15, 1955, the Mamlatdar sold the goods by public auction for a sum of Rs. 857. It may be mentioned at this stage that according to the allegations in the plaint, the Mamlatdar, Niphad, had informed the plaintiff on January 12, 1955, stating that the Government debt had priority over the debt of the plaintiff and all other private debts. That letter, however, is not on the record of the case. On June 30, 1955, a notice was given to the Government

under s. 80, Civil Procedure Code, and in due course of time, a suit was filed against the pledgors (defendants Nos. 1 and 2); the State of Bombay (defendant No. 3); the Collector of Nasik (defendant No. 4); M. R. Yardi, Collector of Nasik (defendant No. 5); the Mamlatdar of Niphad (defendant No. 6); Gajanan Dattatraya Thite, Mamlatdar of Niphad (defendant No. 7); the Circle Officer, Lasalgaon (defendant No. 8); Ramchandra Nathu Patil, Circle Officer of Lasalgaon (defendant No. 9) and the Union of India (defendant No. 10). It would thus be seen that the Collector, the Mamlatdar and the Circle Officer were sued not only in their official capacity but also in their individual capacity.

I will now give a short resume of the case made out by the plaintiff in the plaint. After pointing out that the plaintiff was a secured creditor to the extent of Rs. 3,181 and future interest, the plaintiff stated in the plaint that defendant No. 9, the Circle Officer, came to the plaintiff and informed that he had orders from the superiors to attach the goods. The plaintiff protested saying that it was a secured creditor and that the goods were pledged with it. Notwithstanding this protest, defendant No. 9 proceeded to attach the goods and took away the key of the said godown with him. It is in that way that the plaintiff lost the custody of the pledged goods. The plaintiff then referred to the letter of the Circle Officer dated October 2, 1954, asking it to take delivery of the goods and stated that the Chairman of the Bank had gone to see the goods and found that the goods were greatly damaged. A Panchnama was made regarding the condition of the goods. As the Government was not prepared to accept the responsibility, the plaintiff refused to take delivery of the goods. The plaint then refers to the letter dated October 14, 1954, in which it was stated that the attachment of the goods was illegal and the State Government would be held responsible for the loss caused thereby. The plaintiff pointed out that the Government had no priority over the Bank in respect of the income-tax dues since the Bank was a secured creditor. The plaintiff, therefore, averred that attachment of the goods was illegal, unwarranted and unjustified. The plaintiff alleged that on account of these illegal actions of the Government of Bombay through its officers, the plaintiff was deprived of its custody of the said goods and has suffered a loss to the extent of the whole amount of the debt secured by the pledge. The plaintiff, therefore, sued for Rs. 3,181 as due at the foot of accounts on August 23, 1954, with interest at seven per cent. At para. (x) the plaintiff repeated that the attachment and the further acts of the Government were illegal, unwarranted and unjustified. It also averred that defendants Nos. 4 to 9 were liable as officers and individuals, if the Government should shirk its responsibility and liability on the ground that the acts of the officers were wrongful and tortious. It then stated that defendant No. 10 was liable, because "it was at the instance of the Union of India that the State of Bombay through the Collector of Nasik had taken the action complained of.

Defendants Nos. 3 to 10, who are the contesting defendants, put in their written statement (exh. 23) and raised the following contentions:

(1) The suit was bad for multifariousness. The claim against defendants Nos. 1 and 2 is on the basis of the original cause of action, whereas the claim against the Government and its servants and the Union Government is based on the wrongful character of attachment of the goods.

(2) The suit against defendants Nos. 4, 6 and 8 is not maintainable, since they acted in their official capacity and they could be only sued in their official designations.

(3) The State of Bombay is not responsible for the alleged illegal attachment or the consequent sale nor has the State of Bombay ratified the act of the officers attaching the tobacco.

(4) Defendants Nos. 5, 7 and 9 are public officers and they have undertaken the recovery proceeding in the discharge of their duties as Revenue Officers under the provisions of the Bombay Land Revenue Code. They have

acted bona fide as Revenue Officers in pursuance of the provisions of the Income-tax Act and the Bombay Land Revenue Code and the suit is, therefore, barred under s. 6 of the Bombay Revenue Jurisdiction Act as against defendants Nos. 5, 7 and 9.

(5) The tobacco was not removed from the place where it was deposited by the plaintiff. The plaintiff was requested by the Mamlatdar to take delivery of the tobacco which it refused. The plaintiff was at fault in not taking over the stock of the tobacco. The plaintiff is not entitled to claim any compensation.

(6) The defendants denied the averments that the goods were damaged during the custody of the Government officers as they remained uncared for. All possible care and precaution was taken by the officers while the tobacco was in their custody. On September 29, 1954, there were unexpected rains and the warehouse leaked. This an unforeseen incident.

It appears that defendants Nos. 1 and 2 remained *ex parte*. The trial Court held that the attachment of the goods was illegal and wrongful. It also held that the goods became badly damaged, because of the negligence of the Government and its officers. At the same time, the Court held that there was no causal connection between the attachment of the goods and the actual damage caused thereto. Consequently, it came to the conclusion that none of defendants Nos. 3 to 10 was liable for the plaintiff's claim except for a sum of Rs. 857 i.e., the sale proceeds. Consequently, it passed a decree against defendant No. 3 for a sum of Rs. 857. It also passed a decree for a sum of Rs. 3,455-1-0 with future interest on Rs. 3,181, at six per cent. per annum against defendants Nos. 1 and 2. Against that judgment, the plaintiff went in appeal to the District Court. The District Court, agreeing with the finding of the trial Court, held that the attachment was illegal and wrongful. The District Court also held that the plaintiff would be entitled to claim damages notwithstanding that negligence was not proved by it. On the question of negligence, the District Court held that the loss occurred not on account of negligence but on account of unavoidable circumstances viz., unforeseen and excessive rains. The District Court also held that the plaintiff should have been entitled to claim damages in the ordinary course. The State is not liable for the tortious acts of its servants, since the State had not ratified the act of its servants in attaching the goods. According to the District Court, the Circle Officer (defendant No. 9) alone would have become liable for wrongful attachment but for the protection given to him under s. 6 of the Bombay Revenue Jurisdiction Act. Consequently, the District Court dismissed the appeal and confirmed the decree passed by the trial Court. It is against that judgment that the plaintiff has come up in second appeal.

Mr. Abhyankar, Assistant Government pleader, for the State, contended that the Courts below were wrong in holding that attachment of the goods was illegal. It is not disputed that the goods were pledged with the plaintiff and were lying in its possession at the time of the so-called attachment. The determination of the question regarding the legality or otherwise of the attachment mainly depends upon the provisions of s. 46(2) of the Income-tax Act of 1922 and the provisions of ss. 150 and 154 of the Bombay Land Revenue Code. Section 46(2) of the Income-tax Act of 1922 runs thus:

"The Income-tax Officer may forward to the Collector a certificate under his signature specifying the amount of arrears due from an assessee, and the Collector, on receipt of such certificate shall proceed to recover from such assessee the amount specified therein as if it were an arrear of land revenue".

There is no provision in the Income-tax Act of 1922 under which the Government could claim priority over the secured debts. Section 222 of the Income-tax Act of 1961 corresponds to s. 46 of the Act of 1922. Section 222 of the Act of 1961 instead of referring to income-tax arrears as being recoverable as arrears of land revenue, lays down the procedure to be followed for making recovery of the dues. We are not concerned with the change effected in the

procedure for making recoveries. Summarising the legal position prevailing under s. 46(2) of the Act of 1922 and also under s. 222 of the Act of 1961 Sundaram in his book "The Law of Income-tax in India" at page 1058 says:

"While Crown debts cannot have priority over secured debts, profits received by a Receiver in a simple mortgage suit have no priority over Crown debts, for such rents and profits are not part of the security or the debt".

The position of law, therefore, is well-settled and it is to the effect that the Government cannot claim any priority in respect of the income-tax dues *vis-a-vis* the secured debt. Mr. Abhyankar referred to the provisions of ss. 150 and 154 of the Bombay Land Revenue Code and argued that these two sections make no distinction between the goods being in possession of a debtor or being in possession of a third party. Section 150(c) of the Land Revenue Code provides:

"An arrear of land revenue may be recovered by the following processes:—...

(c) by distraint and sale of the defaulter's moveable property under section 154".

Section 154 of the said Code provides:

"The Collector may also cause the defaulter's moveable property to be distrained and sold".

The distraint of moveable property presupposes that the debtor is in actual possession of the same. It is clear that a secured creditor has a right under law to keep the property in his custody till the debts are paid. He has also the right of getting the property sold in case the debts are not paid. The claim of the debtors in that case would restrict itself to the balance after satisfaction of the dues of the secured creditor. Under the Code of Civil Procedure, different procedures have been laid down in respect of attachment of the goods according to the circumstances viz., whether they are in possession of the judgment-debtor or of a third person. Rule 43 of O. XXI, Civil Procedure Code, provides that where the goods are in possession of the judgment-debtor they are liable to be attached by actual seizure. Rule 46 of the same Order provides that in the case of the moveable property, which is not in possession of the judgment-debtor, attachment can be levied by issuing a prohibitive order calling upon that person not to give the property to the judgment-debtor. It is thus clear that the Circle Officer had no right to effect attachment of the goods by actual seizure. Mr. Abhyankar contended that the mere fact that the Circle Officer has followed the procedure of attaching the goods by actual seizure instead of issuing a prohibitive order would not make the attachment illegal. At best, the attachment would be irregular. I am unable to accept this line of reasoning. The distinction between rr. 43 and 46 of O. XXI, Civil Procedure Code, is of prime importance. When the goods are in the possession of a pledgee, the seizure of the goods amounts to wrongful deprivation of the goods which the pledgee is entitled to retain in his possession. In this connection, reference may be made to art. 31(1) of the Constitution of India, which runs thus:

"No person shall be deprived of his property save by authority of law".

It is not clear whether the Circle Officer was directed by the Mamlatdar to proceed to effect attachment of the goods after he was informed by the Circle Officer that the goods were pledged and the possession was with the pledgee. The documents, which would have thrown light upon this question, have been withheld from the Court. The Circle Officer throughout asserted that he was acting under the orders of his superiors. In the intimation which he gave to the plaintiff, he specifically stated that he was acting under the orders of his superiors in effecting the attachment. In the same way, in his report submitted by him on the date of the attachment i.e., August 23, 1954, the Circle Officer stated that it was in pursuance of the personal directions given by the Mamlatdar that the goods were attached and kept in the godown, the key of which was delivered to the police patil. Neither the Circle Officer nor the Mamlatdar has stepped into the witness-box. It is not, therefore, possible to

hold that the Circle Officer acted on his own when he proceeded to effect the attachment. Apart from the question whether the Circle Officer was acting under the orders of his superiors, it is clear that in proceeding to seize the goods with a view to attach the same, the Circle Officer acted without any authority of law. It can at least be said that he acted in excess of the authority given to him by law. Indeed, it was conceded in the Courts below, on behalf of the Government, that the attachment of the goods was illegal. It is, therefore, too late in the day to contend that the act of seizure of goods from the possession of the plaintiff is merely irregular and not illegal.

Another point which strikes me is that, it was assumed in the District Court that the action for damages was in the nature of an action in tort on account of loss caused by the negligence of the officers of Government in whose custody the goods were kept. I have set out the averments in the pleadings in some detail, and there is nothing to indicate that the plaintiff was basing its action either upon negligence committed by the Government officers or the Government. The gravamen of the charge is that the attachment and seizure of goods from its possession is illegal. Mr. Abhyankar relied upon the words used in para. (vii) of the plaint and argued that the basis of the plaintiff's claim is that the goods were not taken proper care while in the custody of the Government and that they were damaged on account of negligence of the Government officers. As I have pointed out above, the plaintiff has claimed the amount due to it under the contract with defendants Nos. 1 and 2. It has not asked for damages for wrongful detention of the goods and for their conversion. Its contention is that since the goods, which were pledged with it, were taken away by the Government, the Government is liable for the debt due to it from defendants Nos. 1 and 2 to the extent of the value of the property taken away from its possession. The plaintiff seems to suggest that it would have been entitled to bring the goods to sale and recover the amount and since the goods were taken away from it and it has been deprived of its remedy, those who are responsible for this deprivation will have to pay the amount due to it under the original cause of action. It is stated in para. (x) of the plaint viz.,

"defendants Nos. 4 to 9 are liable to the plaintiff's claim as officers and individuals, if Government shirks its responsibility and liability on the ground that the acts of the officers were wrongful and tortious. Defendant No. 10 is liable to the plaintiff's claim because it is at their instance or for the recovery of their dues that the State of Bombay through the Collector of Nasik has taken the actions complained of".

It is necessary to note that the plaintiff does not aver as a fact that the action of the officers was wrongful or tortious. What it says is, in case the Government tries to shirk its responsibility on the ground that the acts of the officers were wrongful, then the Union Government would be responsible since it was for the recovery of their dues that the action complained of was taken.

In that view of the case, the question as to whether the officers were negligent in dealing with the goods while they were in their possession does not acquire much significance. The plaintiff's cause of action is not supplied by the damage caused to the goods on account of the decay, which took place after the heavy rains. The plaintiff's cause of action is based upon the illegal seizure of the goods from its possession. Even so, in my view, the learned District Judge erred in holding that the damage was inevitable and, therefore, the officers, in whose custody the goods were lying, would not be considered as negligent. The trial Court, after due consideration of the evidence, recorded a finding that the officers were guilty of remissness and negligence. The learned District Judge has reversed the finding on the basis of certain surmises. First of all, he says that it could not be said that there were no rains before August 23, 1954, that is to say, before the attachment of the goods. He then points out that the rainy season had commenced in June, 1954, and to borrow his own words "and it does not appear that the

roof had leaked at any time before 23rd August 1954". Pausing here, there is no evidence, whatsoever, to show that the roof had not leaked before August 23, 1954. The learned District Judge then proceeds to say:

"The plaintiff Bank itself considered that the goods were quite safe in those very godowns where they were kept by it. Under the circumstances, I think that no leakage must have taken place when it was raining in the ordinary way, otherwise, the plaintiff Bank itself would have taken the steps of removing the goods to some other place especially so when it must have rained between the second week of June and 23rd August 1954. For all these reasons, I think that the leakage occurred because of the excessive rains and this is clear from the statement of the Chairman of the plaintiff Bank himself in the writing passed by him on 3rd October 1954 to the Circle Officer. He has himself stated therein that the damage has occurred because of the excessive rains which fell on the 29th and the 30th of September...It is true that the Chairman has also stated in his writing that some damage has been caused on account of the failure to air the goods by opening the godowns and the congested air in the godown. However, it cannot be said that the damage that was caused by reason of the rain water having leaked in the godown would have been less if the godown had been opened from time to time and the goods had been aired as seems to be necessary in the case of tobacco. I am not impressed by the reasoning of the learned Judge of the Court below in this behalf, and I have come to the conclusion that the damage that came to be caused to the goods was the result of the excessive rains which fell on the 29th and 30th September 1954 and that the damage is not due to any negligence on the part of the person in custody of these goods. Negligence cannot be presumed and the same must be satisfactorily proved..."

With respect, I must point out that the reasoning is vitiated by a number of assumptions and guesses made by the learned District Judge. Assuming, for a moment, that the heavy loss was largely due to heavy rains, it does not mean that there was no negligence on the part of officers in dealing with the goods of tobacco. The heavy rains do not amount to an act of God. It was the duty of the Government officers to take such care as every prudent manager takes of his own goods. The Government stood in the position of bailees and it is for them to prove that they had taken as much care as was possible for them and that the damage was due to reasons beyond their control. In my opinion, the findings reached by the learned District Judge cannot be sustained. But, as stated above, it has no bearing on the question of the claim made by the plaintiff inasmuch as the plaintiff's claim is based on the act of the defendants in wrongfully seizing the goods.

The learned District Judge refused to award the claim of the plaintiff in spite of his finding that the goods were wrongfully attached mainly on the ground that there was no evidence that the act of defendant No. 9 was ratified by the Government. The learned District Judge proceeds to say that the Union Government could not be responsible for wrongful seizure of the goods, because all that the Income-tax Officer did was to send a certificate under s. 46(2) of the Income-tax Act. In addition to the certificate, the Income-tax Officer wrote a letter to the Collector in which he stated that the firm had the stock of tobacco in the ware-house and a plot. He then proceeded to say that the plot was mortgaged to Lasalgaon Merchants Co-operative Bank and suggested that if the plot is likely to fetch more value it should preferably be sold in auction. It seems clear that the Income-tax Officer was under the wrong impression that the plot was mortgaged to the Co-operative Bank. Probably, he was misled by the circumstance that the goods were still lying in the godown belonging to defendants Nos. 1 and 2. By stating that the goods were lying in the godown of defendants Nos. 1 and 2 and omitting to mention that these goods were pledged, in a way, the Income-tax Officer has put the Collector and his subordinates off their guard.

That did not, of course, exonerate the Collector and the Mamlatdar from finding out as to whether the goods were in the possession of defendants Nos. 1 and 2 and whether they were liable to be attached and seized. The learned

District Judge has observed that the Collector has given no instructions to the Mamlatdar for attaching any specific goods, nor is there evidence to show that the Mamlatdar authorised the Circle Officer to attach the goods, although they were in possession of the plaintiff, who was the secured creditor. So far as the authorisation by the Collector and the Mamlatdar is concerned, there is no evidence led on behalf of the defendants, and so far as the authorisation by the Mamlatdar to the Circle Officer is concerned, I have already pointed out that the Circle Officer has claimed that he proceeded to attach the goods and seize them in accordance with the specific instructions given to him by the Mamlatdar. In my view, the question of special authorisation or of subsequent ratification would not possibly arise in the circumstances of this case. The Bombay Land Revenue Code provides that the Collector can delegate his duties to the Mamlatdar. Under s. 12 of the Code, the Mamlatdar has been authorised to carry out the duties which have been delegated to him by the Collector under the general or special orders of the State Government. It was conceded in the Courts below that powers were delegated to the Mamlatdar and the Circle Officer. In fact, Mr. Abhyankar also relied upon the circumstance that the powers, which the Circle Officer has exercised, were delegated powers. Once it is conceded that the Circle Officer was exercising the delegated powers of the Collector, then it is clear that no special authorisation was necessary. In the same way, the question of ratification by the Government cannot arise for consideration in view of the fact that the Circle Officer was exercising the powers delegated to him under the provisions of law. In this connection, I may refer to the provisions of ss. 150 and 154 of the Code again. Under s. 150(c) of the Code an arrear of land revenue may be recovered by distraint and sale of the defaulter's moveable property under s. 154. Section 154 empowers the Collector to distrain the moveable property of the defaulter and have it sold. I have already referred to the provisions of s. 46(2) of the Income-tax Act of 1922 which provided that the arrears of income-tax can be recovered as if they were an arrear of land revenue. That means that the Circle Officer was exercising the delegated powers when he proceeded to attach the goods. In seizing the goods he acted in excess of the power and, therefore, the seizure of the goods is illegal. But all the same, it is clear that the duty he was performing was enjoined on him by the delegation made by the Collector. That being the case neither the question of express authorisation for the commission of the act nor that of subsequent ratification can possibly arise in a case like this.

In this connection, I may refer to a decision of the Allahabad High Court in *Prem Lal v. U. P. Govt.*¹ The facts of that case were as follows: The plaintiff, Prem Lal Singhania, was the owner of a motor truck and a Chevrolet motor car. On January 12, 1948, the District Magistrate of Gorakhpur, purporting to act under the powers delegated to him by the State Government under s. 9 of the U.P. Requisition of Motor Vehicles Act of 1947, passed an order requisitioning both these vehicles. The order required the plaintiff Singhania to place them at the disposal of the Superintendent of Police within 24 hours of the service of this order. The plaintiff contended that the order was illegal and unjustified as the essential conditions for the exercise of the requisitioning power did not exist and it was passed with the object of causing wrongful loss to the plaintiff. The plaintiff alleged that the Chevrolet car was kept uncovered and in the open during the period of requisition with the result that its paint was damaged and some parts became rusty. He had to spend Rs. 760 on getting the car repainted and repaired. Both the vehicles were released on December 18, 1948, having remained in the custody of the Government for over three months. The plaintiff served a notice under s. 80, Civil Procedure Code, claiming damages and compensation but it had no effect. He thereupon filed two separate suits in respect of the truck and the car. He claimed compensation for the motor

car at the rate of Rs. 10 and for the truck at the rate of Rs. 40 per day. He also claimed Rs. 760 as compensation for damage done to the car. The claim in respect of the truck totalled Rs. 3,300 and of the car Rs. 1,410.

The State contended that it was not liable for the damages claimed, firstly, because the act was done in the exercise of the sovereign powers of the State and secondly, the action taken by the District Magistrate was not action of the Government.

The learned Judge referred to the distinction between the acts of a servant or agent which he performs under his master's direction and guidance and for his benefit and acts in the performance of duties imposed upon him by law when the master has no control over him nor any right to give instruction. It was pointed out that in the first case, the master would ordinarily be liable, but in the second, he is not. In rejecting the arguments for the State, the learned Judge observed (p. 236):

"...The District Magistrate was not performing any duty imposed or exercising any power conferred by law, but exercising a power expressly delegated to him by Government under Sec. 9 of the U.P. Requisition of Motor Vehicles (Emergency Powers) Act 1947".

After citing the said section, the learned Judge proceeded to observe on the same page:

"Thus the power to requisition motor vehicles is conferred under the Act on the State Government but it is permitted to delegate its powers to any officer or authority subordinate to it. Neither the statute nor any rule made thereunder confers any powers on the District Magistrate who can exercise them only if he is authorised by the State Government. His power is not to be exercised independently of the Government but 'under such conditions, if any, as may be specified' in the authorisation. He is, therefore, all the time under the control of the Government whose power to impose conditions for its exercise is absolute. The District Magistrate is not persona designata under the Act or any rule for the Government can authorise any other Officer or authority subordinate to it to exercise the power of requisitioning vehicles on its behalf. Whoever requisitions any motor vehicle acts for the benefit of the Government which can control his functions. If however Government does not choose to impose any conditions and gives unlimited powers to any officer, it cannot escape liability for any tortious acts committed by him".

Referring again to s. 150 of the Land Revenue Code, it would be noticed that under that section several courses are open to the officer who is entrusted with the duty of making recoveries and the distraint and sale of the defaulter's moveable property under s. 154 is one of the many such courses open to him to adopt. In these circumstances, when the officer chooses one of these courses viz., to distrain the goods, he takes such a decision for and on behalf of the Government. The power of decision making has been entrusted to him. It is equally clear that the Circle Officer acted for the benefit of the Government, for if he had recovered the dues, the dues would have gone to the coffers of the Government. In my view, therefore, the question either of express authorisation or of subsequent ratification cannot possibly arise under the circumstances of this case.

Mr. Abhyankar relied upon the decision of the Madras High Court in *Ross v. Secretary of State*². The facts of that case were as follows: the plaintiff, who represented the Assam Labour Supply Association in Ganjam and other districts, filed a suit against the Secretary of State for India in Council for damages in respect of two orders of the District Magistrate of Ganjam suspending and dismissing one T.S., the local agent of the Association in Ganjam, and closing his depot to recruiting under the Assam Labour and Emigration Act. The plaintiff complained that he was prevented by these orders from earning from the members of the association his commission of seven rupees for each labourer sent to Assam; and for an alleged libel on the plaintiff in an order passed by the Governor-in-Council on appeals by the plaintiff and

others against the aforesaid orders, in which it was stated that the plaintiff's own conduct was not altogether above suspicion.

It was held that the District Magistrate had power to dismiss the local agent but he did not have the power of suspending or of closing his depot to recruiting under the Act independently of the Notification. It was further held:

"It was not sufficient to render the company liable that an act of this nature had been done by its servant in the course of employment but without previous order or subsequent ratification. Ratification must have been by the Company (East India Co.) and must now be by the Secretary of State".

It was also held that "the defendant was not liable for the act of the District Magistrate on the further ground that it was done by him in the exercise of statutory authority". It is significant to note that the learned Judge of the Madras High Court came to the conclusion that the orders passed by the District Magistrate was an act done in the exercise of sovereign powers. The learned Judge, therefore, held that, if that is so, then the State could not be held responsible unless it was established that the orders had been ratified. (see the observation at p. 66). Another decision, on which reliance was placed by Mr. Abhyanker, was in *Gurucharan Kaur v. Province of Madras*.³ The facts of that case were as follows: The plaintiffs filed a suit for damages for false imprisonment against the Government of Madras and four of its police officers. The incident complained of happened on January 13, 1937, at Kodaikanal Road. The plaintiffs are mother and daughter. Kodaikanal falls within Madura District. Defendant No. 2 was the District Superintendent of Police with his headquarters at Madura. Defendant No. 3 was a Sub-Inspector belonging to the Madras Railway Police Service and defendants Nos. 4 and 5 were police constables of the same service. Plaintiff No. 1 was the wife of the ex-Maharaja of Nabha. By an order of the Government of India, the ex-Maharaja was required to stay at Kodaikanal and had been so staying since 1928. He was kept under close surveillance. Plaintiffs Nos. 1 and 2 were staying with the ex-Maharaja at Kodaikanal and wanted to go to Madras early in 1937. Necessary arrangements were made by her Secretary for reserving accommodation for them in 'Trivandrum Express' on January 13, 1937. That afternoon, the Station-house Officer at Kodaikanal, acting under the erroneous impression that the ex-Maharaja was arranging to proceed to Madras, sent a telegram to defendant No. 2 in the following terms:

'Ex-Nabha Raja departing to Madras Spencer Hotel with family in car M.D. 2037.' Defendant No. 2 decided to take steps to prevent the ex-Maharaja boarding the train at Kodaikanal Road railway station. Defendant No. 2 gave a call on the telephone to the railway police staff at the Madura station platform and as defendant No. 3 answered, defendant No. 2 attempted to instruct him to proceed by that train to Kodaikanal Road and there prevent the ex-Maharaja boarding the train. Defendant No. 3 understood the instructions vaguely and indistinctly, as the platform was noisy and his knowledge of English very poor and he had to catch the train in a hurry as it was about to leave. During the journey between Madura and Kodaikanal Road, he saw that one of the compartments in the train had been reserved for the Maharani of Nabha. Connecting this with the indistinct impressions that he had received from the telephone message from Madura, he seemed to have made up his mind that the instructions given to him by defendant No. 2 must have related to the Maharani.

When the train arrived at Kodaikanal Road, defendant No. 3 informed P. W. 6, who was waiting on the platform, that he had instructions to prevent the Maharani boarding the train. At that time, she was sitting in her car within the railway compound, expecting to be called to the train by her Secretary. Some discussion took place between defendant No. 3 and P. W. 6 and the train had to be delayed for that purpose. The train in the meantime left the station and defendant No. 3 sent a telegram to defendant No. 2 seeking further instructions.

It is on these facts that the plaintiffs filed a suit against the State for compensation for wrongful imprisonment. The High Court held that defendants Nos. 2 to 5 acted in exercise of their statutory power and that in such circumstances a person aggrieved by their acts could have no claim against the Government. It also held that the State could not be held liable for the improper conduct of public servants in the discharge of Governmental functions, unless those acts had been done under the orders of the Government or had been subsequently adopted and ratified by it. The Federal Court by majority judgment accepted the second ground and observed as follows (p. 44):

"...As we however agree with the learned Judges as to other ground of their decision in favour of defendant 1, it is unnecessary to discuss this aspect of their decision".

In my view, neither the decision of the Madras High Court nor of the Federal Court assists the Government in the plea about the need of ratification by the Government of the acts of the Government officers. In *Ross's* case it was held that the acts were done in the exercise of sovereign powers and, therefore, the State was immune from liability. So far as the decision of the Federal Court is concerned, what their Lordships held was that when the conduct of Government servants in the discharge of governmental functions was questionable, the Government could not be held liable unless it was established that those acts had been done under the orders of the Government or had been subsequently adopted and ratified by it. It is thus clear that the question of ratification arises only when Government is sought to be held liable for tort committed by its servants in the discharge of sovereign functions. If the act is ratified, the Government becomes liable notwithstanding that the act was in the discharge of sovereign functions.

As stated above, the powers of making recoveries were delegated to the Mamlatdar by the Collector and the Mamlatdar in his turn delegated those powers to the Circle Officer. It is true that the Circle Officer was exercising powers under general authorisation. The powers that he was exercising were powers conferred by statute upon the Collector. It is equally clear that the Circle Officer had exceeded the limit of the powers given to the Collector by the statute and delegated to him. The law does not empower recovery of arrears by attaching and seizing the goods, which are in the possession of third party. In this connection, it will be useful to refer to the provisions of art. 265 of the Constitution of India, which provides:

"No tax shall be levied or collected except by authority of law".

Basu, in his 'Commentary on the Constitution of India', 4th vol. 4th edn., 1963, has explained the meaning of the word 'levied' as follows (p. 229):

"The words 'levy and collection' are used in this Article (265) in a comprehensive sense and are intended to include the entire process of taxation commencing from the taxing statute to the taking away of the money from the pocket of the citizen. What the Article enjoins is that every stage in this entire process must be authorised by the law".

The action taken by the Circle Officer in seizing the goods was not empowered by law. It is on that ground also that the act was illegal. At the same time, in view of the fact that the Circle Officer was exercising delegated authority, he cannot be taken to be doing an act in the discharge of his statutory duties.

I may now refer to the rulings relied upon by Mr. Abhyankar in support of the proposition that the Government cannot be held liable in tort, when the wrongful act has been committed by subordinate officers in performance of their statutory duties. I will discuss those rulings only briefly with a view to show that the facts of his case do not attract the principles laid down therein.

The first decision in that connection is reported in *Shivabhajan v. Secretary of State for India*.⁴ In that case some sixty-two thousand and odd bundles of hay were attached by the Chief Constable of Mahim, while they were in the plaintiff's possession. The plaintiff gave a notice to the District Superintendent

of Police, Thana, for delivery of possession of the said quantity of hay, but only 14700 bundles were delivered and the remaining 47800 were not given over to the plaintiff. The plaintiff sued to recover Rs. 293-12-10 from the defendants as damages. The Chief Constable had attached the hay in his capacity as a public servant. The seizure was occasioned on account of complaints lodged against the plaintiff of his having stolen the hay. The charge of theft was not sustained and that is why the plaintiff demanded the return of the hay. It was held that the Chief Constable seized the hay not in obedience to an order of the executive Government but in performance of a statutory power vested in him by the Legislature. It was also pointed out that the seizure of the hay was not in any sense productive of benefit to the Revenue of the Bombay Government, nor was it a transaction out of which profit could be derived. It was further held that there was no ratification or adoption of the act. In my opinion, the decision is distinguishable on the ground that the original seizure of the goods was not only not illegal but was authorised by law and the seizure was, in effect, in pursuance of the statutory powers conferred upon the Chief Constable. A number of bundles appeared to have been lost while they were in the custody of the police. But the State could not be held responsible for the loss occasioned due to negligence of its officers by reason of the fact that the goods had been seized in exercise of the statutory powers. In the present case, the seizure of goods itself is illegal. The question of subsequent damage caused to the goods while they were in the custody of the Mamlatdar has not much bearing on the issue in hand. Mr. Abhyankar also relied upon the two decisions of the Allahabad High Court reported in *Ram Gulam v. U.P. Government*⁵ and *Md. Murad v. U.P. Govt.*⁶ and another decision of the Madhya Pradesh High Court reported in *State of M. P. v. Singhai Kapoorchand*.⁷ The facts of these cases were similar to the facts in *Shivabhajan's* case and the view taken by this Court viz., that Government cannot be held liable for damages in respect of the action taken by the inferior officers in the discharge of statutory powers, was upheld. I may only add that the proposition so broadly stated in *Shivabhajan's* case may require reconsideration in view of the decision of the Supreme Court in *Vidhyawati's* case to which reference will be made presently.

In this Court, Mr. Abhyankar raised another point of law. He emphasized the well-known distinction between an action taken in exercise of the sovereign powers of the State and an action in respect of commercial transactions or welfare activities. In a recent decision of the Supreme Court in *State of Rajasthan v. Mst. Vidhyawati*⁸ the Supreme Court, after referring to the decisions of different High Courts and also referring to the provisions of art. 300 of the Constitution of India, held that in respect of the acts done by the subordinates or agents of the Government otherwise than in exercise of the sovereign powers, the State can be made vicariously liable for the tortious act like any other employer. According to the view taken by the Supreme Court, the Government is liable in respect of the acts done in commercial transactions and also acts done in respect of the multifarious activities undertaken by the Government in modern times. At the same time, it seems to have adhered to the view that the Government would not be liable for acts of negligence of its servants in the discharge of sovereign functions. Mr. Abhyankar argued that the levy of tax and the recovery of tax is undoubtedly a sovereign function. No one except the State can possibly levy a tax or proceed to recover the same. Since ancient times the power to levy a tax has been the specific hall-mark or attribute of the sovereign power of the State. I agree with Mr. Abhyankar that the acts of levying of a tax and its recovery are acts done in the exercise of sovereign functions. At the same time, we cannot ignore the provisions of art. 265 of the Constitution of India, which lays down that no tax shall be levied or collected except by authority of law nor the provi-

5 [1950] A.I.R. All. 206.

6 [1956] A.I.R. All. 75.

7 [1961] A.I.R. M.P. 316.

8 [1962] A.I.R. S.C. 933.

sions of art. 31(1) which lays down that no person shall be deprived of his property save by the authority of law. The only power, which the State can exercise in the performance of sovereign functions is to recover the tax under the authority of law. But in the present case, the Circle Officer has proceeded to levy and recover the tax without any authority and, in fact, beyond the authority. The immunity of the State in respect of acts done by its subordinates in the exercise of sovereign powers cannot be considered as a dogma or a *mantra* and will have to be considered on the facts of each case. In this connection, I may refer to certain observations made by Basu in his "Commentary on the Constitution of India", 4th edn., Vol. IV, 1963, at page 404. After citing the passage from the judgment of the Supreme Court in *Vidhyawati's* case, to the following effect (p. 940):

"...As already pointed out, the law applicable to India in respect of torts committed by a servant of the Government was very much in advance of the Common law, before the enactment of the Crown Proceedings Act, 1947, which has revolutionised the law in the United Kingdom, also....When the rule of immunity in favour of the Crown, based on Common Law in the United Kingdom, has disappeared from the land of its birth, there is no legal warrant for holding that it has any validity in this country, particularly after the Constitution",

the learned author observes:

"In explaining the reason why the Courts should take a broader outlook, the Supreme Court appears to have endorsed the views expressed by the Rajasthan High Court in the judgment appealed from (*Mt. Vidyawati v. Lokumal*)".

'...the State is no longer a mere police state...Ours is now a welfare State and it is in the process of becoming a full-fledged socialistic State. Everyday, it is engaging itself in numerous activities in which any ordinary person or group of persons can engage himself or themselves. Under the circumstances, there is all the more reason that it should not be treated differently from other ordinary employers when it is engaging itself in activities in which any private person could engage himself'.

And so observed the Supreme Court—

'Now that we have, by our Constitution, established a Republican form of Government, and one of the objectives is to establish a Socialistic State with its varied industrial and other activities, employing a large army of servants, there is no justification, in principle or in public interest, that the State should not be held liable vicariously for the tortious act of its servant'.

An instance of the broader outlook is to be found in the decision of the Allahabad High Court in *Prem Lal v. U. P. Govt.* (cited above in another context). In this case, a motor vehicle had been requisitioned by an order under the U.P. Requisition of Motor Vehicles Act, 1947. The Court held that the order was *mala fide* and, hence, invalid and awarded damages for the injury caused to the vehicle during the period of requisition. Obviously, compulsory requisitioning of property under statutory powers is an act which a private person could never do and it is a patent instance of exercise of the sovereign powers of the State. According to the P. & O. *dictum*, ... the suit could not be decreed. Nevertheless, the Court (Dhavan J.) decreed the suit on the ground that—

'...Judicial authority and public policy demand that the State to-day cannot claim immunity from the tortious liability in respect of the tortious acts of its servants and agents'.

The task of the High Courts and the subordinate Courts would, of course, have been easier if the Supreme Court had in *Vidhyawati's* case [held] that it was *Secretary of State for India v. Hari Bhanji*⁹ and not the *P. & O. S. N. Co. v. Secy. of State for India*¹⁰ which laid down the correct law to be followed in India. So long as this is not done, the litigant, the Bench and Bar would be swinging in the balance between the exploded pillar of absolute immunity and the not-yet-certain post of absolute liability for all acts done under colour of the municipal law".

The facts in *Secretary of State for India v. Hari Bhanji* were somewhat similar to the facts of the present case. In that case, the plaintiff had purchased a

9 [1957] A.I.R. Raj. 305.

10 (1882) I.L.R. 5 Mad. 273.

11 (1861) 5 Bom. H.C.R. Appx. p. i.

quantity of salt at Bombay and paid excise on it at the rate of Rs. 1-13-0 per maund, the rate leviable under the law there in force, and despatched it by sea to certain ports. While the salt was in transit, Act XVIII of 1878 was passed and came into force. By that Act the import duty on salt was raised to Rs. 2-8-0 per maund. But in virtue of a notification issued by the Governor-General in Council under the authority of the Indian Tariff Act, 1875, importers were allowed a deduction of the excise already paid, and consequently they were chargeable only with the difference between the excise and the import duty. On the landing of the salt in the Madras Presidency, the Collector required the respondents to pay the difference, thirteen annas per maund, between the excise already paid and the import duty leviable under the Act of 1877, and the respondents, having complied with the Collector's requirements in order to obtain possession of the salt, instituted the suit to recover the sums they had been compelled to pay. One of the pleas raised by the defendant was that the Court had no jurisdiction to entertain the suit. This plea was upheld and the suit was dismissed. On appeal, the learned Judges held (p. 273):

"Where an act complained of is professedly done under the sanction of Municipal law, and in the exercise of powers conferred by that law, the fact that it is done by the sovereign power and is not an act which could possibly be done by a private individual, does not oust the jurisdiction of the civil courts".

At page 283 it was pointed out:

"...In the case before us, the demand of which the respondents complained was levied by the Collector acting as he believed under the authority of municipal law". In my view, the dictum laid down by the Madras High Court is applicable to the facts of the present case. In the present case, the act is purported to be done under the authority of ss. 150 and 154 of the Land Revenue Code, but it is found that the act is not only illegal but unconstitutional.

The result is, the appeal succeeds and is allowed with costs throughout. The plaintiff's suit is decreed against all the defendants. Defendants Nos. 5, 7 and 9 are not liable in their individual capacities.

Appeal allowed.

Before Mr. Justice Naik.

TRIMBAK NARAYAN BHAGWAT

v.

SMT. KUMUDINI TRIMBAK BHAGWAT.*

Hindu Marriage Act (XXV of 1955), Sec. 10(1)(b)—Petition for judicial separation on ground of cruelty—Defence of insanity, availability of.

In a petition for judicial separation under the Hindu Marriage Act, 1955, on the ground of cruelty the defence of insanity is not available even if the offending spouse is not capable of knowing what he is doing if the conduct is held to be objectively cruel regardless of motive or intention.

The petitioner filed a petition under the Hindu Marriage Act, 1955, for judicial separation on the ground *inter alia* that the respondent, her husband, had treated her with such cruelty as to cause reasonable apprehension in her mind that it was harmful for her to live with the respondent. It was found at the trial that the respondent had to be sent on three different occasions to a mental hospital for treatment, the last of which was necessitated as he had attempted to strangle his minor son and his brother-in-law. It was also established that he was suffering from schizophrenia

*Decided, April, 8, 1965. Second Appeal No. 1093 of 1964, against the decision of D. G. Tatke, Additional Judge, Poona, in Civil Appeal No. 389 of 1962, reversing the decree

passed by K. C. Surana, Joint Civil Judge, Senior Division, Poona, in Marriage Petition No. 58 of 1955.

and that he was not aware of the acts he was committing. The respondent's defence was that whatever he did, he did under fits of insanity:—

Held, that the schizophrenia from which the respondent had a predilection to suffer periodically was no defence to the plea of cruelty put forward by the petitioner;

that the question whether the respondent was capable of forming an intention to be cruel or actually intended to be cruel was a matter of no consequence in this case; and

that as there was no knowing when the respondent would relapse into a fit of schizophrenia, the apprehensions entertained by the petitioner were well-founded and she was, therefore, entitled to a decree for judicial separation.

Williams v. Williams,¹ applied.

Palmer v. Palmer,² *Swan v. Swan*³ and *Gollins v. Gollins*,⁴ referred to.

THE facts are stated in the judgment.

V. N. Gadgil, for the appellant.

V. B. Rege, for the respondent.

NAIK J. This appeal arises out of proceedings started by the wife against her husband for judicial separation. The facts giving rise to this appeal may be briefly set out as follows: The appellant (who will hereinafter be referred to as the husband) was married to the respondent (who will hereinafter be referred to as the wife) on May 17, 1949. The wife as well as the husband come from respectable families. The wife was a graduate at the time of the marriage and the husband had passed the Diploma of Chartered Accountancy. At the time of the marriage, the husband was working in partnership with another person, which partnership had two offices, one at Hyderabad and the other at Bombay. The husband started working in the office at Hyderabad. In the month of August 1949 the wife went to stay with her husband at Hyderabad. Two issues were born to the wife from the husband, one on April 19, 1950, by name Ravindra and the other on August 9, 1951, by name Vikram. Both were sons. Disputes started between the partners of the firm and eventually the husband closed the office at Hyderabad and returned to Poona, where his father has a house. This was by about the end of 1952. The disputes were a prolonged affair and the husband had to stay in Bombay for the purpose of taking accounts. But, eventually, he got a paltry sum of Rs. 52 or so for his share. All the while the husband remained unemployed. He had taken a shock both as a result of the partnership not yielding him any profits and also as a result of prolonged unemployment. He became moody and went on brooding his own affairs. He was secretive and kept his sorrow to himself. He did not like his wife asking him questions in regard to financial affairs and would resent any intervention on her part. His eccentricity went on increasing and by about February, 1954, he lost balance of his mind. One day he went in a *ricksha* and wandered for a long time. The wife had to go in search and bring him back. On February 15, 1954, the husband was admitted in the mental hospital at Yeravada as his mind was completely unhinged. The husband used to quarrel with his wife and also beat the children without rhyme or reason. He was discharged from the hospital on July 6, 1954. He had not been completely cured. He used to sit brooding for hours together doing nothing. He did not like his wife to take up any employment and earn something for the family. The husband's father had retired from the Agricultural Department and was not in a position to maintain the family of the husband and wife. The husband continued to remain unemployed even in 1955. In the month of May, 1955, a marriage ceremony was held in the house of the parents of the wife at Thana. The husband attended the marriage. He was keen on giving some present to the

1 [1963] 2 All E.R. 994.

2 [1954] 3 All E.R. 494.

3 [1953] 2 All E.R. 854.

4 [1963] 2 All E.R. 966.

bridegroom, but he had no money. That completely upset him and his mind became deranged. On May 22, 1955, he was again admitted to the mental hospital at Yeravada as a voluntary boarder. He was discharged on December 10, 1955. But he continued to be erratic, eccentric and moody. He then started conducting some coaching classes. An incident took place on January 8, 1958, while he was conducting the class. There were only three students in the class. One of them was Suresh, the brother of the wife. The husband was explaining some problem to the students, but he faltered and was unable to find a solution to the problem. He began to shout. People collected. Suresh, the brother of the wife, took him home. Suresh was asked to remain in the house for that night and sleep in the room of the husband. Accordingly, Suresh and the husband slept in one room. The wife slept in the adjoining room. The parents of the husband slept in a third room. At about 12-30 midnight the husband went near Suresh and started strangulating his neck by holding fast to his neck. Suresh raised cries. The wife went in. The father of the husband went there. Suresh was struggling to get himself extricated. The father hit the husband and separated Suresh from his clutches. Next morning i.e., January 9, 1958, as the husband was taking tea, Ravindra was sitting on the lap of his mother i.e., the wife. Suddenly, the husband pounced on him and started strangulating Ravindra by holding his neck. Suresh intervened and snatched Ravindra from the hands of the husband. The same day, the husband was sent to the mental hospital as a voluntary boarder on the third occasion. The wife's case is that as a result of the abnormal behaviour of the husband, she has entertained an apprehension that there is danger to her life. The wife could have left the house immediately after this incident. But, she did not do so firstly because the husband was sent to the mental hospital and the danger was at least temporarily averted and secondly because, she was studying for her B. T. examination and the examination was drawing near. The wife learnt that the husband was to be discharged on April 21, 1958. Sensing danger to herself and her children she left for Thana on April 18, 1958. The husband was discharged on April 21, 1958. After his discharge he wrote letters to the wife asking her to return to his house. The wife, however, did not return. On July 1, 1960, she lodged the present petition for judicial separation on two grounds: (1) That the husband has wilfully deserted her for over the statutory period and (2) that he has treated her with such cruelty as to cause reasonable apprehension in her mind that it is harmful for her to live with her husband.

The findings of the Courts below have gone against the wife on the point of desertion. Mr. Rege, for the respondent, also has not pressed that point in this appeal. Nor is that point now open for consideration in the second appeal.

The husband admitted that he was put in the mental hospital three times on the ground that his mind was deranged on those occasions. He, however, denied that he was brooding over his affairs or that he was moody or eccentric. In particular, he denied that his behaviour was in any way cruel.

The trial Court held that since the so-called cruel behaviour of the husband took place during the husband's insanity, that cannot afford a ground for asking for judicial separation under s. 10(1)(b) of the Hindu Marriage Act. Consequently, it dismissed the petition. The wife went in appeal. The appellate Court held that taking an overall view of the conduct of the husband and the peculiar circumstances in which he was placed, his behaviour amounted to legal cruelty, in the sense that it was sufficient to create a reasonable apprehension in the mind of the wife that it was not safe for her to remain under the roof of the husband. Consequently, it allowed the appeal and also the petition and granted judicial separation. It is against that judgment that the husband has come up in second appeal.

It is an admitted fact that the husband has not treated the wife with any physical cruelty. No act of beating nor even of expostulation towards the

wife has been attributed to the husband. This is purely a case of mental cruelty. According to the wife, a number of circumstances transpired against the husband. In the first place, he was not happy; that his partner and eventually the partnership did not bring him any benefit and that the husband remained unemployed from 1952 right upto 1958. The husband was in very much straightened financial circumstances. He had his own peculiar notions as to how a wife should behave towards the husband. These circumstances heavily weighed upon the mind of the husband and the husband started behaving in an abnormal manner towards her and her children. Even so, the wife put up with all the sufferings till 1958. It is only after the incidents, which took place on January 8, 1958 and January 9, 1958, that the wife was convinced that it was no longer safe to her and her children to stay with her husband. The only answer that has been provided on behalf of the husband to the wife's plea of cruelty is that, whatever he did, he did under the fits of insanity.

In appreciating the case put forward on behalf of the wife, it is necessary to recall the general character and behaviour of the wife. The husband himself has paid a glowing tribute to the wife. Let me use his own language:

"She (the wife) has the quality to face calamities. She treated me with love. She did not insult any time my parents. She treated me with respect. She would not do any thoughtless thing by being influenced by mere appearance".

On the admissions made by the husband, it is clear that the wife would not have rushed to the Court unless she apprehended that there was danger to herself and her children.

Side by side with the certificate given to the wife, let us peep into the mind of the husband and try to see what his views are towards such a wife. The husband says:

"It was my nature that my wife should not talk to me about my financial affairs. I did not expect her to tell me to take a job. I never expected her to enquire about my health. I expect her to manage the family, educate children and keep good relations with the family. It was my responsibility to maintain family. I do not agree that it is equally wife's responsibility. If the wife earns, it would mean that the husband is subsidiary and I would not take this position. I would not like my wife to earn even if I was unable to work".

He has also stated that he got terribly shocked when he found his wife sending a registered letter to his mother from Thana. Admittedly the husband was unemployed and was not earning anything for a number of years. In spite of this, because of his peculiar notions about the position of women, he would not allow the wife to take up any job. One can imagine the sufferings which the wife must have undergone during the period from 1952 to 1958. The wife put up with all the difficulties heroically for full six years and the last straw that broke her patience were the incidents, which took place on January 8, 1958 and January 9, 1958.

As regards the incidents which took place on January 8 and 9, 1958, there is a slight divergence between the versions put forward on behalf of the wife and the husband. On the main outline there is no dispute. On January 8, 1958, as the husband was conducting a coaching class, he posed a problem and finding that he was unable to find a solution, he got upset and started shouting. He had to be removed from the class and was removed by Suresh. At about 12-30 midnight he went near Suresh and tried to strangle him. The wife says that she actually saw the husband trying to strangle her brother, Suresh. Suresh has fully supported this version. The husband's father has been examined. He has admitted that when he went there, a struggle was going on between the husband and the wife's brother, Suresh. Evidently, the husband's father went there at a late stage. That may account for his not having witnessed the actual throttling. The appellate Court has fully believed the version put forward by the wife and supported by Suresh. The finding recorded by the appellate Court cannot be called in question in this appeal.

As regards the incident, which took place on January 9, 1958, the main point made out by Mr. Gadgil, for the appellant was that there is no mention of this incident in the plaint, although the incident of January 8, 1958, has been referred to. There is not much substance in this contention. It is not necessary for the wife to relate the evidence on which she proposed to rely. It is true that the incident of January 8, 1958, was narrated. But, that is a superfluity. The appellate Court has believed the wife and, in my opinion, very rightly. Here is an obedient wife, a wife who put up with all possible hardships and privations for a long period of six years. It is unimaginable that such an obedient and submissive wife would trot out a false incident and try to foist it upon the husband. The evidence of the wife and Suresh clearly shows that the husband tried to strangle the young child, Ravindra, as it was sitting on the lap of his mother on that day. It is mainly because of this incident and the fear engendered in her mind on that account that the wife seems to have apprehended danger to her life and her children. It is difficult to say that the apprehension was without sufficient ground.

Mr. Gadgil contended that assuming that the two incidents took place as alleged, still, in the first place, they do not establish cruelty towards the wife, and, in the second place, they were committed during the fits of insanity. The first argument leaves me unimpressed. This is not a case of physical cruelty. This is a case of mental cruelty or torture, and if the husband behaved towards her brother, Suresh, and son, Ravindra, in the manner attributed to him, not only her feelings would be injured thereby, but a grave apprehension would be created in her mind regarding danger to the life of the children and herself. On the second question about derangement, the evidence of Dr. Mujawar discloses that the husband was suffering from, what is known in medical terminology, schizophrenia. It is in evidence that the husband used to say at times that he was Sumersing and at times that he was Mahatma Gandhi and at other times he used to say that he was C. D. Deshmukh etc. Dr. Mujawar has quoted Frederick W. Price from his book 'Text Book of the Practice of Medicine', at pages 1940 and 1941, about the symptoms of schizophrenia as follows:

"Schizophrenia may be regarded for clinical purposes as a form of maladaptation in which there are characteristic defects of inner harmony and consistency in behaviour, thought and emotion. These are rarely seen in childhood, but from puberty onwards they may appear in varied combinations (often in persons who for years have been introspective and unsociable). There is discrepancy between mood and utterance, disturbance of conduct (briefly summed up as catatonic or hebephrenic), self absorption and incapacity for sustained thinking along normal lines. A guarded or artificial demeanour may conceal these essential features, whereas they may be conspicuous in a florid or 'deteriorated' case. Hallucinations and delusions may fill out the picture; affective or other morbid types of reaction may complicate it".

It is not, however, clear from the evidence as to whether the two principal acts committed by the husband, one towards Suresh and the other towards Ravindra, were committed while the husband was actually suffering from a split personality. In the written statement, he denied the correctness of the first incident, which implies that he was aware of the same. In his deposition, however, he has explained that he did not remember anything about the incidents of January 8 and 9, 1958. I am, therefore, prepared to proceed on the footing that on both these occasions, the husband was not aware of the nature of the act that he was committing.

Proceeding on that footing, the first question is, would it be correct to say that insanity affords defence to the plea of cruelty. Mr. Gadgil relied upon a passage in "The Law and Practice of Divorce and Matrimonial Causes" by Tolstoy, 5th edn., at p. 62:

"Insanity is a defence to a charge of cruelty, and both limbs of M'Naghten Rules apply, that is to say, a spouse who does not know the nature and quality of his acts,

i.e., does not know what he is doing, or who, while knowing what he is doing, does not know that what he is doing is wrong is not guilty of cruelty."

This statement is based on the decision in *Palmer v. Palmer*.¹ Mr. Gadgil relied upon a decision of the Court of Appeal in *Swan v. Swan*.² The facts of that case were as follows: For several periods during the married life the husband had been a voluntary patient in a mental hospital. During the intervals in which he had returned to the matrimonial home he had committed acts of cruelty towards his wife. On the hearing of the wife's petition for divorce on the ground of her husband's cruelty there was medical evidence which was accepted by the Court that at the material times the husband did not know the nature and quality of his acts. It was held: "in these circumstances the husband was not capable of being guilty of cruelty to the wife". Mr. Gadgil also cited the decision in *Palmer v. Palmer*. In that case, the facts were: A husband suffering from insane delusions seriously assaulted his wife on several occasions. The medical superintendent of a mental hospital at which the husband had been treated for several years gave evidence, that, when committing the assaults, the husband would not know that his acts were wrong, because he was suffering from delusions. On the evidence, however, it appeared that the husband struck his wife on several occasions because he thought she had been unfaithful to him, which was not the case, and because she wanted him to go back to the mental hospital and he did not wish to go, and the evidence showed that he recognised that he had ill-treated her. It was held:

"the wife was entitled to a decree nisi for divorce on the ground of cruelty, because both limbs of M'Maghten rules applied on the hearing of petitions for divorce on grounds involving insanity and assaults or the inflicting of personal injuries, and because, on the facts, the husband knew the nature and quality of his acts, that is to say, of his assaults, and knew that what he was doing was wrong; therefore, he was not excused from responsibility for his acts on the ground of insanity".

It is apparent that in the first case, only one part of the *McNaghten* rule viz., the husband did not know the nature of his act, was established and it was held that it afforded a complete defence to the charge of cruelty. On the footing that the husband did not know what he was doing, the second part viz. whether he knew that what he was doing was wrong, did not arise for consideration. In the second case, the husband knew the nature and quality of his acts (i.e. assaults) and also knew that what he was doing was wrong. That is why it was held that both parts of the rule were satisfied. It is noteworthy that a distinction has been made between the two parts of the *McNaghten* rule. No difficulty arises when the first part is established viz., that the husband did not know the nature of his acts i.e., what he was doing, and that affords a complete defence to the charge of cruelty. Difficulty, however, arises when it is only established that the husband while knowing what he was doing did not know that what he was doing was wrong.

The position has been explained in the two recent decisions of the House of Lords. In *Gollins v. Gollins*,³ the question arose as to whether the husband would be held guilty of cruelty when he was not deliberately treating the wife with cruelty and in fact was oblivious of the consequences of his actions upon his spouse. It was held (p. 966):

"An intention on the part of one spouse to injure the other is not a necessary element of cruelty as a matrimonial offence, though the presence of such an intention, if it exists, is material and may be crucial".

The House of Lords further held (p. 966):

"Whether cruelty, as a matrimonial offence, has been established is a question of fact and degree, which should be determined by taking into account the particular individuals concerned and the particular circumstances of the case, rather than by any

1 [1954] 3 All E.R. 494.

2 [1953] 2 All E.R. 854.

3 [1963] 2 All E.R. 966.

objective standard; accordingly, in cases where the two spouses are of normal physical and mental health, and the conduct of the respondent spouse, so considered, is so bad that the other should not be called on to endure it, cruelty is established, and then it does not matter what was the respondent's state of mind, e.g., it is immaterial whether the respondent's conduct was 'aimed at' the other spouse or due to unwarranted indifference, attributable, perhaps, to selfishness or laziness".

These observations support the conclusion which I have already drawn viz., that the behaviour of the husband taken in its perspective was such that it was beyond the endurance of the wife. In *Gollins's* case the facts were more or less similar to the facts of the present case, except that there was no question of insanity so far as the husband was concerned. Only his behaviour was considered as abnormal. The decision in *Gollins's* case was pronounced on the same day as the decision in *Williams v. Williams*.⁴ In *William's* case the precise question that came up for consideration was how far insanity is a defence to the charge of cruelty in matrimonial proceedings. The entire case-law on this question was reviewed by the House of Lords including the two cases referred to above viz., *Swan v. Swan* and *Palmer v. Palmer*. On the facts of the case the question that arose for consideration was, whether insanity could afford a defence when it was established on evidence that the husband knew what he was doing but did not know that what he was doing was wrong. The House of Lords was not disposed to base its decision on the distinction between the two parts of the *McNaghten* rule and has gone into the general question viz., how far insanity is a good defence and if it is a good defence, under what circumstances and within what limitations. Some of the Law Lords have emphasized that the distinction made between two parts of the *McNaghten* rules is illogical and untenable. The facts in *William's* case were as follows: A husband by his conduct caused damage to his wife's health. His conduct took the form of deliberately accusing his wife of adulterous associations, but he thought that such accusations were justified because he believed that they were true, having been so induced to think by imaginary voices which informed him of them as fact. The wife petitioned for a divorce on the ground of cruelty. The trial Judge found that the husband knew what he was doing in making the accusations, but that he did not know that they were wrong; the trial Judge would have granted a decree, but felt constrained to dismiss the petition because of the husband's insanity. On appeal from a decision of the Court of Appeal that the second limb of the *McNaghten* rules afforded the husband a defence, it was held (Lord Hodson dissenting): the fact that the husband did not know that his acts were wrong did not of itself constitute a defence to a suit for divorce on the ground of cruelty. It was further held:

"Insanity of a respondent spouse is not necessarily a defence to a suit for divorce on the ground that the respondent treated the petitioning spouse with cruelty; but insanity is a factor to be taken into account in applying the test whether in all the circumstances of the case the respondent's conduct is of such gravity that he has by his acts treated the petitioner with cruelty, e.g., if the conduct were such that it would amount to cruelty only if aggravated by intention to hurt, a spouse who could not form such an intention would not be held to have treated the other with cruelty".

It would at once be clear from this decision that it is not necessary to attribute a guilty mind or *mens rea* to the husband for the purpose of establishing cruelty. Lord Reid in regard to *McNaghten* rules has observed (p. 1002):

"I have come to be clearly of opinion that it would be wrong to take the *McNaghten* rules as a test. Not only have these rules been subject to persistent and powerful criticism for nearly a hundred years but their strict application would lead to capricious results. It appears to be the general opinion of medical men, who at least have a better understanding of insanity than lawyers, that there are types of insanity not within the rules which deprive the insane man of choice or responsibility just as much

as those types which are covered by the rules. So if guilt, culpability, or blameworthiness in some degree is to be held a necessary element in cruelty, I can see no rational basis for holding that if two persons are in fact equally irresponsible one is to be divorced because his type of insanity does not come within the rules, but the other is to have a defence because his case is covered by the rules".

Again, at page 1003 Lord Reid has posed two alternatives and observed:

"So it remains for me to choose between the two clear-cut alternatives—either insanity is a defence or it is not. I think that ultimately the answer must depend on the meaning one gives to the word 'cruel', and on this there are obviously two opinions, even among judges".

Lord Reid thereafter referred to the decision in *Gollins's* case and pointed out that whether the behaviour is cruel or not must be considered from an objective standard. Lord Reid has also tried to assimilate the position of an insane person to that of an abnormal person and pointed out that it is illogical to make a distinction between the behaviour of an abnormal person and that of an insane person. From the point of view of the consequence on the spouse the impact of both is the same. At page 1004 Lord Reid has observed:

"In my judgment decree should be pronounced against such an abnormal person not because his conduct was aimed at his wife, nor because a reasonable man would have realised the position, nor because he must be deemed to have foreseen or intended the harm he did, but simply because the facts are such that, after making all allowances for his disabilities and for the temperaments of both parties, it must be held that the character and gravity of his acts was such as to amount to cruelty. And, if that is right for an abnormal person, I see no good reason why the same should not apply to an insane person".

Lord Evershed in his concurring judgment pointed out that it is not enough to say that the second part of *McNaghten* rule did not apply to the facts of that case, because the arguments inevitably raised the general and important question viz., to what extent is insanity an answer to a plea of cruelty in a petition for divorce? After posing the question in that general form, Lord Evershed conceded that it cannot be laid down that the test of judging cruelty in all cases is purely objective. Lord Evershed proceeded to observe that proof of insanity is not necessarily an answer to the charge. He then referred to the point of view of the sufferer and considered the necessity to give protection to the suffering spouse. Lord Pearce pointed out that the divorce Court has more similarity to the common law Courts than to the criminal Courts. He was not prepared to accept the argument that divorce was partly punitive and, therefore, we must look to the criminal law for guidance. He then emphasized that in considering the question as to whether insanity afforded a defence, one should look to the meaning of the word 'cruelty'. After referring to the cases in which the objective view of cruelty was emphasized, Lord Pearce emphasized the hardships to which one party is subjected by the distinction between the two parts of the *McNaghten* rules. Lord Pearce then observed (p. 1028):

"The argument for holding that a man should not be held to have treated his wife with cruelty if he did not know what he was doing has an attractive simplicity. But so to hold would create a dividing line which in practice is not easy to apply (even with medical help), which will at times make the courts powerless to help when help is most needed, and which will cause more hardship than it alleviates. It is not the dividing line which has been drawn in criminal cases, nor is it that which has been drawn in cases of contract. It is that which has, after much doubt, been drawn in cases of tort. For divorce cases it has little practical justification.

And inevitably it must be so if the court is to exercise its duty of protection between spouses who are otherwise under a duty to live with one another".

Lord Pearce then concluded with the following observations (p. 1029):

"In my opinion insanity should, like temperament, and other circumstances, be one of the factors that may be taken into account in deciding whether a wife is entitled

to relief. Where therefore the conduct in question is such that it would not amount to cruelty in the absence of an actual intention to hurt, an insane man who could form no such intention would not be held to have treated his wife with cruelty. Where, however, the conduct would be held to be cruelty regardless of motive or intention to be cruel, insanity should not bar relief.

As stated above, the evidence in this case does not justify the conclusion that the husband was not aware of what he was doing. Assuming, however, that the husband was not capable of knowing the nature of his acts, still, that by itself would not afford a defence to an action of judicial separation. In view of the decision of the House of Lords in *Williams v. Williams* the distinction made in some judicial pronouncements between the two parts of the *Mc-Naghten* rule no longer remains valid. Defence of insanity is not available even on the first part viz., that the offending spouse is not capable of knowing what he is doing, if the conduct is held to be cruelty regardless of motive or intention to be cruel. The conduct of the husband in this case is such as to amount to cruelty, even in the absence of an intention to be cruel. Insanity, therefore, should not bar the relief claimed by the wife. On the facts of this case, the schizophrenia from which the husband has a predilection to suffer periodically is no good defence to the plea of cruelty put forward on behalf of the wife. The question whether the husband was capable of forming an intention to be cruel or actually intended to be cruel is a matter of no consequence in the present case. There is no knowing when the husband would relapse into a fit of schizophrenia, in which case anything may happen. The apprehensions entertained by the wife are, therefore, well-founded.

The result is, the appeal fails and is, therefore, dismissed. No order as to costs.

Appeal dismissed.

[NAGPUR BENCH]

Before Mr. Justice Kotval and Mr. Justice Wagle.

SK. AHMAD SK. ABDULLA

v.

GIRDHAR BHAGWANSA JIRAPURE.*

Central Provinces & Berar Municipalities Act (II of 1922), Secs. 20-A(2), 15(j)—Maharashtra Zilla Parishads and Panchayat Samitis Act (Mah. V of 1962), Sec. 16(1)(f)—C. P. & Berar Civil Courts Act (I of 1917)—Provincial Insolvency Act (Act V of 1920), Sec. 73—District Judge whether can entertain election petition under s. 20-A(2) of Act II of 1922 though not authorised in this behalf.

In s. 20-A(2) of the C. P. & Berar Municipalities Act, 1922, the expression "especially empowered by the Provincial Government in this behalf" qualifies only the words "a Civil Judge". Therefore, a District Judge or an Additional District Judge although he is not especially authorised in this behalf by the Provincial Government has the authority to entertain an election petition under s. 20-A of the Act and to dispose it of.

Trimbaksa Ramasa v. Habib Mohammad,¹ approved.

Yeshwant v. Nandkishore,² disapproved.

Bhojraj v. State,³ agreed with.

*Purushottam v. G. V. Pandit*⁴ and *Kewalchand Kanhayalal v. Manoharbhair Babarbhair*,⁵ referred to.

THE facts are stated in the judgment.

*Decided, March 5, 1965. Civil Revision Application No. 459 of 1963.

¹ [1961] N.L.J. 117.

² [1961] N.L.J. 235.

³ [1958] A.I.R. M.P. 286.

⁴ [1950] N.L.J. 520.

⁵ (1959) Civil Revision Application No. 493 1958, decided by Badkas J., on February 18, 1959 (Unrep.).

B. R. Mandlekar, for the petitioner.
C. S. Dharmadhikari, for opponent No. 1.
D. B. Padhye, amicus curiae.

WAGLE J. This is an application in revision under s. 20-A(5) of the C. P. & Berar Municipalities Act, 1922. The facts which need a mention are the following:

On June 16, 1962, election for a seat in Ward No. 9 of the Achalpur Municipal Committee was held at which the present petitioner obtained 190 votes, opponent No. 1 obtained 153 votes and opponent No. 2 obtained 59 votes. The petitioner having obtained the largest number of votes was declared elected. Against this declaration of the result, the present opponent No. 1 Girdharsa filed an election petition No. 10 of 1963 before the District Judge, Amravati.

The ground urged for the contention that the petitioner was not-entitled to be elected was that he was an undischarged insolvent. Section 15(j) of the C. P. & Berar Municipalities Act, 1922, mentions that no person who is, under the provisions of any law for the time being in force, ineligible to be a member of any local authority, shall be eligible for an election or nomination as a member of a committee. The contention of opponent No. 1 was that under the provisions of s. 16(1)(f) of the Maharashtra Zilla Parishads and Panchayat Samitis Act, 1961 (hereinafter called the Zilla Parishads Act), an undischarged insolvent is not eligible for being elected to the Zilla Parishad. Under the provisions of s. 15(j) of the C. P. & Berar Municipalities Act, therefore, he is ineligible to be a member of the Municipal Committee. The said opponent also contended that the petitioner should be unseated and that he being the person who had obtained next largest number of votes should be declared as elected for the said seat. The learned District Judge having considered the contentions of the parties and the evidence led by them held that the petitioner was an undischarged insolvent. The learned District Judge also held that there is no reason why the present opponent No. 1 should not be declared to have been elected, and declared him elected after setting aside the election of the present petitioner. Against this order the present application in revision has been filed by the petitioner whose election was set aside.

Mr. Mandlekar, who appears for the petitioner, contends that, in the first instance, the entire order should be set aside for the reason that the District Judge had no authority to act as a Judge under the provisions of s. 20-A of the C. P. & Berar Municipalities Act. Mr. Mandlekar's contention was that the plain meaning of the authorisation under s. 20-A(2) of the C. P. & Berar Municipalities Act was that a person, who was specially empowered by the Provincial Government in this behalf had alone the authority to entertain and dispose of such election petitions. Mr. Mandlekar in this connection relied upon the provisions of s. 20-A, sub-s. (2), which reads as follows:

"(2) Such petition shall be presented to the District Judge or Additional District Judge or to a Civil Judge especially empowered by the State Government in this behalf within the local limits of whose jurisdiction the election or selection was held and no petition shall be admitted unless it is presented within fourteen days from the date on which the result of such election or selection was notified."

Mr. Mandlekar's contention in this respect was that in order to enable either the District Judge or the Additional District Judge, or a Civil Judge, it was necessary that he was to be empowered by the Provincial Government in this respect and that, unless this special empowerment was received by him from Provincial Government, neither the District Judge, nor the Additional District Judge, nor the Civil Judge had jurisdiction to entertain any election petition under s. 20-A. In this connection Mr. Mandlekar referred to a decision of a Single Judge of this Court, *Yeshwant v. Nandkishore*¹ which favoured the view that was propounded by Mr. Mandlekar.

Mr. Mandlekar, however, brought to our notice the fact that on this point there is a conflict of decisions of two Single Judges of this very Court. In *Trimbaksa Ramasa v. Habib Mohammad*² one of us (Kotval J.) had a similar point for disposal, and it was held in that case that the words "especially empowered by the Provincial Government in this behalf" used in s. 20-A(2) of the C. P. and Berar Municipalities Act, only applied to the words "a Civil Judge" and did not apply to the words "the District Judge or Additional District Judge". Mr. Mandlekar, therefore, contended, when this matter was placed before a Single Judge of this Court on March 11, 1964, that this point be referred to a Division Bench as there was a conflict.

As the point was of some importance in regard to the interpretation of a section, we called upon Mr. D. B. Padhye, Assistant Government Pleader, to assist us, and we are thankful to Mr. Padhye for the assistance given by him in placing his view before us. Having considered the arguments advanced in this case and the two judgments expressing a conflict of views, we are of opinion that the view expressed in the earlier judgment of a Single Judge of this Court in *Trimbaksa Ramasa v. Habib Mohammad* is preferable to the view expressed in *Yeshwant v. Nandkishore*. We may also point out that in the case before Mr. Justice Abhyankar in *Yeshwant v. Nandkishore* this point did not really arise. It was not necessary for the disposal of this point to arrive at a decision in the case before the learned Judge. The point before the learned Judge was a little different from the point which is now before us. The facts of that case were that an election petition was filed before the District Judge and the District Judge, under the powers given to him under the Bombay Civil Courts Act, 1869, transferred the election petition for disposal to the Assistant Judge. The Assistant Judge in fact disposed of the election petition, and in a revision application filed under s. 20-A(5) of the C. P. & Berar Municipalities Act, the jurisdiction of the Assistant Judge was challenged before Mr. Justice Abhyankar.

The short point before Mr. Justice Abhyankar was whether there was authority in the District Judge to transfer the matter to the Assistant Judge under the provisions of the Civil Courts Act. The learned Judge considered the various authorities and came to the conclusion that any authority mentioned in s. 20-A(2), whether specially empowered or not, was an authority acting as a *persona designata*. Having come to this conclusion, the learned Judge further held that the provisions of the Civil Courts Act did not apply to such proceedings except to the extent to which they were especially made applicable, either by the Act or by any of the rules framed thereunder. No provision was brought to the notice of the learned Judge wherein any authority entertaining an election petition under the provisions of s. 20-A of the C. P. & Berar Municipalities Act was given the power to transfer the election proceeding for disposal to another authority. In the absence of any such provision, the learned Judge came to the conclusion that the transfer to the Assistant Judge by the District Judge was bad and, therefore, the Assistant Judge had no authority to dispose of the election petition. The question whether the authority should have been specially empowered to exercise jurisdiction in respect of an election petition did not, in fact, arise before the learned Judge. This also seems to be the view taken by the learned Judge. In para. 11, at page 240, the learned Judge observes as follows:

"...Even assuming that a District Judge or an Additional District Judge need not be empowered as contended by Mr. Mandlekar, there is no room for an argument that an Assistant Judge could be an authority, though not enumerated or mentioned in sub-section (2) of section 20-A, which would still have the power to entertain or dispose of an election petition merely by reason of section 16 of the Bombay Civil Courts Act. In fact, in my opinion, the Bombay Civil Courts Act does not purport to create any power in the District Judge when he is acting as a *persona designata* to transfer any application entertained by him under any special Act to his Assistant Judge."

The question that arose in *Trimbaksa Ramasa v. Habib Mohammad* was, however, the exact question that now arises before us. The facts of that case were that an election petition was presented before the District Judge on June 10, 1959, during the period when the Courts of the Civil Judges were closed for summer vacation between May 3, 1959, and June 14, 1959. After the reopening of the Civil Courts the District Judge sent the election petition to the Civil Judge, Senior Division, for disposal. The contention taken up by the opponent in the election petition was that this presentation to the District Judge was not proper as he was not the authority empowered by the Provincial Government in this behalf under s. 20-A of the C. P. & Berar Municipalities Act. There is no dispute about this fact, viz. that the notification issued by the Provincial Government in this connection empowers only the Civil Judges, Class I, to hear election petitions under s. 20-A(2) of the C. P. & Berar Municipalities Act. No District Judge or Additional District Judge had till then been empowered by any notification issued by the Provincial Government under s. 20-A(2).

The contention taken up was, therefore, that the District Judge not being the person who is authorised by the Provincial Government had no authority to entertain a petition as it could not be presented to him and, therefore, he had no power to have seisin of it. All further proceeding that followed by an erroneous presentation did not properly dispose of any election petition. The result, as submitted, was that the election petition not having been properly presented, no valid orders could be passed thereon. In this case it was necessary for the learned Judge to consider the question whether the presentation of an election petition to a District Judge, who is not especially empowered in this respect under s. 20-A, was a proper presentation of the petition in order to make the petition a valid one. The learned Judge considered the clause and in particular, the wording of the clause, to hold that the presentation to the District Judge, although he was not specially empowered in this respect by the Provincial Government, was proper presentation within the meaning of s. 20-A(2) of the C. P. & Berar Municipalities Act. The learned Judge considered the particular clause, in s. 20-A(2), viz. "Such petition shall be presented to the District Judge or Additional District Judge or to a Civil Judge especially empowered by the Provincial Government in this behalf". The view taken by the learned Judge in *Trimbaksa Ramasa v. Habib Mohammad* appears to be preferable to the view taken by the learned Single Judge in *Yeshwant v. Nandkishore*.

The wording of the clause clearly indicates the intention of the Legislature. There are three alternative authorities which are mentioned in the section. The first one is the District Judge, the second one is Additional District Judge and the third one is a Civil Judge. If it was the intention that the words "especially empowered by the Provincial Government in this behalf" were to apply to all the three authorities, then we are of opinion that the clause would definitely have been worded differently. The clause worded as follows, "the District Judge, the Additional District Judge, or a Civil Judge especially empowered by the Provincial Government in this behalf" would have made the meaning of the clause quite clear if it was the intention of the Legislature to have the later clause of especial empowerment applicable to all the three authorities. Mr. Padhye, who argued *amicus curiae* in this matter, contended that the intention of the Legislature has got to be gathered by the words used. His argument was that the word 'or' between the words "District Judge" and the words "Additional District Judge" really made no difference to the phraseology so far as its meaning is concerned. Similar was his argument in respect of the use of the word "to" between the clause "the District Judge or Additional District Judge or," and the words "a Civil Judge". His view was that the words used by the Legislature were clear enough to indicate that the expression "especially empowered" was used

in reference to all the three authorities and not with reference to the third authority only.

It, however, appears to us that if this meaning were to be given to that expression, the first word "or" between the words "the District Judge" and the words "Additional District Judge" would have no meaning at all. Similarly, the word "to" between the words "Additional District Judge or" and the words "a Civil Judge" would also have no meaning. In other words the Legislature should be presumed to have used two words without attaching any meaning to them. Those words would be superfluous. If, however, the meaning of the words is to be given as an intention expressed by the Legislature that the expression "especially empowered by the Provincial Government" was only to apply to "a Civil Judge" which is the last alternative used, then, in our opinion, the first word "or" and the second word "to" have a definite meaning. By the use of the word "to" between the words "Additional District Judge or" and "a Civil Judge", a categorical distinction is brought between the two classifications. The first classification is "the District Judge or Additional District Judge" and the second classification is "a Civil Judge". If this expression is understood in this manner, then the word "or" as well as the second word "to" have a meaning and the meaning is quite clear, viz. that there was an intention of the Legislature to distinguish between the first category of "the District Judge or Additional District Judge" and the second category of "a Civil Judge", and that the expression "especially empowered" could only be with respect to the second classification viz. "a Civil Judge".

It also appears to us that there is good reason for it. The reason is connected with the jurisdiction of these various authorities. The jurisdiction of the District Judge and the Additional District Judge was unlimited, whereas the jurisdiction of the Civil Judge was limited to Rs. 10,000 at that time. If this jurisdictional difference is taken into account, the intention of the Legislature appears perfectly clear viz. that in order to enable a Civil Judge to have a power on par with the District Judge or the Additional District Judge, a special notification was necessary from the Provincial Government empowering a Civil Judge under s. 20-A. In other words, a selection was to be made by the Provincial Government from the third authority, mentioned in s. 20-A(2), which would bring those persons on par jurisdictionally with the first category which includes the District and the Additional District Judge.

To our mind, the expression used by the Legislature is clear enough to indicate that a distinction between the classifications which include the District and the Additional District Judges and the classification of a Civil Judge was definitely made by the Legislature by the two words used—the first word "or" between the words "District Judge" and "Additional District Judge", and the word "to" between the words "Additional District Judge or" and the expression "a Civil Judge."

One of the earlier decisions of the Nagpur High Court which was also mentioned in *Yeshwant v. Nandkishore*, was a decision of a Single Judge reported in *Purushottam v. G. V. Pandit*.³ The view taken by the learned Single Judge in this case was that the words "especially empowered" referred to all the three authorities. This question, however, was subsequently reconsidered by the Madhya Pradesh High Court in *Bhojraj v. State*⁴ and the Division Bench presided over by Hidayatullah C. J. (as he then was) came to the conclusion that the view expressed in the earlier decision of *Purushottam v. G. V. Pandit* was not acceptable. The reasons given are the same as are now placed before us by Mr. Dharmadhikari, viz. that the proper meaning has to be given to the first word "or" and the second word "to". We agree with the opinion expressed in the case, *Bhojraj v. State*. This judg-

3 [1950] N. L. J. 520

4 [1958] A.I.R. M.P. 286.

ment of the Madhya Pradesh High Court was followed by a Single Judge (Badkas J.) of this Court in *Kewalchand Kanhayalal v. Manoharabhai Babar-bhai*.⁵

One of the grounds upon which the view to the contrary was expressed by Kaushalendra Rao J. in *Purshottam v. G. V. Pandit* and by Abhyankar J. in *Yeshwant v. Nandkishore*, was that if the meaning which we have given to it were to be given, then there was a likelihood of a conflict between the three authorities in regard to the same election petition. The argument advanced was that if an election petition were filed before each of the three authorities, then each of the three authorities might decide the matter differently and that there would thus be a conflict. The notification issued by Government in the instant case also raises a likelihood of a conflict. The notification issued by Government authorises all Civil Judges of Class I to hear such election petition under s. 20-A of the C. P. & Berar Municipalities Act. If at a particular place more than one Civil Judge, Class I, are posted, then a conflict is likely in respect of the present notification also. However, we do not think that that should be one of the matters which should determine the interpretation of sections. Whether a conflict arises or not and what would happen if a conflict arises, is not a matter which should persuade us to come to a different conclusion when the plain meaning of the section is different.

A further argument advanced by Mr. Dharmadhikari in this connection was that the view taken earlier that an authority which acts under the provisions of s. 20-A of the C. P. & Berar Municipalities Act is a *persona designata* cannot be supported on the plain reading of s. 20-A of that Act and the provisions of the C. P. & Berar Civil Courts Act I of 1917. Section 20-A(2) mentions the authorities who should entertain election petitions. Section 20-A(5)(b) gives the power to the High Court to entertain an application in revision where the Court has exercised jurisdiction not vested in it by law or has failed to exercise a jurisdiction vested in it by law. The clause is not that the revisional jurisdiction is against the decision of a Judge acting as *persona designata*, but the clause uses words to mean that the revision lies against an order of a Court which has exercised a particular jurisdiction. Mr. Dharmadhikari contended that the use of the word "Court" would make it abundantly clear that the authority whether empowered or not which was mentioned in s. 20-A(2) was exercising its authority as a Court and that, therefore, there was no scope for any argument that the authority was acting as a *persona designata*. The second point urged in this connection by Mr. Dharmadhikari was that the expression "within the local limits of whose jurisdiction the election was held" giving the localized jurisdiction to the authority under s. 20-A(2) also supported the view that the authority was acting as a Court, and not as a *persona designata*.

In this connection it was pointed out that the C. P. & Berar Courts Act, 1917, did not give jurisdiction officerwise, but the jurisdiction was only courtwise. There was no particular jurisdiction given to a Judge as such, but the jurisdiction was of the Court and it was to be exercised by the presiding officer. If, therefore, the Judge did not have any particular jurisdiction as unrelated to a Court, then Mr. Dharmadhikari contended that the expression "within the local limits of whose jurisdiction" must have reference to the Court which was presided over either by the District Judge or by the Additional District Judge or by the Civil Judge. Mr. Dharmadhikari's contention, therefore, was that if the authority, which had the jurisdiction to entertain election petitions under s. 20-A(2) was not a *persona designata* but a Court, all these questions, which arose by reason of the presentation and the exercise of jurisdiction, could not, in fact, arise. However, though we find good substance in this argument we think that it is not necessary to go into this discussion so far as the present case is concerned. This present case has

⁵ (1959) Civil Revision Application No. February 18, 1959 (Unrep.).
493 of 1958, decided by Badkas J., on

to be disposed of upon the interpretation of the expression "to the District Judge or Additional District Judge or to a Civil Judge especially empowered by the Provincial Government in this behalf". Having come to a conclusion that the last expression "especially empowered by the Provincial Government in this behalf" qualifies only the words "a Civil Judge", it is not necessary to enter into a further discussion upon a question whether the authorities mentioned in s. 20A(2) act as *persona designata* or as a Court.

In the result, we hold that the learned District Judge, although he was not especially authorised in this behalf by the Provincial Government, had the authority to entertain the election petition under s. 20-A and to dispose of it.

Mr. Mandlekar's further contention in this case was that the order passed by the learned District Judge in the election petition No. 10 of 1963 was partly erroneous. He did not seriously dispute the contention advanced that the undischarged insolvent was not eligible for being elected as a member of the Municipal Committee. It was also pointed out by Mr. Dharmadhikari that s. 73 of the Provincial Insolvency Act was clear enough to indicate that no undischarged insolvent was entitled to seek an election to any local authority. The Municipal Committee of Achalpur being a local authority s. 73 was clear enough to indicate that the petitioner was not entitled to be elected. However, the learned District Judge relied upon s. 16(1)(f) of the Zilla Parishads Act along with the provisions of s. 15(j) of the C. P. & Berar Municipalities Act.

Mr. Mandlekar's contention, however, was about the later portion of the Judge's order, viz. that the present opponent No. 1 be declared to have been elected. The submission was that the petitioner having been found ineligible for election, the number of votes which he had obtained, viz. 190, should have been considered by the learned District Judge as capable of being obtained by any one of the other candidates. Opponent No. 1 had obtained 153 votes and opponent No. 2 had obtained 59 votes. There is no evidence on record to suggest an inference that the votes which were obtained by the petitioner would all have been obtained by opponent No. 1 or that such number of votes would have been obtained by opponent No. 1 as would give him a majority over the votes obtained by opponent No. 2. In this state of events, it is not possible to come to any conclusion that, if the petitioner were not to stand for the election and the votes were to be redistributed between the other candidates, opponent No. 1 would have obtained a majority of votes. Mr. Mandlekar, therefore, contended that, in the present case, the only order that could have been passed by the learned District Judge was to set aside the election and direct a fresh election. We accept this contention of Mr. Mandlekar and hold that the order passed by the learned District Judge declaring opponent No. 1 as elected is bad and should be set aside.

In the result, this petition is partly allowed. The order of the District Judge holding that the present petitioner is not eligible for election is upheld, but the order declaring opponent No. 1 as elected is set aside. A fresh election will be necessitated for the vacant seat. In the events that had happened, we direct the parties to bear their own costs.

Petition partly allowed.

Before Mr. Justice K. K. Desai and Mr. Justice Palekar

THE STATE OF BOMBAY v. GANPAT DHONDIBA SAWANT.*

Bombay Police Act (Bom. XXIII 1951), Secs. 4, 25, 26, 27—Rules made under s. 29, District Police Act (IV of 1890); Bombay Police Manual, 1950. Chapter XV. Ss. 535-537, 556-558—Bombay Civil Services Conduct, Discipline and Appeal Rules. Appendix II—Police officer exonerated in departmental enquiry into alleged misconduct—Whether State Government barred from ordering fresh departmental enquiry in connection with same charge of misconduct—State Government whether can institute enquiry against defaulting police officers under procedure prescribed in Appendix II of Civil Services etc. Rules.

There is no bar under the Bombay Police Act, 1951, or the Rules made thereunder preventing the State Government from ordering a fresh departmental enquiry in connection with charges of misconduct against a police officer in respect whereof he has been exonerated in a prior departmental enquiry.

In matters of departmental action taken by officers authorised under s. 25(2) of the Act for punishment of members of the subordinate ranks, the State Government can at any stage intervene under the power of superintendence reserved to it under s. 4. In those very cases, if it finds it necessary, the State Government can directly for itself proceed to exercise punitive powers and after enquiry inflict necessary punishments. There is no direct provision in the Act providing for ordering of a further fresh enquiry for punishment of members of Police Force in respect of their misconduct. That, however, does not result into a position that there is no jurisdiction in the authorities mentioned in ss. 4 and 25 to order further fresh enquiry when the facts of a particular case warrant such directions.

Govind Pedroo v. Dy Commissioner of Police, Division South and Port, Bombay¹ and Arjunrao Baburao v. State of Bombay,² referred to.

There is no prescribed procedure binding on the State Government in connection with punitive powers exercised by the State Government under the first part of s. 25 of the Bombay Police Act, 1951.

Shantaram v. Chudasama,³ referred to.

One Ganpat Dhondiba Sawant (plaintiff) joined service in Police Force of the Province of Bombay on June 11, 1929. In September 1949, the plaintiff was attached to the Cantonment Police Station, Poona, as Sub-Inspector of Police. His salary then was Rs. 234-2-0 inclusive of allowances in the grade of Rs. 120-5-195. It appears that on September 6, 1949, at or about 8/8.20 p.m., one unknown stranger was found lying in the passage in the compound of Petit Hall at Bhavani Peth, Poona City. Information about this fact was conveyed to a Constable at a Chowki at Pool Gate within the limits of the Cantonment Police Station. The Constable went to the Police Station and reported the matter orally to Head Constable Kate. The Police thereafter saw the stranger in the compound of the Petit Hall and removed him to the Cantonment Police Station. On the next day, i.e. September 7, 1949, in the morning, the stranger was found near Empress Garden within the jurisdiction of another Police Station in unconscious condition. He was removed to that other Police Station and therefrom to the Sassoon Hospital, where he was admitted as an in-patient at 8.25 a.m. He died at about 8.40 a.m. On post mortem, it was found out that he had died as a result of cerebral haemorrhage due to fracture of skull. The plaintiff's duty hours on September 6, 1949, at the Cantonment Police Station as Sub-Inspector in charge thereof appear to have been from 9 p.m. onwards.

Under the above circumstances, by an order dated October 26, 1949, exh. 25, the District Superintendent of Police, suspended the plaintiff and others from

*Decided. April 21/22, 1965. First Appeal No. 229 of 1959, with Cross Appeal No. 244 of 1959, against the decision of V. V. Ghotage, Joint Civil Judge (S.D.), Poona, in Special Civil Suit No. 7 of 1957.

1 (1959) Special Civil Application No. 361 of 1959, decided by Chainani C. J. and V.S. Desai J., on August 25, 1959 (Unrep.).

2 (1960) 62 Bom. L.R. 1038.

3 (1953) 56 Bom. L.R. 350.

service with effect from October 26, 1949, pending departmental enquiry into the conduct of the plaintiff and other personnel of the Police Station.

The plaintiff was prosecuted in the Court of the City Magistrate, First Class, Poona, for offences under ss. 202 and 217 of the Indian Penal Code. In other words, the charge against the plaintiff was that he intentionally omitted to give information and he as a public servant disobeyed directions of law with intent to save certain persons from punishment. By his judgment and order dated November 6, 1950, the learned Magistrate found the plaintiff not guilty and acquitted him under s. 258 of the Code of Criminal Procedure. The result of the above acquittal was that by an order dated January 29, 1951, the D.S.P., Poona (Rural), ordered the plaintiff to be reinstated in service and gave directions as regards his posting. By the order, it was provided that the plaintiff's period of suspension be treated as duty on full pay and allowances.

The plaintiff joined service as from February 1, 1951. On or about September 25, 1951, a departmental enquiry was started against the plaintiff. The charges levelled against the plaintiff appear in exh. 28 dated September 25, 1951. The gravamen of the charges was that the plaintiff was guilty of gross negligence of duty and slack in supervision, inasmuch as on the night of September 6/7, 1949, he failed to take any legal action or to issue orders to his subordinates to take legal action in respect of the unknown person who was brought to the Police Station on the alleged charge of offence under s. 61-D of the District Police Act and further that he failed to arrange to obtain medical aid for the unknown person who was brought to the Police Station in a sick condition and became unconscious thereafter and further that the plaintiff allowed the unknown person to continue in the Police Station till midnight without any action being taken in respect of him. The second charge was that the plaintiff was guilty of reprehensible misconduct in that he caused the unknown sick and unconscious person to be removed from the Police Station precincts to a spot near Empress Garden and abandoned him there in order to cause disappearance of the evidence of his gross negligence of duty and evade responsibility and liability in the matter. The departmental enquiry in connection with the above charges was held by the Assistant Superintendent of Police Heble. By his report, copy whereof forms part of exh. 62, the Enquiry Officer held that the plaintiff was present at the Police Station on the above date and that he was not in a position however to exercise supervision over the happenings in the Police Station. His subordinates had not apprised him about the relevant facts regarding the unknown person who was brought to the Police Station. He further held that it was not proved that the plaintiff could have been aware of the facts relating to the above stranger brought to the Police Station through other sources. Having made the above findings, he held that the plaintiff had not failed to take lawful action in respect of the above stranger and he had not ordered and/or connived at the removal of the stranger from the Police Station to a spot near Empress Garden. The result of the above findings, obviously, was that the plaintiff was exonerated by the above report from the charges levelled against him. The District Superintendent of Police made an endorsement dated February 21, 1952, on the above report accepting the same. The Inspector General of Police also accepted the above report by endorsement dated May 1, 1952. It is necessary to record that pending the above enquiry, the plaintiff was not suspended from service and continued in service and continued to receive his salary.

The Government then decided that a general departmental enquiry should be held afresh against all the Police Officers and men concerned in respect of their conduct in the above case. The Government, therefore, directed the District Magistrate that the enquiry should be conducted by a senior Prant Officer of Poona District in the conduct of Police Officers and men concerned in respect of the happening of September 6/7, 1949. The District Magistrate was called upon to take steps accordingly. The other senior Police Officers were informed about the Government's decision. By his order dated January 10, 1953, the

District Magistrate, Poona, appointed M. R. Caldeira, Prant Officer, Poona City Prant, as Enquiry Officer in the general departmental enquiry to be held against the Police Officer and men concerned in respect of their conduct in the culpable homicide in the office of the Cantonment Police Station, Poona Urban Area. By the order, Caldeira was requested to observe all instructions regarding the holdings of departmental enquiries printed in Appendix II to the Bombay Civil Services Conduct, Discipline and Appeal Rules. In pursuance of that order, Caldeira commenced general departmental enquiry proceedings against the Police Officers concerned including the plaintiff. By a memo to show cause and charge-sheet dated January 24, 1953, Caldeira furnished the plaintiff with the copies of the joint charge and statement of allegations against the Police Officers and men concerned and gave him notice that enquiry would be held in his office from February 6, 1953. The plaintiff was called upon to remain present and to produce oral and documentary evidence as he required. He was informed of the list of witnesses who would be examined in support of the charge. The charges levelled were as follows:

- "(1) You failed to make any entry in the station diary regarding this person.
- (2) Failed to record any complaint either by the unknown person or against him.
- (3) Failed to take prompt and necessary measures to render medical aid to the unknown person.
- (4) Removed the unknown person against his will from the Police Station to the road near Empress Garden, apparently with a view to evade responsibility and cover negligence of duty.
- (5) Failed to give information when the photograph appeared in the papers."

In due course, after all opportunity was given to the plaintiff in connection therewith, the departmental enquiry was proceeded with. Caldeira by his report dated March 14, 1953, made findings against the plaintiff and found that the plaintiff was guilty of all the five charges. By his letter dated July 1, 1953, the Assistant Secretary to the Government of Bombay, Home Department, informed the plaintiff about the findings made by Caldeira by his above report. The plaintiff was furnished with the copy of the report and he was requested to show cause, if he so desired, against the proposed penalty of dismissal to be inflicted on him. The plaintiff's representations against the proposed punishment were received by the Government. Ultimately, by the challenged order dated January 11, 1954, the State Government ordered dismissal of the plaintiff and certain other Government servants from service with effect from January 11, 1954, and directed that formal orders of dismissal should be issued separately. Such order of dismissal dated January 11, 1954, was passed in connection with the dismissal of the plaintiff.

The plaintiff appealed against the above order of dismissal on March 8, 1954. In connection with his appeal, the plaintiff was heard on October 15, 1954. By the order dated October 18, 1954, the plaintiff was informed that the Government saw no reason to reconsider its earlier decision to dismiss the plaintiff from service. The plaintiff served usual statutory notice under s. 80 of the Code of Civil Procedure dated March 13, 1956, on the Government and ultimately filed the present suit on March 8, 1957. In his plaint, the grounds, on which the plaintiff challenged the above order, were as follows:—The enquiry by the Prant Officer was illegal, *ultra vires* and without jurisdiction and contravened the provisions of the Constitution regarding fundamental rights and other rights guaranteed to an individual under the Constitution. The Prant Officer had no jurisdiction to hold the enquiry "when he (the plaintiff) was acquitted in a Court of law and when in a departmental enquiry he was also exonerated". His second contention was that his conditions of service were governed by the Bombay Police Act and the Bombay Police Manual and the rules made thereunder and the Civil Services Classification, Control and Appeal Rules were not applicable to the plaintiff. The result of those facts was that the enquiry by the Prant Officer was with-

out jurisdiction and was of the nature of a second trial and contravened the provisions and the spirit of the Constitution. The third contention was that the enquiry was improper because the Prant Officer had failed to supply to the plaintiff copies of the required papers on plea of confidential documents. In the plaint, the plaintiff further contended that he had not been paid the sum of Rs. 1,701-5-0 for the salary due to him during the period of suspension. That amount should be directed to be paid to him. The plaintiff further claimed the sum of Rs. 12,182-7-0 as arrears of salary from January 11, 1954, till the date of the suit and future salary at the rate of Rs. 305-2-0 per month.

The main contentions in defence raised by the written statement of the State Government were that the claim of Rs. 1,701-5-0 was barred under art. 102 in Schedule I to the Indian Limitation Act. The plaintiff's suggestion that no enquiry can be held on the same charges after an acquittal by the criminal Court was not correct. There was no legal bar to the institution of a departmental enquiry on the same facts which were also the subject matter of criminal trial. In the first departmental enquiry, the Government had found that the case against the plaintiff had not been properly considered. It was for that reason that the Government directed that fresh general departmental enquiry should be held. The main contention was that the Government had powers by virtue of s. 4 of the Bombay Police Act, 1951, under which superintendence of the Police Force throughout the State vested in Government, to order fresh general departmental enquiry. For this reason, it was contended that there was nothing illegal or unconstitutional in the Government's ordering the fresh enquiry. The further contention was that all the essential requirements of the rules of Police enquiry as laid down by the Bombay Police Manual came to be observed as appeared from the departmental proceedings carried out by the Prant Officer. A precise charge-sheet giving details and the statement of allegations were served on the plaintiff and the departmental enquiry was held in a manner whereby nothing that was prescribed by the rules made under the Bombay Police Act and contained in the Bombay Police Manual had been violated. The contention was that as the essential requirements of the Police Rules had been satisfied, mere reference to penalties specified in r. 49 of the Civil Services Rules did not affect the validity of the enquiry. In this connection, the further contention was that the plaintiff had not previously raised any of the objections raised in the plaint alleging that the proper rules were not observed. He had in his replies and written statement not raised any such contention. The plaintiff had in fact acquiesced in the procedure followed, because the plaintiff knew that the requirements of the rules of enquiry under the Police Rules had been satisfied. The plaintiff was accordingly not entitled to agitate this point about the enquiry in accordance with the rules contained in the Police Manual.

The trial Judge negatived the contention of the defendant that the notice under s. 80 of the Code of Civil Procedure was bad. He held that the enquiry by the Prant Officer was not illegal or *ultra vires* (i) because the plaintiff had been acquitted in the criminal trial and (ii) because the plaintiff had been exonerated in the previous departmental enquiry in respect of the same charges. He negatived the plaintiff's contention that the enquiry by the Prant Officer was without jurisdiction and in contravention of the Constitution. The learned Judge held that the findings in the earlier enquiry were not acceptable to the government and it was for that reason competent for the government to direct a fresh enquiry. He negatived the contention of the State Government that the plaintiff's claim regarding the sum of Rs. 1,701-5-0 was barred by the law of limitation. He, therefore, dismissed the plaintiff's suit as regards all the reliefs claimed except in respect of the sum of Rs. 1,701-5-0.

The plaintiff as well as the State Government appealed. These cross-appeals were heard together.

In *F. A. No. 229 of 1959.*

K. J. Abhyankar, Assistant Government Pleader, for the appellant.
S. J. Sorabji, with *S. C. Pratap*, for the respondent.

In *F. A. No. 244 of 1959*

S. J. Sorabji, with *S. C. Pratap*, for the appellant.
K. J. Abhyankar, Assistant Government Pleader, for the respondent.

K. K. DESAI J. [His Lordship after stating the facts, proceeded]. The first contention which has been made before us on behalf of the plaintiff, is as follows:—

The State Government was not entitled to direct and/or hold the fresh departmental enquiry held by Caldeira, because the scheme of the rules framed under the relevant provisions of law negatived the right in the Government to hold further enquiries after a defaulting Government servant was exonerated from the charges levelled against him in prior duly held departmental enquiry. The contention was that under s. 4 of the Bombay Police Act, 1951, the State Government in its powers of superintendence was not entitled to direct a fresh enquiry as is contended for by the written statement. The contention was developed by arguing that there was no affirmative provision for revising in fresh enquiries findings made in prior enquiries that the defaulting Government servants were not guilty of charges levelled against them. The further argument was that powers of superintendence, if any, must be exercised by observing principles of fairplay. The order of fresh enquiry on the basis of the same facts and evidence was in breach of principles of fairplay. In ordering the fresh enquiry in this case, the Government had acted arbitrarily and in violation of the principles of fairplay and/or natural justice. The powers of superintendence did not entitle the Government to act arbitrarily in the above manner. In this connection, the alternative argument was that the provisions in s. 4 of the Act were not intended to deal with and apply to the provisions in altogether another Chapter, i.e. Chapter III relating to regulation, control and discipline of the Police Force. Section 4 appears in Chapter II which deals with matters specified in that Chapter and relates to superintendence, control and organisation of the Police Force. The contention was that in connection with matters dealt with under Chapter III of the Act, the provisions in s. 4 relating to powers of superintendence in the State Government were never intended to be applicable.

The substance of the reply of the State Government was that in all the relevant rules as well as the above Act which was admittedly applicable to the parties, there was no specific bar or even implied bar preventing the State Government from ordering a fresh departmental enquiry in connection with charges in respect whereof a prior departmental enquiry might have been held. In fact, under the provisions in s. 4 and sub-s. (1) of s. 25 of the above Act, express power was reserved so as to enable the Government to order departmental enquiries in connection with misconduct of defaulting Police Officers to decide whether penalties of various kinds should be imposed against such Police Officers. The power of the Government envisaged in the above sections was not controlled by any rules or otherwise. There were no rules which could be relied upon on behalf of the plaintiff to show that a fresh departmental enquiry cannot be ordered against Police Officers who may have been in prior enquiry exonerated of the charges levelled against them.

Now, in connection with these contentions, it is first necessary to refer to the relevant provisions in the Act and also the rules which were admittedly applicable to the plaintiff's case. The plaintiff belongs to the subordinate ranks as defined in sub-s. (16) of s. 2 of the Act. Chapter II of the Act relates to superintendence, control and organisation of the Police Force. Section 4 in that Chapter provides that

"The superintendence of the Police Force throughout the State of Maharashtra vests in and is exercisable by the State Government and any control, direction or

supervision exercisable by any officer over any member of the Police Force shall be exercisable subject to such superintendence".

Chapter III relates to regulation, control and discipline of the Police Force. The important provisions in this Chapter relating to punishment of members of the Police Force and procedure to be observed in awarding punishment and also in appeals from orders of punishment are contained in ss. 25, 26 and 27. It is necessary to quote the relevant parts of the above sections here:

"25. (1) The State Government or any officer authorised by sub-section (2) in that behalf may suspend, reduce, dismiss or remove an Inspector or any member of the subordinate ranks of the Police Force...

(2) (a) The Inspector-General, the Commissioner and the Deputy Inspector-General shall have authority to punish an Inspector or any member of the subordinate ranks under sub-section (1). A District Superintendent shall have the like authority in respect of any Police officer subordinate to him below the grade of Inspector...

(b) ...

(ba) ...

(bb) ...

(c) The exercise of any power conferred by this sub-section shall be subject always to such rules and orders as may be made by the State Government in that behalf.

(3) Nothing in sub-sections (1) and (2)—

(a) shall affect any Police Officer's liability to a criminal prosecution for any offence with which he may be charged; or

(b) ...

26. When any officer passes an order for fining, suspending, reducing, removing or dismissing a Police officer, he shall record such order or cause...together with the reasons therefor...

Provided that no order for reducing, removing or dismissing a Police officer shall be passed without giving him a reasonable opportunity of showing cause against the action proposed to be taken against him..."

Section 27 provides for an appeal against any order passed against a Police officer under s. 25 or the rules or orders thereunder to the State Government itself or to such officer as the State Government may by general or special order specify.

The rules applicable to the plaintiff's case were the rules enacted under the District Police Act and continuing in force at relevant times having regard to the relevant provisions in the above Bombay Police Act, 1951. Parties have found it difficult to furnish to us any clear and complete copy of the rules enacted under the District Police Act. Reference has accordingly been made to the Bombay Police Manual published in 1950 in connection with the rules made under the District Police Act. These are all to be found in Chapter XV beginning with s. 531. The relevant rules, on which reliance has been placed, are to be found by reading ss. 535, 536, 537, 556, 557, and 558 in the above Police Manual.

It requires to be stated that on a reading of the sections in the above Manual, it appears that they include explanations and instructions intended to be borne in mind and are not in the exact language of the rules made under the District Police Act. The relevant parts of the above rules, which need be referred to, are as follows:—

Section 535 mentions the punishments that can be awarded to Police officers including the punishments of reduction in rank, removal from service and dismissal from service. Section 536 confers right of appeal in respect of certain punishments imposed. Under cl. (4) of s. 537, it is provided that

"No officer of the District Police below the grade of Inspector can be punished departmentally, except by a Superintendent, a Deputy Inspector-General of Police, the Inspector-General of Police or Government."

It further provides that

"If any District Magistrate considers that a Superintendent of Police has wrongly acquitted or otherwise dealt with such a Police officer in a departmental inquiry, he may, unless the Superintendent voluntarily revises his own order, report the case to the Inspector-General of Police for revision".

Section 556 provides for appeals against the Inspector-General's orders of punishment of Inspectors to the Government. This section also makes provision for appeals against the orders of punishment passed by the Deputy Inspector-General of Police and Superintendent of Police. Under cl. (4) of this section the phrase "subject to the control of the Inspector-General of Police" is explained as intended to mean that the Inspector-General of Police, in the exercise of his inherent power and duty as Head of the Department, possesses the right of revising the departmental proceedings of a Superintendent of Police. Section 557 relates to mode of preferring an appeal. Under cl. (10) of that section it is, *inter alia*, provided that

"...but nothing herein contained shall be deemed to debar Government from the exercise of any authority or control vested in them under the provisions of the Bombay District Police Act, or from issuing such special orders, as they may deem fit, restricting the exercise of the power of punishment in the case of a particular Police officer".

Section 558 provides for petitions in revision and confers a right on officers who feel aggrieved by the decisions passed by an appellate authority on their appeal. In connection with the petitions for revision and appeals, under cls. (4), (5) and (6) of s. 558, it is provided that

"It is improper for a Superintendent of Police to revise his own proceedings after he has received an appeal.... If fresh facts necessitating the enhancement or reduction of punishment are brought to light while a case is under appeal, the Superintendent of Police should inform the appellate authority accordingly."

For enhancing punishment on fresh evidence, it is provided that

"it will be necessary to hold fresh proceedings to give the defaulter the opportunity to defend himself."

It is also provided that the procedure to be adopted in connection with fresh proceedings should be decided by the Deputy Inspector-General on the merits of each case. Under cl. (6), it is provided that

"it is, however, open to the punishing authority to revise his own or his predecessor's order of punishment when no appeal lies against that punishment, but not otherwise..."

The contention on behalf of the State Government is that it is clear on a reading of the provisions in s. 4 and sub-s. (1) of s. 25 that the State Government has been vested with powers to inflict, *inter alia*, punishments of dismissals of Police Officers from Government service. In connection with these powers, rules have not been framed at any time. The powers are not controlled except by and under the provisions of arts. 310 and 311 of the Constitution.

It is clear on a reading of cl. (c) of sub-s. (2) of s. 25 and the corresponding provision in s. 29 of the District Police Act that the rules relating to departmental enquiry and punishments all relate to the exercise of powers in that connection by Officers mentioned in sub-s. (2) of s. 25. Thus, these rules clearly relate to inquiries to be held by the Inspector-General, the Commissioner and the Deputy Inspector-General as also the District Superintendent and other Officers mentioned in sub-s. (2) of s. 25. These rules do not control in any manner the extremely wide and general power reserved to the State Government for making enquiry into misconduct of Police Officers and imposing punishments against them.

The language of s. 4 is clear and unambiguous. Obviously, under that section, the State Government is vested with power of superintendence over the Police Force throughout the State. Having regard to the clear language of the section, it would not be wrong to hold that as regards each and all the matters pertaining to the Police Force, the State Government has absolute powers to deal with them in the best interests of Police Force as it deems fit. Nothing has been pointed out from the con-

tents of the Act to show that this general power of superintendence vested in the State Government was intended to be curtailed in any manner whatsoever. The contention that the power vested in the State Government under s. 4 appearing under Chapter II was not intended to overlap in connection with matters of discipline of the Police Force provided for under s. 25 appearing under Chap. III of the Act appears to be unwarranted. In fact, the heading of the Chap. II contains the phrase "... control.. of the Police Force". Similar is the position in the heading of Chap. III. Chapter III does not purport to deal with the matter of the power of superintendence that is dealt with under Chap. II. There is nothing in s. 25 to indicate that the power of superintendence conferred under s. 4 on the State Government is in any manner curtailed by reason of the provisions in s. 25 for punishments of members of the subordinate ranks of the Police Force departmentally for neglect of duty and other misconduct. It appears to us that in connection with powers given under sub-s. (2) of s. 25 to various Officers to award punishments against members of subordinate ranks of Police Force, the power of superintendence vested in the State Government under s. 4 of the Act would always be available. Further, by the first part of s. 25, direct power which is not merely of superintendence is conferred on the State Government to award punishment against members of the subordinate ranks of the Police Force departmentally for neglect of duty and other misconduct. Thus, under s. 25, direct authority and power is created in favour of (i) the State Government and also (ii) the Officers mentioned particularly in sub-s. (2) of s. 25. The result of the above contents of ss. 4 and 25 is that in matters of departmental action taken by Officers authorised under sub-s. (2) of s. 25 for punishment of the members of the subordinate ranks, the State Government can at any stage intervene under the power of superintendence reserved to it under s. 4. In those very cases, if it finds it necessary, the State Government can directly for itself proceed to exercise punitive powers and after enquiry inflict necessary punishments. There is, therefore, no substance in the contention that there is nothing in the Act to confer jurisdiction on the State Government to order a further departmental enquiry for punishment of the members of subordinate ranks guilty of misconduct. This power is to be found in ss. 4 and 25. It is true that there is no direct provision in the Act providing for ordering of a further fresh enquiry for punishment of members of Police Force in respect of their misconduct. That, however, does not result into a position that there is no jurisdiction in the authorities mentioned in ss. 4 and 25 to order further fresh enquiry when the facts of a particular case warrant such directions. The question that requires to be answered in this connection is as to whether there is any provision in the Act and/or rules made thereunder to warrant a conclusion that further fresh enquiry cannot be held after a defaulting Police Officer has been exonerated in one or more departmental enquiries from the charges levelled against him. On behalf of the appellant it is not contended that there is such direct provision in the Act. The contention has been that it is principle of fairplay that requires that such a limitation on the powers should be assumed to exist. It is not contended that there are provisions in the Act corresponding to and/or like the provisions in s. 11 of the Code of Civil Procedure (*res judicata*) or s. 403 of the Criminal Procedure Code (*autrefois acquit*) or art. 20 of the Constitution. It is, therefore, clear that the appellant is not able to rely upon any statutory contents of the Act and/or rules made thereunder in support of his contention that the State Government was not entitled to order fresh enquiry as it did in this case.

In connection with what we have observed above, support can be derived from the decision of two Division Benches of this Court respectively in *Gabrial Pedroo v. Dy. Commissioner of Police, Division South and Port, Bombay*¹

1 (1959) Special Civil Application No. 361 Desai J., on August 25, 1959 (Unrep.).
of 1959, decided by Chainani C. J. and V. S.

and the case of *Arjunrao Baburao v. State of Bombay*². In the first of these cases, it was contended on behalf of the defaulting Police Officer that under s. 25 the power to punish can be exercised either by the State Government or any Officer authorised by sub-s. (2). Once such power to punish is exercised by any Officer, it was not open to the State Government to exercise the power again or to revise the order made by the Officer concerned. The Court negatived this contention and observed:

"...This argument ignores clause (c) in sub-section (2), which states that the exercise of the power by any of the officers mentioned in clause (a) shall be subject to such orders as the State Government may make".

The Court further observed:

"...Section 4 of the Act also provides that the superintendence of the Police Force throughout the State of Bombay vests in and is exercisable by the State Government...". The ratio of that decision appears to us to be that even in cases where a departmental action is taken by Officers authorised to exercise punitive powers under sub-s. (2) of s. 25, it is permissible for the State Government once again to order further enquiry for the purpose of punishing the defaulting Officers. The reason, according to the Division Bench, was that such power was contemplated by the contents of the first part of s. 25 and also by reason of the powers of superintendence created in favour of the State Government under s. 4.

In the second case, the contention on behalf of the defaulting Police Officer was that since the District Superintendent of Police had acquitted the Police Officer, there was no power in the State Government under the first part of s. 25 to make a finding that the Officer was guilty of the offence and impose on him the punishment of dismissal. In that case, six charges were levelled against the Officer concerned. He was exonerated in the departmental enquiry of the two last charges, being charges Nos. 5 and 6. The State Government not having been satisfied with such exoneration from those charges, ordered further enquiry. The result of that enquiry was that even in respect of the last charge No. 6, the Officer concerned was ultimately found guilty. He was thereupon dismissed from service. The argument advanced was not accepted by the Division Bench. The Division Bench agreed with the ratio of the decision in the previous case and observed (p. 1042):

"...and hold that the mere fact that the District Superintendent of Police had acquitted the appellant would not deprive the State Government of its power under sub-s. (1) of s. 25 to hold him guilty of the offence of having demanded a bribe and impose on him the punishment of dismissal".

It is clear to us that there is no substance in the contention that the State Government was not entitled to make the order of further enquiry and direct that the proceedings be held for investigating into the misconduct of Police Officers concerned once again in respect of the incident that had taken place on September 6/7, 1949.

We have been shown certain reported decisions of different High Courts where in connection with further fresh enquiries in respect of charges whereof Police Officers were first exonerated the Courts came to the conclusion that on principles of justice, equity and good conscience, it was wrong in the absence of provision in the Service Rules in that connection to permit such further departmental enquiries. We find it unnecessary to go into details of those cases. The Courts came to that conclusion in spite of their noticing that there was no provision corresponding to s. 11 of the Code of Civil Procedure or s. 403 of the Code of Criminal Procedure or art. 20 of the Constitution in the relevant statutes. It is sufficient to state that having regard to the provisions in ss. 4 and 25 of the Act, we are unable to accept the ratios of the decisions in those cases as applicable to the facts of this case.

There is no substance in the contention that in the matter of the further

enquiry ordered by the State Government, principles of fairplay have not been observed. The letter dated December 31, 1952, exh. 63, addressed by the Secretary to the Government, Home Department, to the District Magistrate Poona, in pursuance whereof the further fresh enquiry was held, has been referred to whilst reciting the facts leading to the institution of the suit. It is clear from the contents of that letter that the R.L.A. had given an opinion as regards the report of the Enquiry Officer in the first enquiry observing that proper results had not been arrived at. It is this opinion of the R.L.A. which had induced the Government to decide that a general departmental enquiry should be held afresh against all the Police Officers concerned. It is, in this connection, relevant to notice that the enquiry was ordered against all Police Officers concerned. The enquiry related to an extremely gross incident of a stranger having been brought in almost unconscious condition to the Cantonment Police Station in the night of September 6, 1949, and the same person having been found near Empress Garden in the jurisdiction of another Police Station in the morning of September 7, 1949. The person died as a result of cerebral haemorrhage consequent upon fracture of skull in the morning of September 7, 1949. Now, in a matter of such incident, obviously, it was permissible for the Government to decide that the offending Police Officers must be brought to book. The result of the previous enquiry proceedings was that no one was brought to book in connection with gross misconduct of which someone or the other was guilty in connection with the above incident. The Government directed that the enquiry should be entrusted to a senior Prant Officer of Poona District. But the decision of the Government to order further fresh enquiry having regard to the above facts cannot be held to be in violation of principles of fairplay. It appears to us that the contention that an Officer exonerated in a departmental enquiry cannot be once again charged with the same misconduct is entirely technical and not warranted by any of the statutory provisions in the Act and/or rules made thereunder.

The next contention made was that the present enquiry was held under procedure prescribed in Appendix II to the Bombay Civil Services Conduct, Discipline and Appeal Rules. Such departmental enquiry is wholly inapplicable to the enquiries to be held for punishment of defaulting Police Officers under the Bombay Police Act, 1951. The only appropriate procedure for departmental enquiries was contained in the rules made under the District Police Act and continued under the Bombay Police Act, 1951. The contention was that as admittedly the present enquiry was held under the procedure prescribed in Appendix II to the Bombay Civil Services Conduct, Discipline and Appeal Rules, it was contrary to the provisions of the Bombay Police Act, and was therefore illegal and vitiated. In the result, the punishment was liable to be quashed. In this connection, it requires to be stated that in the case of *Shantaram v. Chudasama*³, the question that arose was that the first preliminary enquiry in connection with misdemeanour of the Police Officer concerned had been held by an Inspector of Police, whilst under the rules made under the Bombay Police Act, 1951, such preliminary enquiry was liable to be held by a Superintendent of Police. The subsequent formal enquiry was held by the Officers prescribed by the rules. Even so, on the mere ground that the preliminary enquiry was held by the Officer who was not prescribed for that purpose by the rules, the Court held that the whole enquiry was vitiated and issued a writ of prohibition to prevent further proceedings in that enquiry. The Court observed (p. 353):

"Now, it is well established that a tribunal though duly constituted may be acting without or in excess of jurisdiction by reason of the absence of some essential preliminary or non-compliance with a condition precedent. The holding of a departmental inquiry by a superintendent of police is a condition precedent, a fact which must exist before the Commissioner of Police can assume jurisdiction or authority for the purpose of

passing the final order of dismissal.... This is not, therefore, a case merely of any illegality or error in conducting the departmental inquiry, but a case of acting without or in excess of jurisdiction. It is also clear that in any view of the matter, here is a case in which there is substantial error apparent on the face of the record and this is regarded as an error of jurisdiction....".

On behalf of the appellant, reliance was placed on the above decision and provisions in ss. 545 and 558 in the Police Manual being rules for enquiry prescribed under the District Police Act. Under s. 545, where the defaulting officer is of the rank of Sub-Inspector, the Superintendent himself is the authority directed to hold enquiry as far as possible. Under s. 558, there is a right of petition in revision in favour of all Officers who feel aggrieved by decisions passed by appellate authority on their appeals to submit to the Inspector-General of Police a petition for revision. The contention was that the plaintiff who was sub-Inspector was entitled to have the enquiry proceeding held by the Superintendent himself. The Prant Officer was not the prescribed statutory authority to hold the enquiry. The enquiry held by Caldeira as Prant Officer was contrary to the statutory provisions and without jurisdiction. By reason of Caldeira having held the enquiry proceedings under the Bombay Civil Services Conduct, Discipline and Appeal Rules, the plaintiff lost the benefit of the right of revision and other rights which might exist in his favour under the rules made under the District Police Act. It is contended that for this reason the plaintiff is entitled to succeed in this appeal and to a finding that the order of dismissal was illegal and void.

It is to be noticed in this connection that it is not contended by Mr. Abhyankar for the State Government that the enquiry has been held in this case under the provisions of the rules made under the District Police Act. Even so, it appears to us that there is no substance in this contention. The reason for this is that the rules made under the District Police Act have been made under the provisions in s. 29 of that Act which are in substance reproduced in and correspond with the provisions in sub-s. (2) of s. 25. It is clear on a reading of sub-s. (3) of s. 29 of the District Police Act and cl. (c) of sub-s. (2) of s. 25 of the Bombay Police Act, 1951, that the statutory rules which have been framed in connection with exercise of punitive powers for punishment of the defaulting members of the Police Force have all been made in connection with the exercise of such powers by Officers mentioned in sub-s. (2) of s. 25 of the 1951 Act and sub-s. (3) of s. 29 of the District Police Act. In other words, the rules which have been enacted relate to departmental enquiries held for exercising punitive powers by the Inspector-General, the Commissioner, the Deputy Inspector-General and other subordinate Officers prescribed by the above two sub-sections. That is the result in the case of the 1951 Act of the provisions in cl. (c) of sub-s. (2) of s. 25 and the last part of sub-s. (3) of s. 29 of the District Police Act. In this last sub-section, the provision is: "The exercise of any power conferred by *this sub-section* shall be subject always to such rules and orders as may be made by the State Government in that behalf". It is clear, therefore, that the rules relate to the enquiries by the Officers mentioned in sub-s. (3) of s. 29 of the District Police Act. Similar is the effect of the provisions in cl. (c) of sub-s. (2) of s. 25 of the 1951 Act. It appears to us that as regards the exercise of punitive powers by the State Government as the authority mentioned in the first part of sub-s. (1) of s. 25, rules, statutory or otherwise, have not been enacted. Even so, to make the whole enquiry fair, the State Government directed that the instructions regarding the holding of departmental enquiries printed in Appendix II to the Bombay Civil Services Conduct, Discipline and Appeal Rules should be observed. In this very connection the lower Court has made a finding that in fact every protection that the plaintiff was entitled to under the rules framed under the District Police Act has been made available to the plaintiff because of observance of the above rules in the enquiry proceedings. The plaintiff has been afforded clear opportunity to show cause.

The plaintiff was furnished with charge-sheet, statement of allegations against him, concise statements of the evidence of witnesses who were going to be produced in the enquiry and a list of such witnesses. The plaintiff was given opportunity to cross-examine all witnesses. He was further allowed to put forward in defence whatever evidence he desired. Suffice it to state that having regard to the facts as exist, it was not possible for the plaintiff to contend that he had not been afforded a fair opportunity to show cause in the matter of the enquiry held against him. The plaintiff's contention was only technical. As there is no prescribed procedure binding on the State Government in connection with punitive powers exercised by the State Government under the first part of s. 25 of the Act, we are unable to accept the contention made as above on behalf of the appellant.

The next contention made on behalf of the appellant was that in spite of notice to produce that was tendered on it, the State Government failed to produce at the hearing of the suit in the lower Court the whole file of papers relating to the first departmental enquiry. For this default, an adverse inference should be drawn against the State Government to the effect that the first enquiry was properly held and that there was no reason to hold further enquiry.

We have not been able to appreciate this contention. The plaintiff was aware of all that had happened in the first enquiry. If in connection with any of the issues raised before the lower Court, the plaintiff and/or his advocates needed any particular document, the same could have been at appropriate time called for and tendered in evidence. In default of the defendant (State Government) producing such a document, the plaintiff could have made appropriate complaint by written application to the trial Court. We have no doubt that the trial Court would have in that connection passed appropriate orders. We do not also appreciate the contention that the production of such document would have supported the plaintiff's case that there was no necessity in this case to hold further enquiry. In that connection, what we have already observed above can usefully be read over. It is not necessary to reproduce all that once again here. It is sufficient to state that the incident of September 6/7, 1949, was such that the Government was entitled to take the view that all defaulting Officers should be brought to book.

We have dealt with all the contentions made on behalf of the appellant. On behalf of the State Government, it is contended that the decree for Rs. 1,701-5-0 and interest thereon passed by the learned Judge below relates to the plaintiff's claim which was barred by law of limitation. The lower Court was, therefore, in error in granting that decree. The relevant facts in that connection are as follows:—

Admittedly, the sum of Rs. 1,701-5-0 relates to a part of arrears of salary which became due to the plaintiff whilst he was under suspension between October 26, 1949, and January 29, 1951. The plaintiff was reinstated in service on the last date and continued to receive salary until he was dismissed by the order dated January 11, 1954. Thus, the above amount became due to the plaintiff in any event prior to January 29, 1951. The plaintiff demanded the above amount by his letter dated May 2, 1954, exh. 37, i.e. a little before 4 months expired from the date of the order of dismissal. The plaintiff's demand was rejected by the reply dated May 15, 1954, exh. 39. This suit was filed on January 9, 1957. The contention of the State Government is that to the above claim of the plaintiff the provisions in art. 102 in Schedule I to the Indian Limitation Act were applicable. Article 102 provides:—

Description of suit.	Period of Limitation	Time from which Period begins to run.
102 For wages not otherwise expressly provided for by this Schedule.	Three Years.	When the wages accrue due.

The suit for the above arrears according to the State Government was liable to be filed in any event within 3 years from January 29, 1951, i.e. on or before January 29, 1954. The suit was filed about 3 years after the period of limitation expired.

The learned Judge below made a finding that to this claim of the plaintiff, art. 120 in Schedule I to the Indian Limitation Act applied. He, therefore, granted decree in favour of the plaintiff. Now, the learned Judge's finding is contrary to the view taken by the Supreme Court in the case of *M. L. Vaikunthe v. The State of Mysore*.⁴ The Supreme Court has clearly made a finding in that case that to a claim by an Officer for arrears of salary, allowances, etc., art. 102 of the Limitation Act applies. Following that decision, we are bound to make a finding in this case that the plaintiff's claim for the above sum of Rs. 1,701-5-0 was barred by the law of limitation at the date of the institution of the suit. That claim was liable to be rejected in toto.

The result is that the appeal of the plaintiff, being First Appeal No. 244 of 1959, is dismissed with costs. The State Government's appeal, being First Appeal No. 229 of 1959, is allowed without any order as to costs. The decree of the lower Court dismissing the plaintiff's suit is accordingly confirmed. The decree of the lower Court in favour of the plaintiff in the sum of Rs. 1,701-5-0 and interest thereon is reversed and set aside. The suit of the plaintiff is wholly dismissed.

Orders accordingly.

Before Mr. Justice K. K. Desai and Mr. Justice Palekar.

ANKUSH NARAYAN SHINGATE v. JANABAI RAMA SAWAT.*

Hindu Adoptions and Maintenance Act (LXXVIII of 1956), Secs. 11 (vi), 12, 14 (1) (2) (3), 5, 6, 7—Widow adopting a son—Whether adoptee adopted son of deceased husband.

Under ss. 11 (vi) and 12 of the Hindu Adoptions and Maintenance Act, 1956, the necessary consequence of a widow adopting a son would be that the adoptee would be the adopted son of the deceased husband.

The true effect of these provisions of the Act is that, when either of the spouses adopts a child, all the ties of the child in the family of his or her birth become completely severed, and these are all replaced by those created by the adoption in the adoptive family. This would be so for each and all different purposes. Therefore, the result of adoption by either spouses is that the adoptive child becomes child of both spouses.

ONE Narayan died intestate at village Mardhe in or about the year 1917, living him surviving as his only heirs and next of kin his two widows respectively senior Laxmibai and junior Tanubai (defendant No. 1) and one Janabai (defendant No. 2), daughter of the senior widow Laxmibai. He left certain properties at village Mardhe. The senior widow Laxmibai died intestate in 1948. The plaintiff Ankush's case was that, on or about December 2, 1957, the junior widow Tanubai adopted him who was then a minor of the age of nine years. In connection with the adoption, a deed dated December 2, 1957, was executed and registered. On the same date, a deed of consent was executed by the natural mother of the plaintiff in connection with his adoption by Tanubai. The plaintiff's case was that Tanubai was residing with his natural father. Taking advantage of the absence of the plaintiff's natural father, defendant 2, Janabai, removed Tanubai from the house of the plaintiff's natural father to village Limb by making false representations. Thereafter, Tanubai (the adoptive mother) served the plaintiff with a notice dated December 9, 1957. Plaintiff gave reply dated December 16, 1957, denying the contentions made by Tanubai in the notice dated December 9, 1957, and contended that plaintiff had been duly adopted by Tanubai. Thereafter on December 31, 1957, the plaintiff filed the present suit for relief of possession of all the properties left by Narayan

4 [1962] 1 S.C.J. 134.

*Decided, April 23, 1965. First Appeal No. 194 of 1959, against the decision of M. H.

Shaikh, Civil Judge, Senior Division, at Satara, in Special Civil Suit No. 10 of 1957.

and for mesne profits amounting to Rs. 1,000 per year from the date of the suit till possession, and for costs. The main contention for relief of possession that was made was that, defendant No. 1 Tanubai had taken the plaintiff in adoption on December 2, 1957, after performance of necessary rites of "giving and taking" and performing the necessary *homa* in the presence of her *Bhaubands*, relations and other people. The plaintiff's natural father Vithoba had, with the consent of plaintiff's natural mother, given the plaintiff in adoption. A deed of adoption was executed on December 2, 1957, and the same was registered. It was stated by the plaintiff that the adoption was in accordance with and under the old Hindu law and it was also stated :

"In this manner, even under the Hindu Law of 1956, the plaintiff is the validly adopted son of deceased Narayan and defendant No. 1 and as such he has become the heir to the entire estate of deceased Narayan."

Defendant No. 1 contended that the allegation of plaintiff that defendant No. 1 had adopted him was false and dishonest. Defendant No. 1 had not adopted the plaintiff with full comprehension and that the adoption had been brought about fraudulently. In that connection, defendant No. 1 Tanubai made certain allegations of facts, namely, that she was aware that she had executed a document and that she did not know properly whether the documents that were prepared were in connection with adoption or something else. She denied that by reason of adoption, the plaintiff became entitled to right of ownership in the properties in suit. She pointed out that the ownership of the suit properties had vested in herself and her co-widow Laxmibai; that even before the plaintiff's adoption, the properties continued to vest in them; and that the plaintiff could not deprive them of the properties on the strength of his adoption. She, therefore, denied that the possession of the suit properties by the defendants was illegal.

The learned Judge raised a number of issues. Issue No. 2 was, whether the plaintiff proves that he is validly adopted son of deceased Narayan and defendant No. 1 under the Hindu Adoptions and Maintenance Act, 1956, and therefore succeeds to the estate of deceased Narayan. The trial Judge held that the plaintiff had not been validly adopted son of deceased Narayan and defendant No. 1 Tanubai under the Hindu Adoptions and Maintenance Act, 1956, and had, therefore, not succeeded to the estate of deceased Narayan and dismissed the plaintiff's suit.

The plaintiff appealed to the High Court.

Sharad Manohar, for *U. R. Lalit*, for the appellant.

K. B. Sukthankar, for respondents Nos. 1 and 2.

P. S. Joshi, for respondent No. 2.

M. B. Kadam, for respondents Nos. 3 and 4.

K. K. DESAI J. [His Lordship after setting out the facts, proceeded]. The main contention on behalf of the appellant-plaintiff in this appeal is that the learned Judge's approach to the question of the plaintiff having been validly adopted is entirely wrong. The learned Judge has wrongly construed the provisions in the Hindu Adoptions and Maintenance Act, 1956, hereinafter referred to as the Act and based the whole of his judgment on such wrong construction. The learned Judge has, in that connection, placed wrong emphasis on the first part of the statement of facts in para. 4 of the plaint, where, it is stated that, defendant No. 1 took the plaintiff in adoption under the old Hindu law. The learned Judge has proceeded to decide the main issue about the validity of the adoption of the plaintiff in entirely unjustified manner.

The substance of the reasons why the learned Judge held that the plaintiff had not been validly adopted in accordance with the provisions in the Act, may be summarised as follows : Under s. 5 of the Act, adoption (to be made) by a Hindu must be in consonance with the provisions of the Act. Adoption in contravention of the provisions would be void. The result of the general scheme of the Act, and, particularly, the provisions in ss. 5, 6, 7 and 8 is that, from the date the Act came into force a Hindu female can adopt a son or a daughter to herself only; and a widow is not entitled to adopt a son to her deceased husband. The plaintiff's case was that

Tanubai had adopted the plaintiff in accordance with the old Hindu law, that is, Tanubai had purported to adopt the plaintiff to her deceased husband Narayan, but the Act did not permit such adoption. The result was that the adoption, if any, by Tanubai of the plaintiff as a son to her deceased husband Narayan, was entirely invalid and void. In that connection, the learned Judge emphasized that, under the Act, the adopted child does not divest any person of any estate vested in him (or her) before the adoption.

It is with some emphasis contended on behalf of the appellant that the above reasoning is contrary to the provisions in the Act. It is necessary in this connection to notice the relevant provisions in the Act. The appellant has, in support of his argument, relied upon the provisions in ss. 11(vi), 12, 14(1) (2) and (3) of the Act. The respondents have relied upon the provisions in ss. 5, 6 and 7 of the Act. Both sides have relied upon the general scheme of the Act. Section 11 relates to "other conditions for a valid adoption". Sub-section (vi) of s. 11 provides—

"the child to be adopted must be actually given and taken in adoption by the parents or guardian concerned or under their authority with intent to transfer the child from the family of its birth to the family of its adoption."

Section 12 provides—

"An adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes with effect from the date of the adoption and from such date all the ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those created by the adoption in the adoptive family :

Provided that

(a) ...

(b) ...

(c) the adopted child shall not divest any person of any estate which vested in him or her before the adoption."

Section 14, sub-ss. (1), (2), (3) and (4) provide :

14. (1) "Where a Hindu who has a wife living adopts a child, she shall be deemed to be the adoptive mother.

(2) Where an adoption has been made with the consent of more than one wife, the senior-most in marriage among them shall be deemed to be the adoptive mother and the others to be step-mothers.

(3) Where a widower or a bachelor adopts a child, any wife whom he subsequently marries shall be deemed to be the step-mother of the adopted child.

(4) Where a widow or an unmarried woman adopts a child, any husband whom she marries subsequently shall be deemed to be the step-father of the adopted child."

It has appeared to us that the provisions in the above parts of ss. 11, 12 and 14 are of extreme importance for ascertainment of the true intent and purpose of adoption under the Act. Now, it is clear on a reading of the main part of s. 12 and sub-s. (vi) of s. 11 that the effect of adoption under the Act is that it brings about severance of all ties of the child given in adoption in the family of his or her birth. The child altogether ceases to have any ties with family of his birth. Correspondingly, these very ties automatically get replaced by those created by the adoption in the adoptive family. The intention in giving the child in adoption must be to transfer the child from the family of its birth to the family of its adoption. The result is as mentioned in s. 14(1), viz., where a wife is living, adoption by the husband results in the adoption of the child by both these spouses; the child is not only the child of the adoptive father but also of the adoptive mother. In case of there being two wives, the child becomes the adoptive child of the senior-most wife in marriage, the junior wife becoming the step-mother of the adopted child. Even when a widower or a bachelor adopts a child, and he gets married subsequent to the adoption, his wife becomes the step-mother of the adopted child. When a widow or an unmarried woman adopts a child, any husband she marries subsequent to adoption becomes the step-father of the adopted child. The true effect of these sections can be arrived at by emphasizing the phrases "family of its adoption" and/or "adoptive family." We have no doubt that the true construction of the provisions in the above sections is that the adopted child is for all purposes absorbed in the adoptive family with the ties

natural to his or her situation as adoptive son or daughter. The obvious result of this position in connection with the adoption by a widow would be that the adopted child will become absorbed in the adoptive family to which the widow belongs. This family would obviously be the family of her deceased husband. When a widow adopts a son, the obvious result of the provisions in ss. 11 and 12 would be that the child adopted is tied with the relationship of sonship with the deceased husband of the widow. The other collateral relations of the husband would be connected with the child through that deceased husband of the widow. In other words, the husband's brother would necessarily be the uncle of the adopted child. The daughter of the adoptive mother (and father) would necessarily be the sister of the adopted son, and, in this way, the adopted son would become a member of the widow's family, with the ties of relationship which all spring from his new relationship with the deceased husband of the widow as his adoptive father. It appears to us that non-inclusion of the provision mentioning the above effect in s. 14 of the Act does not have the effect of avoiding the true consequence of the adoption by a widow in the manner mentioned above. Such non-inclusion cannot have the effect of not making the son adopted by a widow as having no adoptive father at all. We have no doubt that on a widow adopting a son the necessary consequence that arises under the provisions of the Act is that the child would be the adoptive son of the deceased husband. It is for this reason that we find in sub-s. (4) of s. 14 a provision that, where a widow adopts a child and subsequently marries a husband, the husband becomes the "step-father" of the adopted child. It appears to us that, if the learned Judge below had borne this main scheme of the Act in mind, the conclusions that he arrived at would have been different and he would not have found that, under the Act, when a widow adopts a son, the adopted child does not get any relationship with her deceased husband as adoptive father. He would not have held that the adopted son does not become the son of the deceased husband of the widow.

We will now notice the provisions in the other sections of the Act to find out if the learned Judge's finding could be justified. Section 5 provides :

"(1) No adoption shall be made after the commencement of this Act by or to a Hindu except in accordance with the provisions contained in this Chapter (Chap. II), ...".

Section 6 deals with "requisites of a valid adoption", and provides:

"No adoption shall be valid unless—

- (i) the person adopting has the capacity, and also the right, to take in adoption;
- (ii) the person giving in adoption has the capacity to do so;
- (iii) the person adopted is capable of being taken in adoption; and
- (iv) the adoption is made in compliance with the other conditions mentioned in this Chapter."

Sections 7 and 8 relate to the capacity of a male Hindu and a female Hindu to take in adoption. Under s. 7, any male Hindu who is of sound mind and is not a minor has the capacity to take a son or a daughter in adoption. If he is married, he requires consent of his wife in connection with the adoption. A person having more than one wife is required to have consent of all his wives. Under s. 8, any female Hindu, who is of sound mind and not minor is stated to have capacity to take a son or a daughter in adoption. The contents of this section show that all females except a wife have capacity to adopt a son or a daughter. Thus, an unmarried female or a divorcee or a widow is stated to have capacity to take a son or a daughter in adoption. On examining the reasoning contained in the learned Judge's judgment, it appears to us that he has based his findings on the contents of these sections. He has held that s. 8 relating to capacity of a female Hindu to take in adoption shows that the female takes a child in adoption to herself alone. In that connection, he has emphasized that even an unmarried female has been authorized under the Act to take a child in adoption. He has emphasized the phrase "No adoption shall be made... by or to a Hindu" in s. 5(1) of the Act and has come to the conclusion that the language of ss. 5 and 8 indicates that from and after the commencement of the Act, it was not permissible for any widow to take any child in adoption to her husband. The customary Hindu law in that connection, according to the learned

Judge's reasoning, has been entirely abrogated. Under the customary Hindu law, when a widow adopted a son, she adopted the son to her deceased husband who became the adoptive father of the adopted child. This was, according to the learned Judge, not the position under the provisions of the Act. It has appeared to us that the learned Judge has laid wrong emphasis on the phrase "by or to" as contained in sub-s. (1) of s. 5. In our opinion, the true effect of the provisions in sub-s. (vi) of s. 11 and s. 12 of the Act is that, when either of the spouses adopts a child, all the ties of the child in the family of his or her birth become completely severed, and these are all replaced by those created by the adoption in the adoptive family. This would be so for each and all different purposes. Obviously, the result of adoption by either spouses is that the adoptive child becomes child of both the spouses. This is the only possible view which can be taken of the scheme and intent of adoption under the Act in view of the provisions in ss. 11, 12 and 14.

If the contentions made by the respondents are accepted, absurd results must follow. The result of accepting their contention would be that a son adopted by a widow would not be the son of her deceased husband. Even so, it is not contended that he will not become collaterally related, with the husband's collateral relations, such as husband's father, mother, brother, etc. Mr. Sukthankar is not prepared to state that these relations would not become, as a result of the adoption by the widow, grand-mother or grand-father or uncle (as the case may be) of the adopted son. It is not possible for the respondents to contend that the son adopted by the widow will not become coparcener with the other coparceners surviving after the death of her deceased husband. It appears to us that there is nothing in the Act to indicate that the provisions in the Act were intended to abrogate the position which arose under the customary Hindu law as regards the new ties of the adoptive son in the adoptive family in consequence of adoption by a widow. On the contrary, as we have already observed, upon an adoption by a widow, the adopted son's all ties in the family of his birth become completely severed and are replaced by those created by his adoption in the adoptive family (of the widow and her deceased husband). The learned Judge's finding that, under the Act a son adopted by a widow does not become the son of deceased adoptive father is contrary to the provisions of the Act, and is set aside.

[The rest of the judgment is not material to this report]

Appeal allowed.

FULL BENCH.

Before the Hon'ble Mr. H. K. Chainani, Chief Justice, Mr. Justice Tambe and Mr. Justice Abhyankar.

RAJE VYANKATRAO JAGJIWANRAO DESHMUKH v. SITALPRASAD SIVNATH*.

Berar Regulation of Agricultural Leases Act (XXIV of 1951), Secs. 2 (j), 16, 16-A, 16-B—Berar Land Revenue Code, 1928—Absence of notification under s. 2 (j) appointing Revenue Officer to discharge functions under s. 16—Whether Civil Court in absence of such appointment can decide question under s. 16(1).

As no notification is issued by the State Government under s. 2 (j) of the Berar Regulation of Agricultural Leases Act, 1951, appointing any officer to discharge the functions of a Revenue Officer under s. 16 of the Act, the Civil Court has jurisdiction to decide the question referred to in s. 16 (1) of the Act.

If a Civil Court is deprived of its jurisdiction, because the Legislature has provided for trial of the matter by a special tribunal, then if the tribunal is not constituted, the provisions made for referring the matter to the tribunal having become ineffective, the aggrieved person has the right to proceed in an ordinary Civil Court and the Civil Court will be competent to decide the matter.

*Decided, June 28, 1965. Letters Patent Appeals Nos. 10 and 11 of 1961.

Paika v. Rajeshwar,¹ *Bhima Balu v. Basangouda Nemgouda*,² *Bharat Chandra v. Gour Chandra*,³ *Krishna Chandra v. Panchu Ghosh*,⁴ *Lachmi Chand Suchanti v. Ram Pratap Choudhry*,⁵ *Sat Narain v. Hanuman Parshad*⁶ and *Balakrishna v. Madras Corporation*,⁷ referred to.

ONE Raje Vyankatrao Jagjiwanrao Deshmukh (plaintiff) filed suits against two persons: (1) Ratan Soba in regard to survey No. 17/1 and (2) Sitalprasad Sivnath in respect of Survey No. 23/7, both of mouza Darati. The suits were filed for possession of the fields and eviction on the basis of the plaintiff's title to them. The plaintiff alleged that the defendants in the two suits were trespassers and had taken possession forcibly. The defence in both the suits was that each one of the defendants was a tenant and had acquired protected status by virtue of the Berar Regulation of Agricultural Leases Act, 1951. Both the defendants had also put forward an oral agreement to lease alleged to have been entered into with the plaintiff in the year 1952-53. As an inevitable corollary to this plea of the defendants, they also raised the plea that the Civil Court had no jurisdiction to decide the suit until the question whether they were lessees was decided by the Revenue Officer.

In both the suits, the Courts below concurrently found upon the facts that the defendants in each of the two suits were complete trespassers and that they had forcibly taken possession of the two fields as stated by the plaintiff and that it was in the circumstances not necessary to refer the question to the Revenue Officer under s. 16 of the Berar Regulation of Agricultural Leases Act.

The defendants appealed to the High Court. The appeals were heard by Naik J. who reversed the decision of the lower Courts.†

The plaintiff appealed under the Letters Patent. The appeals came on for hearing before Kotval and Wagle JJ., who referred a question arising out of the appeals to a full bench. Kotval J. delivered the following referring judgment on February 5, 1965.

KOTVAL J. [His Lordship after stating the facts, proceeded.]

Naik J. has reversed the decision of the Courts below relying upon the decision of a Full Bench of this Court in *Paika v. Rajeshwar*¹ and in *Devaji Limbaji v. Ganpatlal*². So far as the latter decision is concerned, we were informed that it has subsequently been reversed on a different point in Letters Patent Appeal No. 12 of 1961, decided on August 9, 1962. So far as that decision is concerned, therefore, we will not refer to it in this order, though the point upon which it proceeded was not reversed.

The decision in *Paika v. Rajeshwar* undoubtedly takes the view that having regard to the provisions of s. 16(1) of the Berar Regulation of Agricultural Leases Act, the moment a defendant to a suit for possession of a field alleges that he is a protected lessee under the Act, that question "arises" and, therefore, the question must be referred to a Revenue Officer, and relying upon that view Naik J. has held that the two Courts below should have referred the question because the two defendants before them had stated that they were protected lessees. It is not on that point however that we propose to make this reference. There was another point raised of considerable importance, which, in our opinion, requires to be dealt with by a larger Bench.

The point arises in this way. The Berar Regulation of Agricultural Leases Act, 1951, was brought into force by virtue of sub-s. (3) of s. 1 on November 15, 1951. In that Act, as originally enacted, s. 16 provided that

"No Civil Court shall entertain any suit instituted to obtain a decision on any matter which a Revenue Officer is by or under this Act, empowered to determine, decide or dispose of."

To that extent no doubt, there was an ouster of the jurisdiction of Civil Courts; but that ouster obviously related to matters expressly mentioned in the Act, such as,

1 [1957] N.L.J. 344, F.B.
2 [1954] Bom. 1080, F.B., s.c. 56 Bom. L.R.
520, F.B.
3 [1953] A.I.R. Cal. 95.
4 [1953] A.I.R. Cal. 720.
5 (1934) I.L.R. 14 Pat. 24, F.B.

6 [1946] A.I.R. Lah. 85.
7 [1962] A.I.R. Mad. 7, F.B.
† See 64 Bom. L.R. 41.
1 [1957] N.L.J. 344, F.B.
2 [1958] N.L.J. 381.

for instance, in ss. 8 and 9 thereof, but the question whether a particular person is a lessee or not a lessee, was not a question which under that Act, a Revenue Officer was empowered to determine, decide or dispose of. Therefore, that question continued to be determined by Civil Courts. It was only in 1953 that s. 16, as it now stands, came to be inserted by s. 10 of the Berar Regulation of Agricultural Leases (Amendment) Act, 1953 (Act No. XXII of 1953), which came into force on December 28, 1953. The original s. 16 appears to have been re-enacted as s. 16-B but s. 16(1) contains new provisions. It ran as follows :

"Whenever any question arises whether any transaction between a landholder and a person claiming to be his lessee is a lease within the meaning of this Act, such question shall be decided by the Revenue Officer."

Now, this was a completely new provision. For the first time the law barred the jurisdiction of the Civil Court to decide the question whether a party was or was not a lessee. Indeed, sub-s. (1) of s. 16, as amended, says that the question whether any transaction between a landholder and a person claiming to be his lessee is a lease, shall be decided by "the Revenue Officer". We have already noticed the view of the Full Bench on this provision that if the question is merely raised by a defendant in the suit, the Civil Court must refer the matter to "the Revenue Officer". But who is "the Revenue Officer" ?

In order to answer this question, it is necessary to refer to the definition of "Revenue Officer" in s. 2 (j) which runs as follows :

" 'Revenue Officer' in any provision of this Act means such Revenue Officer appointed under the Berar Land Revenue Code, 1928, as the State Government may, by notification, direct to discharge the functions of a Revenue Officer under that provision."

This definition was always there in the Act since the inception and has not been changed. The "Revenue Officer" in any provision of the Act means in terms, the "Revenue Officer" in the Berar Land Revenue Code, 1928, designated by the State Government to discharge the functions of a Revenue Officer "under that provision". Pursuant to this provision, the then State Government also issued on January 29, 1952, a notification No. 364-7273-XII empowering particular Revenue Officers to discharge all functions under the Berar Regulation of Agricultural Leases Act, 1951. That notification was as follows :

"REVENUE DEPARTMENT"

Nagpur, the 29th January 1952.

No. 364-7273-XII.—In exercise of the powers conferred by clause (j) of section 2 of the Berar Regulation of Agricultural Leases Act, 1951 (XXIV of 1951), the State Government are pleased to direct that the Revenue Officers specified in column (1) of the table below shall discharge the functions of a Revenue Officer under the provisions of sections specified in the corresponding entries in column (2) thereof :—

TABLE	
Revenue Officers (1)	Sections (2)
Deputy Commissioners and	4 (2) and (4);
Sub-Divisional Officers.	8 (1), (2) and (3);
	9 (3), (4) and (6);
	10 (2), (3), (5)
	and (6) ; 11 (1)
	and (2) ; 14; 19 (1),
	(2) and (3).
Deputy Commissioners.	15 (1) and (5).

By order of the Governor, Madhya Pradesh,
B. L. PANDEY, Secy."

It will be noticed that there is no mention in this notification of the functions under s. 16. The notification issued under the original Act continued and is still continuing inspite of the Berar Regulation of Agricultural Leases (Amendment) Act, 1953, by virtue of which the new s. 16 came to be enacted and the old s. 16 came to be re-enacted as s. 16-B.

Now, the point taken is that in view of the definition of "Revenue Officer" in s. 2(j), there must be an express empowering by the State Government by notification or, at least, a designation of a Revenue Officer to discharge the functions of the Revenue Officer under this particular provision of the Berar Regulation of Agricultural Leases Act, 1951, namely, s. 16, and since that has not been done, there is no Tribunal which can try the question directed by sub-s. (1) of s. 16 to be decided by the Revenue Officer. The jurisdiction of the Civil Court, therefore, is not ousted and continues as before.

It is indisputable that the Civil Courts would have jurisdiction to try the issue when raised in a suit before them unless their jurisdiction is expressly or impliedly barred. It has also been the view held that if a provision is made whereby the jurisdiction of the Civil Court is ousted and the matter is to be referred to an Authority or Tribunal and if it be found that there is no such Authority or Tribunal appointed or in existence, the jurisdiction of the Civil Court will continue. That view was taken by a Single Judge of the Calcutta High Court in *Krishna Chandra v. Panchu Ghosh*³ and is supported by the decision of this Court in *Ganesh Mahadev v. The Secretary of State for India*⁴ and *Sat Narain v. Hanuman Parshad*.⁵ The first and third cases referred to above were cited before the learned Single Judge, but in the view which he took he felt that it was unnecessary for him to consider those authorities. It seems to us reasonable to hold that if a provision of law is made whereby the jurisdiction which always vests in a Civil Court to decide any issue before it is expressly taken away and it is provided that the jurisdiction shall be exercisable only by a particular Officer or Authority to be appointed, in this case the "Revenue Officer", and subsequently no steps are taken to appoint or designate such Officer or Authority, then the provision cannot take effect and the normal jurisdiction of the Civil Court continues. In all suits of a civil nature the Civil Courts have the primary jurisdiction conferred in very general terms by s. 9 of the Code of Civil Procedure, unless that jurisdiction is expressly or impliedly barred by any law. The Civil Courts, therefore, cannot say to a party asking for relief in a suit, that they have no jurisdiction because a special law has indicated some remedy which in fact is wholly ineffective. It seems to us that it is that remedy alone which can bar the jurisdiction of the Civil Court, which is available and effective but that is not the case here for want of designation of a Revenue Officer to try the matter. In the present case by virtue of s. 2 (j) it is clear that a Revenue Officer under the Berar Land Revenue Code must be appointed by notification to discharge the functions of a Revenue Officer under the particular provision of the Berar Regulation of Agricultural Leases Act with which it is decided to entrust him and in fact pursuant to s. 2 (j) the then State Government did issue a notification on January 29, 1952, empowering particular Revenue Officers to try matters arising under particular sections of the Act, but not s. 16. It appears that originally it was considered unnecessary to refer the matter arising under s. 16, as it then stood, but that when the amendment was made by s. 10 of the Amending Act No. XXII of 1953 on December 28, 1953, the definition was somehow lost sight of and no notification was issued empowering any Revenue Officer to discharge the functions under s. 16, as amended.

An argument was advanced before us, as it was advanced before the learned Single Judge, that s. 2 (j) does not require any such notification empowering a Revenue Officer to discharge the functions of a Revenue Officer under any particular provision of the Berar Regulation of Agricultural Leases Act. Mr. Kherdekar emphasised the concluding words of the definition "under that provision" and he pointed out that the word used is "that" to qualify "provision" and not "this". If the latter had been used, he says, it would have applied to the Berar Regulation of Agricultural Leases Act. But since the word used is "that" it does not imply the Berar Regulation of Agricultural Leases Act, but the Berar Land Revenue Code, which is also referred to in the definition. In the first place, if by the use of the word "that" before the word "provision" it was intended to refer to the Berar Land Revenue

3 [1953] A.I.R. Cal. 720.

L.R. 27.

4 (1918) I.L.R. 43 Bom. 221, s.c. 21 Bom.

5 [1946] A.I.R. Lah. 85.

Code, we do not see why the whole provision should have been incorporated at all in the Berar Regulation of Agricultural Leases Act, for, upon that construction, the meaning of the whole clause would be that a Revenue Officer is one appointed under the Berar Land Revenue Code, 1928, who may be appointed as the State Government may, by notification, direct to discharge the functions of a Revenue Officer under the Berar Land Revenue Code. Such a provision would make no sense. It would be completely out of place in the Berar Regulation of Agricultural Leases Act. If that were the intention, it was only necessary to say in the definition that "the Revenue Officer" means a Revenue Officer appointed under the Berar Land Revenue Code, and the subsequent words become completely redundant.

The clue to the interpretation of this clause, in our opinion, is to be found in the opening words thereof, "Revenue Officer in any provision of this Act means". There are several provisions of the Berar Regulation of Agricultural Leases Act referred to and it was in the contemplation of the Legislature that the functions under different provisions of the Act may be discharged by different officers, high or low, and therefore, in the concluding words the legislative draftsmen used the words "that provision" meaning thereby that particular provision of this Act. It is only on such a construction being placed upon s. 2 (j) that its correct meaning can be brought out.

Thirdly, we cannot help noticing an important fact viz. how the particular State Government which was functioning when the legislation was originally enacted itself construed it. It construed it as we have construed it in the paragraph above and actually issued a notification empowering different Revenue Officers under different sections of the Berar Regulation of Agricultural Leases Act. That is the notification No. 364-7273-XII, dated January 29, 1952, which is expressly a notification issued under cl. (j) of s. 2. The learned Single Judge did not decide this point, but confessed to a feeling of diffidence in interpreting the provisions of s. 2 (j). In our opinion, the provisions of s. 2 (j) are plenary and vitally affect the point raised and so far as its interpretation is concerned, the view we have taken appears to be the only view possible.

We also think that the view which the learned Single Judge took that the point could be decided on general principles under the provisions of the Berar Land Revenue Code cannot be sustained by us, for the Berar Regulation of Agricultural Leases Act, expressly gives a definition of the word "Revenue Officer" and, in doing so, provides an exclusive dictionary for the interpretation of these words in the rest of the Act. We cannot, therefore, look to any other enactment to interpret those words, nor rely upon general principles. We do not think, therefore, that we can accept the interpretation put upon the words "Revenue Officer" by the learned Single Judge. The view we have taken moreover was also taken by another learned Single Judge of this Court, Mr. Justice Chitale in *Pralhad Ganpatrao v. Jayendra Sadashiv*.⁶ Mr. Justice Naik distinguished this ruling. We are unable to accept the view of Mr. Justice Naik that "the point was not strenuously urged before him" (Mr. Justice Chitale). It has been actually dealt with by Mr. Justice Chitale.

Thus, upon the interpretation of s. 2 (j) which commends itself to us a rather important question arises which may affect a very large number of cases already decided either by Civil Courts or by Revenue Officers. It may also affect the decision, of this Court in some measure in *Paika v. Rajeshwar*. In fact, it was, in terms argued before Mr. Justice Naik that if the point taken in these appeals were at all substantial, it would have been raised when the full Bench case was argued and the learned Judge accepted that submission by observing :

"If the argument was really based on sound considerations, I have no doubt in my mind that would have been urged before or at any rate before the Full Bench."

For these reasons, we have decided to refer this question to a larger Bench. We think that the following question will sufficiently bring out the point to be determined:

Whether in view of the fact that no notification under section 2 (j) of the Berar Regulation of Agricultural Leases Act, appointing any Revenue Officer to discharge the functions of "the Revenue Officer" under section 16 of that Act has been issued, the Civil Court's jurisdiction in the two suits was ousted?

⁶ (1961) Civil Revision Application No. 161 1961 (Unrep.)
of 1961, decided by Chitale J. on April 19,

The papers be placed before my Lord the Chief Justice for constitution of a Full Bench.

THE question was considered by a full bench comprised of Chainani C. J. and Tambe and Abhyanker JJ.

K. C. Chendke, Mrs. Vasanti Chendke and M. D. Bazi, for the appellant.
S. N. Kherdekar, for the respondent.

CHAINANI C. J. The question referred to the Full Bench as slightly reformulated by us is as under :

Whether in view of the fact that no notification under s. 2 (j) of the Berar Regulation of Agricultural Leases Act, 1951 (No. XXIV of 1951) appointing any Revenue Officer to discharge the functions of a Revenue Officer under s. 16 of that Act has been issued, the Civil Court's jurisdiction to decide the question referred to in sub-s. (1) of this section is ousted ?

The facts of the two suits, which have given rise to this reference, are briefly these : The plaintiff had filed the two suits for obtaining possession of the lands from the defendants and for eviction of the defendants. In each suit, he alleged that the defendant was a trespasser and that he had forcibly taken possession of the land. The defence was that the plaintiff had entered into an oral agreement with each defendant, by which the land had been leased to the defendant, that the defendants had acquired the rights of protected lessees under the Berar Regulation of Agricultural Leases Act, 1951 (hereinafter referred to as the Act), and that, consequently, the plaintiff had no right to evict them from the lands. It was also contended that the question whether they were protected lessees could only be decided by a Revenue Officer under the Act and that the Civil Court had, therefore, no jurisdiction to decide the suits. Both the trial Court and the First Appellate Court have found that the defendants were trespassers and that they had forcibly entered upon the lands. These Courts also took the view that in the circumstances it was not necessary to refer any question for decision to a Revenue Officer under the Act. Against these decisions, second appeals were filed in this Court. These came up for hearing before a Single Judge of this Court†. It was urged before him that as no Revenue Officer had been appointed to decide questions of the kind referred to in sub-s. (1) of s. 16, the Civil Court was competent to decide the two suits. This argument was not accepted, as in the opinion of the learned Judge, even though no notification had been issued by the State Government under s. 2 (j) of the Act, the Deputy Commissioners and Sub-Divisional Officers were competent to decide such questions. He, therefore, reversed the decisions of the lower Courts and directed that, in each suit, the question whether the defendant was a protected lessee should be referred to a Revenue Officer for decision. Against the decisions in these two second appeals, Letters Patent Appeals were filed. The Division Bench, before which these appeals came up for hearing, has referred the question mentioned above for consideration by a Full Bench.

In order to appreciate the arguments, which have been advanced before us, it is necessary to refer to the relevant provisions of the Act. Clause (j) in s. 2 defines the expression "Revenue Officer" in these terms :

"'Revenue Officer' in any provision of this Act means such Revenue Officer appointed under the Berar Land Revenue Code, 1928, as the State Government may, by notification direct to discharge the functions of a Revenue Officer under that provision;"

In order to be a Revenue Officer within the meaning of any provision of the Act, the officer must, therefore, be a Revenue Officer appointed under the Berar Land Revenue Code. The second thing, which is necessary, is that the State Government should by a notification direct that such officer should discharge the functions of a Revenue Officer "under that provision". A notification has been issued by the State Government under this clause empowering Deputy Commissioners to discharge the functions of Revenue Officers under s. 15 and Deputy Commissioners and Sub-Divisional Officers to discharge the functions of Revenue Officers under ss. 4, 8, and certain other provisions of the Act. This notification was issued in 1952. The

†See 64 Bom L.R. 41.

present ss. 16 and 16-A were inserted in the Act in 1953. Thereafter the definition seems to have been lost sight of and no notification has so far been issued empowering any officer to discharge the functions of a Revenue Officer under s. 16 of the Act.

There has been some argument before us as to what the words "that provision" mean. It has been urged by Mr. Kherdekar that these words refer to the Berar Land Revenue Code and that they have no reference to the words "any provision of this Act" in the opening part of the definition. In this connection, our attention has been invited to certain provisions of the Code. Section 3 of the Code states that there shall be the following classes of Revenue Officers :

Deputy Commissioners.

Assistant Commissioners of the first and second grade.

Tahsildars.

Naib-Tahsildars.

The section further provides that the term "Assistant Commissioner" includes "Extra Assistant Commissioner". Section 7 provides that the State Government shall appoint in each district a Deputy Commissioner who shall exercise therein the powers and discharge the duties conferred and imposed on a Deputy Commissioner or a Collector by this law or by any enactment for the time being in force. This section, therefore, provides for the appointment of a Deputy Commissioner in each district. He can, however, exercise only such powers and discharge such duties as are conferred and imposed on him by the Code or by any enactment for the time being in force. Section 7-A provides for the appointment of an Additional Deputy Commissioner. Sub-section (3) of this section states that an Additional Deputy Commissioner shall exercise such powers and discharge such duties conferred and imposed on a Deputy Commissioner or a Collector by this law or by any enactment for the time being in force, as the Deputy Commissioner of the district may direct. Section 8 states that an Assistant Commissioner shall exercise such powers as the State Government may, by notification, direct. Sub-section (2) of s. 9 states that the Tahsildars and the Naib-Tahsildars shall exercise the powers and discharge the duties conferred and imposed upon them by or under this law or any enactment for the time being in force. Section 10 states that the State Government may appoint such other officers and invest them with such powers as may be necessary to give effect to the provisions of this law. Section 11 states that an Assistant Commissioner, who is placed in charge of one or more sub-divisions of a district, shall be called a Sub-Divisional Officer and shall exercise such powers of a Deputy Commissioner as the State Government may, by notification, direct. In exercise of the powers conferred on the State Government by ss. 8 and 11, notifications have been issued by the State Government. No notification of the State Government is, however, required in regard to the powers to be exercised and the duties to be discharged by a Deputy Commissioner, Tahsildar or Naib-Tahsildar. Under ss. 7 and 9 these officers can exercise such powers and discharge such duties as are conferred and imposed upon them by the Code or by any law for the time being in force.

If the argument of Mr. Kherdekar that the words "under that provision" in the definition of "Revenue Officer" mean "under the Berar Land Revenue Code" be correct the notification contemplated by this section would be a notification directing a Revenue Officer appointed under the Code to discharge the functions of a Revenue Officer under the Code. Such a provision would, as rightly pointed out by the Division Bench, convey no sense. The Code provides for the appointment of different classes of Revenue Officers, each of whom exercises certain kinds of powers, but there is no provision in the Code specifying the powers of a Revenue Officer as a Revenue Officer. The Code does not contemplate the investment of any Revenue Officer with the powers of a Revenue Officer as such. The Notifications issued by the State Government under ss. 8 and 11 specify the powers which the Assistant Commissioners and Sub-Divisional Officers may exercise. They have not been directed to discharge the functions of a Revenue Officer as such. In our opinion, therefore, the argument of Mr. Kherdekar that the words "that the provision" mean the Land Revenue Code is devoid of any merit.

The definition contained in s. 2 (j) is also clear and unambiguous. A plain reading of it leaves no doubt that the words "that provision" refer to the opening words in the definition "in any provision of this Act." In other words, reference to a Revenue Officer in any provision of the Act is reference to that officer who is directed by the State Government to discharge the functions of a Revenue Officer under that particular provision. It follows that before a Revenue Officer appointed under the Code can discharge functions under any provisions of the Act, it is necessary that he must be empowered by the State Government to discharge those functions.

Sub-section (1) of s. 16 of the Act states that whenever any question arises whether any transaction between a landholder and a person claiming to be his lessee is a lease within the meaning of this Act, such question shall be decided by the Revenue Officer. In *Paika v. Rajeshwar*¹, a Full Bench of this Court has held that if an issue arises between the parties whether there was a transaction, which resulted in one of the parties becoming a lessee, and the lease is a lease which falls within the Act, then that issue could only be tried by the Revenue Officer and not by the Civil Court. The argument that no officer had been empowered to discharge the functions of a Revenue Officer under sub-s. (1) of s. 16 was not advanced before the Full Bench. Consequently, the Full Bench did not consider the question, which has now arisen for our consideration. The judgment of the Full Bench proceeds on the assumption that there was a competent Revenue Officer for deciding the question referred to in sub-s. (1) of s. 16. According to the decision of the Full Bench, the Civil Court's jurisdiction would, therefore, be ousted, if there is a Revenue Officer within the meaning of s. 2 (j), who can determine the question as is referred to in sub-s. (1) of s. 16.

Sections 16-A and 16-B are in the following terms :

"16-A. (1) Whenever any question as is referred to in section 16 arises before a Civil Court in any suit or proceeding, the Court shall, unless such question has already been determined by a Revenue Officer, refer the question to the Revenue Officer for decision and shall stay the suit or proceeding so far as it relates to the decision of such question.

(2) The Civil Court shall accept the decision of the Revenue Officer on the question and decide the suit or proceeding before it accordingly.

16-B. Except as otherwise provided in this Act, no Civil Court shall entertain any suit instituted, or application made, to obtain a decision or order on any matter which a Revenue Officer is by or under this Act, empowered to determine, decide or dispose of."

The effect of these provisions is that the question whether a person is a lessee is to be decided by a Revenue Officer. Before, however, any officer can discharge the functions of a Revenue Officer under s. 16, it is necessary that the State Government should issue a notification empowering him to discharge those functions. If such a notification has been issued, and if there is a Revenue Officer competent to decide the question of the kind referred to in sub-s. (1) of s. 16, then the jurisdiction of the Civil Court to decide such question will be barred, and under sub-s. (1) of s. 16-A, the Civil Court will have to stay the suit, so far as it relates to the decision of such a question, until that question has been decided. It will be noticed that sub-s. (1) of s. 16-A does not bar the Civil Court from entertaining a suit. What the Civil Court is required to do is to stay the proceeding until the question, as is referred to in s. 16, has been decided by the Revenue Officer.

In the present case, however, no officer has been empowered to discharge the functions of a Revenue Officer under s. 16. There is, therefore, no Revenue Officer who can decide any question as is referred to in s. 16. In the absence of such an officer, there is no one to whom the Civil Court can refer the question for decision under sub-s. (1) of s. 16-A. The Legislature has, no doubt, provided for a special tribunal to decide the questions as are referred to in s. 16. Having made provision for a special tribunal, the Legislature has deprived the Civil Court of its jurisdiction to decide such questions. But where no such tribunal has been constituted, the special remedy provided is not available and cannot be resorted to. There being no Revenue Officer to whom the Civil Court can refer the question,

sub-s. (1) of s. 16-A cannot be given effect to. The Legislature could not possibly have intended that a person should be left without any means of obtaining relief to which he may be lawfully entitled. In such a case, therefore, the Civil Court, before which the suit is proceeding, being unable to obtain a decision from a competent Revenue Officer, is not required to stay the suit. It must proceed to decide the issue itself and give relief and redress to the person aggrieved. This is on the principle that if a Civil Court is deprived of its jurisdiction, because the Legislature has provided for trial of the matter by a special tribunal, then if the tribunal is not constituted, the provisions made for referring the matter to the tribunal having become ineffective, the aggrieved person has the right to proceed in an ordinary Civil Court and the Civil Court will be competent to decide the matter.

The view, which we are taking, is in accordance with the Full Bench decision of this Court in *Bhima Balu v. Basangouda Nemgouda*². That was a case under s. 64 of the Bombay Tenancy and Agricultural Lands Act, 1948. Sub-section (1) of s. 64 of this Act provides that where a landlord intends to sell any land, he shall apply to the Agricultural Lands Tribunal for determining the reasonable price thereof, and that the Tribunal shall thereupon determine the reasonable price of the land in accordance with the provisions of s. 63-A. Sub-section (8) of this section provides that any sale made in contravention of this section shall be invalid. In the case before the Full Bench, a deed of sale was executed on January 6, 1949, after the Act had come into force on December 28, 1948. The notification under s. 67(3) of the Act appointing the Mamlatdar to exercise the powers of the Agricultural Lands Tribunal was issued by the Government on January 18, 1949. It was held that s. 64 of the Act only became effective on January 18, 1949, when the authority to perform the functions of the Tribunal was set up, and that as the sale was effected prior to that date, it did not come within the ambit of s. 64(3) of the Act and that, therefore, the sale was valid. On the same reasoning, sub-s. (1) of s. 16 cannot become effective, until there is a Revenue Officer competent to decide the question as is referred to in this section. If there is no such officer, the question of staying the suit under sub-s. (1) of s. 16-A will not arise.

The same principle has been expressed in *Bharat Chandra v. Gour Chandra*³. In that case, s. 7 of the West Bengal Bargadare Act, 1950, provided for disputes of the kind referred to in sub-s. (1) of s. 7 being decided by a Board established under s. 6 of the Act. Sub-section (2) of s. 9 stated that no Court shall entertain any suit or any proceeding whatsoever in respect of a matter required under sub-s. (1) of s. 7 to be decided by a Board referred to in that sub-section. It was observed that if there was no Board established under the Act, the dispute, even if it came within s. 7(1), could not be said to be one which was required to be decided by a Board: see also *Krishna Chandra v. Panchu Ghosh*⁴.

A similar view has been taken in *Lachmi Chand Suchanti v. Ram Pratap Choudhry*⁵ and *Sat Narain v. Hanuman Parshad*⁶.

Mr. Kherdekar has relied upon the decision of the Madras High Court in *Bala-krishna v. Madras Corporation*⁷. The principle laid down in that case is that where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it, the remedy provided by the statute must be followed, and it is not competent to the party to pursue his remedy at common law. That principle has no application to the facts of the present case. The right of a landlord to obtain possession from his tenant is a right exercisable by him at common law. The Act imposes restrictions on the exercise of this right and provides for the question whether a person is a tenant being determined by a Revenue Officer. This provision cannot, however, be given effect to because the State Government has not empowered any officer to decide questions of this kind.

We are, accordingly, of the opinion that as no notification has been issued by the State Government under cl. (j) of s. 2 of the Act, appointing any officer to discharge

² [1954] Bom. 1080, s.c. 58 Bom. L.R.
520, F.B.

³ [1953] A.I.R. Cal. 95.

⁴ [1953] A.I.R. Cal. 720.

⁵ (1934) I.L.R. 14 Pat. 24, F.B.

⁶ [1946] A.I.R. Lah. 85.

⁷ [1962] A.I.R. Mad. 7, F.B.

the functions of a Revenue Officer under s. 16 of the Act, the Civil Court has jurisdiction to decide the question whether the defendants were the tenants of the plaintiff.

The reply to the question referred to the Full Bench will, therefore, be in the negative. Both the appeals may be placed before a Division Bench for further orders.

Answer accordingly.

Before the Hon'ble Mr. H. K. Chainani, Chief Justice, Mr. Justice Tambe and Mr. Justice Abhyankar.

RAMBHAU JAIRAM DHAMANGE v. THE PRESIDENT, VINKAR CO-OPERATIVE SOCIETY LTD.*

Maharashtra Co-operative Societies Act (Mah. XXIV of 1961), Secs. 91, 92, 93, 95, 163 (1) (b), 146 (m), 2 (4), 65 (2), 71, 75 (3), 165 (2) (xxxi) (xl)—Bombay Co-operative Societies Act (Bom. VII of 1925), Sec. 54—Industrial Disputes Act (XIV of 1947), Secs. 2 (j) (s) (k), 18(3), 10—C. P. & Berar Industrial Disputes Settlement Act (XXIII of 1947), Secs. 22, 23, 54—Dispute between Co-operative society and its employee in regard to change in terms of employment or for reinstatement of employee—Whether such dispute could be decided by Registrar of Co-operative Societies—“Any dispute”, meaning of words in s. 91(1)—Non obstante clause in s. 91 (1), effect of—Section 91 (2) whether enlarges jurisdiction conferred on Registrar by s. 91 (1).

Section 91 of the Maharashtra Co-operative Societies Act, 1960, does not operate as a bar to a dispute between a co-operative society and its employee in regard to a demand for a change in the terms of employment or for reinstatement of the employee, being decided under the C. P. and Berar Industrial Disputes Settlement Act, 1947, or the Industrial Disputes Act, 1947.

The words “any dispute” in s. 91 (1) of the Act must be given a limited meaning and mean any dispute which the Registrar is competent to try and decide.

The *non obstante* clause in s. 91 (1) of the Act excludes the operation of other laws, which confer jurisdiction on some other Court, authority, or Tribunal to try the disputes mentioned therein. If there is any other law which lays down that a matter, which under s. 91 the Registrar has jurisdiction to decide, may be tried by some other Court, authority or Tribunal, then the application of that law is excluded by the *non obstante* clause. But this clause does not alter or modify the substantive rights of the parties, nor does it confer any additional powers on the Registrar.

Section 91 (2) only empowers the Registrar to determine a jurisdictional issue; it does not enlarge the jurisdiction conferred on the Registrar by s. 91 (1).

*Jullundur T. C. Society v. Punjab State*¹ and *Kerala State Handloom Weavers Co-operative Society v. State of Kerala*,² agreed with.

Majoor Sahakari Bank v. Majumdar,³ explained.

*Farkhundali v. V. B. Poidar*⁴, *Asbestos Cement Cooperative Consumers' Society Ltd. v. The State of Bombay*⁵ *Wolverhampton New Water Works Co. v. Hawkesford*⁶ and *N. P. Ponnuswami v. Returning Officer, Namakkal Constituency*,⁷ referred to.

ONE Rambhau Jairam Dhamange (petitioner) was working as a “dye” with the Vinkar Co-operative Society, Limited, Chand, (respondent No. 1), under an agreement of service entered into on November 11, 1961. On March 12, 1962, he was removed from service, but after some litigation he was reinstated under a compromise entered into before the Assistant Commissioner of Labour. Soon after his reinstatement, his services were again terminated by a notice dated November 14, 1962, which was to have effect from December 15, 1962. The petitioner, there-

Decided, July 1, 1965. Special Civil Application No. 765 of 1964 (with Special Civil Applications Nos. 161 of 1965 and 443 of 1964).

1 [1959] A.I.R. Punjab. 34.

2 [1964] 1 L.L.J. 559.

3 (1955) 57 Bom. L.R. 1097.

4 (1961) 63 Bom. L.R. 985, F.B.

5 (1960) O. C. J. Misc. Application No. 344 of 1959, decided by Tarkunde and Patwardhan JJ., on September 13, 1960 (Unrep.).

6 (1859) 6 C.B. (N.S.) 336.

7 [1952] S.C.R. 218, at pp. 231, 232.

fore, applied to the Assistant Commissioner of Labour on April 4, 1963, under s. 16 of the C.P. and Berar Industrial Disputes Settlement Act, 1947, claiming that an inquiry should be made into the termination of his service and his reinstatement and payment of back wages should be ordered.

In answer to that application, the respondent co-operative society raised a preliminary objection that the jurisdiction to decide the dispute did not lie with the Assistant Commissioner of Labour but that the dispute could only be decided by the Registrar of Co-operative Societies who had exclusive jurisdiction in the matter.

The State Industrial Court functioning under the C.P. and Berar Industrial Disputes Settlement Act, 1947, held that the dispute could not go on before the Assistant Commissioner of Labour but that only the Registrar under the Co-operative Societies Act had jurisdiction.

The petitioner applied to the High Court under art. 227 of the Constitution of India for quashing the orders passed by the State Industrial Court and the Assistant Commissioner of Labour.

The application came on for hearing before Kotval and Wagle JJ. who referred the question involved in it to a full bench. Kotval J. delivered the following referring judgment on February 22, 1965.

KOTVAL J. [His Lordship after stating the facts as above, proceeded]. Having heard counsel for both the parties, we find that in this petition not merely a very substantial and important question of law arises affecting the jurisdiction of the two tribunals under the C.P. and Berar Industrial Disputes Settlement Act and the newly enacted Maharashtra Co-operative Societies Act, 1960, but that it is a question which will affect a vast number of industrial matters and also in turn the functioning of co-operative societies. Therefore, we have decided to refer this question to a larger Bench. We may only set forth the respective contentions and the authorities which were relied upon and state what is *prima facie* our view in the matter.

On behalf of the society, the contention is founded upon the provisions of the new s. 91 of the Maharashtra Co-operative Societies Act. That section makes a radical departure from the analogous provisions of s. 54 of the Bombay Co-operative Societies Act, 1925, which the new Act repealed. Section 54(1)(a) of the old Act ran as follows :

"54. (1) (a) If any dispute touching the constitution or business of society arises between members or past members of the society or persons claiming through a member or past member or between members or past members or persons so claiming and any officer, agent or servant of the society past or present or between the society or its committee, and any officer, agent, member or servant of the society past or present, it shall be referred to the Registrar for decision by himself or his nominee.

A dispute shall include claims by a society for debts or demand due to it from a member or past member or the heirs or assets of a past member as well as claims by a member or past member or the heirs of a past member for any debts or demands due to him from the society, whether such debts or demands be admitted or not.

Provided that if the question at issue between a society and a claimant, or between different claimants, is one involving complicated questions of law and fact, the Registrar may, if he thinks fit, suspend proceedings in the matter until the question has been tried by a regular suit instituted by one of the parties or by the society. If no such suit is instituted within six months of the Registrar's order suspending proceedings the Registrar shall take action as laid down in paragraph 1 of this section."

Considering the provisions of this section and particularly the expression used therein, "any dispute touching the business of society", this Court interpreted those words in a very wide sense. In a Full Bench decision reported in *Farkhundali v. Poldar*¹ this Court held (p. 986) :

"In regard to the first point, the argument advanced is that the payment of wages or any sum due to an employee cannot be said to relate to the business of a co-operative society. Dealing with the matter apart from authority, it seems to us that there is no substance in this argument.

The nature of business which a society does, is to be ascertained from the objects of the society. But whatever the society does or is necessarily required to do for the purpose of carrying out its objects can be said to be part of its business. The word 'touching' is also very wide and would include any matter which relates to, concerns or affects the business of the society. Every society must necessarily employ some servants for the purpose of carrying on its business. The payment of wages or any sum due to them under law, is, therefore, part of the business of the society. In any case, there can be no doubt that such payment would touch the business of the society."

The Full Bench also referred to the decision of a single Judge of this Court in *G. I. P. Railway Employees Co-operative Bank Ltd. v. Bhikhaji Karanjia*² where Chagla J. (as he then was) observed that in the expression "touching the business of a society" in s. 54, the word "business" was a very wide term and was not synonymous with the objects of a society and that the expression means affecting or relating to the business of a society. It may be noticed that in the Full Bench case, the conflict was between the provisions of the Payment of Wages Act and s. 54 of the Bombay Co-operative Societies Act. The question was whether the non-payment or the delay in the payment of wages of a person working in a co-operative society was a question which fell to be determined only by the authority under the Payment of Wages Act or by the Registrar under the Co-operative Societies Act. In *G.I.P. Railways Employees Co-operative Bank, Ltd. v. Bhikhaji Karanjia* the conflict was between the exclusive jurisdiction conferred by the Arbitration Act in the event of an arbitration clause being agreed upon and the jurisdiction of the Registrar under the Co-operative Societies Act. In other words, if there is a term in an agreement between an employee and a co-operative society to refer to arbitration any dispute, who would have the jurisdiction to determine it.

Two other cases were referred to and both of them are of the Kerala High Court : *Malabar Co-operative Central Bank v. State of Kerala*³ and *Kerala State Handloom Weavers' Co-operative Society v. State of Kerala*.⁴ In those cases we come nearer to the point which falls for determination here. In those cases the competition was between the Industrial Disputes Act and the Madras Co-operative Societies Act in one case and the between the Industrial Disputes Act and the Travancore-Cochin Co-operative Societies Act in the other, and in both the cases the same Judges held that questions falling under industrial disputes, even though they may concern employees of a co-operative society, would not fall within the ambit of the Co-operative Societies Act. In the first-mentioned case the question was touching wage-rates, allowances and fitment, promotion, gratuity and pension, medical aid, recruitment and probation, and retirement. In the second case, the question was touching pay-scales and dearness allowance, bonus, promotion according to seniority, abolition of commission system and restoration of dearness allowance instead and house-rent allowance. All these subjects were held to fall outside the jurisdiction of the Registrar of Co-operative Societies and although they arose between a Co-operative Society and its workmen they were held to be industrial disputes falling exclusively within the jurisdiction of Industrial Courts or tribunals.

In the latter case, the expression "touching the business of a registered society" was commented upon by the Division Bench of the Kerala High Court and the decision of Chagla C. J. in *Majoor Sahakari Bank. v. Majumdar*⁵ was referred to with approval. The view taken in those cases depends not so much upon the provisions of any of the two competing enactments but the view taken is, as mentioned in *Majoor Sahakari Bank's* case, that the whole purpose and object of these enactments are different and, therefore, the rights and remedies under the one should not be allowed to be affected by the rights and remedies conferred by the other. The argument which found favour with the Kerala High Court was thus put by Chagla C. J. in *Majoor Sahakari Bank'* case in a passage which was cited with approval by the Kerala High Court.

"...Now, Mr. Rane has very rightly pointed out that the disputes contemplated by s. 54 are disputes of a civil nature which could have been decided by civil Courts but for the provisions

2 (1942) 45 Bom. L.R. 676.

3 [1964] 1 L.L.J. 557.

4 [1964] 1 L.L.J. 559.

5 (1955) 57 Bom L.R. 1097, s.c. [1955] II L.L.J. 755.

with regard to compulsory arbitration provided in s. 54. Mr. Rane has also rightly pointed out that the present dispute between respondent No. 2 and the petitioners could not have been the subject-matter of a reference to arbitration under s. 54. Respondent No. 2 is not claiming to assert any civil rights against the petitioners. What he is claiming is certain rights which are now conferred upon workmen and employees as a result of principles of social justice which are now almost universally acknowledged all the world over. There is no right of re-instatement under civil law which can be enforced by an employee against his employer. No contract of personal service can be specifically enforced by a civil Court, nor does a civil Court determine whether the wages paid to an employee are proper wages or not. Civil Courts are bound down by the law of contract and it is under the law of contract that the civil Courts decide disputes between a master and his servant. Industrial Courts decide the disputes between a master and his servant on principles of social justice and whereas the civil Courts consider what are the actual terms of the contract regulating the rights of master and servant the industrial Courts consider not the terms of the contract but what is just and fair and what is proper for the master to pay to his servant" (p. 1099).

Now, if we had been left with these decisions, perhaps no question of doubt or difficulty would have arisen. But with these decisions there, the Legislature in 1960 completely altered the provisions in this respect when it repealed the Bombay Co-operative Societies Act, 1925, and re-enacted many of its provisions in the Maharashtra Co-operative Societies Act, 1960 (No. XXIV of 1961). It is clear that s. 91 of the new Act is a substantial reproduction of s. 54 of the old Act as it then stood, under which all the previous decisions to which we have referred to were given. It must be assumed that when the Legislature enacted s. 91 of the new Act, it had before it the interpretation given to s. 54 of the old Act; and the important reason behind those interpretations was that the objects and purpose of the two enactments must be considered and, if they are different, then matters like payment of wages and arbitration would not fall within the ambit of s. 54. It is in the light of this position as it subsisted on the date of the new enactment that we must consider the provisions of s. 91. The most important change that has been brought about in s. 91 is the introduction of the vital *non-obstante* clause at the commencement of the section "Notwithstanding anything contained in any other law for the time being in force." The intention clearly was to exclude all other laws for the time being in force. This is a most powerful argument in favour of the view taken by the Industrial Court and so far as we can see there is no answer to it.

Now, there is no question here of any conflict of legislations or legislative jurisdictions. There is no question also raised in the petition regarding repugnancy such as for instance fell to be determined in the Full Bench case of this Court referred to above. In that case, the conflict was between a Central Act like the Payment of Wages Act, s. 15 and a State legislation (s. 54 of the Bombay Co-operative Societies Act) and the Full Bench resolved it in favour of the Central legislation on the principle of repugnancy. In the present case, however, that conflict is not there, nor, as we have said, upon the face of the petition is any question of repugnancy or conflict of laws raised. Therefore, one has to consider the effect of the *non-obstante* clause in the light of these circumstances, and so far as we can see there is no escape from the plenary words of that clause.

In order to avoid the impact of the *non-obstante* clause in sub-s. (1) of s. 91, the first contention raised on behalf of the petitioner was to rely upon two decisions: *Vasant Rao v. Election Commission*⁶ and *Nawab Bahadur v. Rameshchandra*⁷ to urge that the *non-obstante* clause is not always as wide in its amplitude as its language would indicate and that it should be construed in the light of the object and purpose of the Act and the purposes of the laws which it excludes. No doubt, in the last mentioned case the Court declined to apply the *non-obstante* clause in the Bengal Money-lenders Act (ss. 30 and 36) in order to exclude the Murshidabad Estate Administration Act; but the Calcutta High Court explained why it was so done. There were very special circumstances there, and the clearest indications to the contrary in the Murshidabad Act. The Murshidabad Estate Administration Act was passed by the Legislature in order to assist one particular individual, namely, the

6 [1953] A.I.R. Nag. 237.

7 [1949] A.I.R. Cal. 323, at p. 333, paras. 56 to 58.

Nawab Bahadur of Murshidabad for certain reasons which do not appear clear upon the judgment, and the very purpose of that Act was to protect the Murshidabad Estate which perhaps was in a very difficult financial state. If under those circumstances the Bengal Money-lenders Act had been applied to the Murshidabad Estate, the effect would virtually have been to undo the provisions of the Murshidabad Estate Administration Act. The very object and purpose of the latter Act would have been defeated. Therefore, the Calcutta High Court held that the *non-obstante* clause in the Bengal Money-lenders Act would not apply to the Murshidabad Estate at all. Here the principle which seems to have been applied was that if by the application of a *non-obstante* clause the very purpose and object of another enactment, the provisions of which were to be excluded by the *non-obstante* clause, would be rendered completely nugatory and of no effect, then the Court in its duty to interpret the law before it would try to so interpret it that another Act was not rendered completely nugatory. These considerations cannot possibly prevail in the present case. The C.P. and Berar Industrial Disputes Settlement Act would continue to apply even though its operation to co-operative societies were excluded. So far as the Nagpur case is concerned, all that was pointed out in that case was that it can only apply where there is, in the first instance, a repugnancy or a clash between two pieces of legislation and in that case the Division Bench held that there was in fact no repugnancy or clash between the two provisions and, therefore, the *non-obstante* clause would continue to apply. That does not advance the argument here urged any further.

As to the effect of a *non-obstante* clause such as this, the following decisions were relied upon and are useful: *Manohar v. Konkan Co-op. Housing Socy.*,⁸ *Aswini Kumar v. Arabinda Bose*⁹ and *Dominion of India v. Shrinbai*.¹⁰ There is nothing in s. 91 or any other provision of the Maharashtra Co-operative Societies Act to suggest that the *non-obstante* clause deliberately introduced into s. 91 when the law was amended and consolidated in 1961, should be given any limited meaning, nor does there appear anything in the C.P. and Berar Industrial Disputes Settlement Act suggesting that the provisions of the Maharashtra Co-operative Societies Act are in any way excluded. It is of some significance here to notice that as between the two jurisdictions, the one created by the C.P. and Berar Industrial Disputes Settlement Act and the other created by the Maharashtra Co-operative Societies Act, the C.P. and Berar Industrial Disputes Settlement Act does not exclude the operation of other laws but the Maharashtra Co-operative Societies Act in express terms excludes all other laws. This difference, in our opinion, is crucial, particularly when both are State laws.

Then it was urged upon the authority of the decision of the Division Bench in *Majoor Sahakari Bank v. Majumdar* the relevant passage from which we have already cited above, that since the essential purpose of the C. P. and Berar Industrial Disputes Settlement Act was radically different from the purpose and object of the Maharashtra Co-operative Societies Act, and the Division Bench has, prior to the incorporation of the *non-obstante* clause, held that the provisions of the law for co-operative societies cannot affect the law relating to industrial disputes, we must upon the same basis construe the present s. 91 and limit the *non-obstante* clause, and so limiting it, hold that it does not apply to the C. P. and Berar Industrial Disputes Settlement Act. Now, the decision of the Division Bench in the *Majoor Sahakari Bank's* case was given as far back as 1955, and we must assume that when the Legislature completely repealed s. 54 of the old Act and replaced it by s. 91 of the new Act, they had in mind the decision of the Division Bench of this Court and took into account the principle which it had laid down. Notwithstanding that principle, the Legislature deliberately introduced into s. 91 the words "Notwithstanding anything contained in any other law for the time being in force." It cannot be, as was urged on behalf of the petitioner, that the Legislature, knowing full well that the principle had already been laid down in the *Majoor Sahakari Bank's* case that the provisions of the Co-operative Societies Act would not apply to industrial disputes, incorporated this *non-obstante* clause, thinking that the same principle

8 [1961] 63 Bom. L.R. 1001.

10 [1954] A.I.R. S.C. 596, para. 10.

9 [1952] A.I.R. S.C. 369.

would continue to apply. On the other hand, it may equally well be that by incorporating this *non-obstante* clause, the Legislature deliberately wanted to exclude industrial disputes and the provisions relating to the settlement of industrial disputes from the operation of the Co-operative Societies Act. We think that *prima facie* the latter is the correct inference to be drawn, for we cannot understand a Legislature adding these words and not, at least by way of abundant caution, making a provision that s. 91 will not apply to the settlement of industrial disputes. The wide amplitude of the *non-obstante* clause and the want of any exception made by the Legislature when already upon the authorities an exception was there before amendment are all indications that perhaps the Legislature intended to exclude industrial law from operating in the co-operation field.

A consideration of the other provisions of s. 91 reinforces the above conclusion. Sub-section (2) of s. 91 reads as follows :

"When any question arises whether for the purposes of the foregoing sub-section, a matter referred to for decision is a dispute or not, the question shall be considered by the Registrar, whose decision shall be final."

Therefore, it is clear that sub-s. (2) has provided that every question as to whether there exists a dispute or not must be decided by the Registrar and his decision is final. Now, a dispute may not necessarily be a dispute which from its inception falls within the categories of disputes mentioned in sub-s. (1). In fact, anybody may go before the Registrar and raise a question as to any subject and the Registrar would be called upon to decide whether the dispute before him is a dispute to which sub-s. (1) applies. It is quite clear from this provision therefore that initially disputes which may not fall within the ambit of sub-s. (1) would as well come up for decision before the Registrar as disputes which do fall within the ambit of sub-s. (1). If that be so, then it clearly conflicts with the principle of the *Majoor Sahakari Bank's* case that no industrial dispute would fall within the ambit of the provisions of the Co-operative Societies Act. Here there is a clear provision that even a dispute which may ultimately be found to be purely an industrial dispute must for the purposes of his jurisdiction be decided by the Registrar. How therefore such a provision can be reconciled with the principle of the *Majoor Sahakari Bank's* case remains to be determined. It seems to us that it can only be resolved by saying that all the provisions of the law relating to the settlement of industrial disputes were excluded.

Next, the provisions of sub-s. (3) of s. 91 also point to the same conclusion. Sub-section (3) says :

"Save as otherwise provided under sub-section (3) of section 93, no Court shall have jurisdiction to entertain any suit or other proceedings in respect of any dispute referred to in sub-section (1)."

Here there is an express ouster of the jurisdiction of Courts in respect of any dispute referred to in sub-s. (1). It is clear that the jurisdiction of Courts is ousted but not of all tribunals, and at any rate the Legislature was alive to the necessity of circumscribing the jurisdiction given to the Registrar and other Courts. Even here, no exception is made in the case of industrial Courts and that again militates against the principle of the *Majoor Sahakari Bank's* case that matters in the exclusive jurisdiction of industrial tribunals and Courts would not be affected by the laws relating to co-operative societies.

We have just said in one of the paragraphs above that the *non-obstante* clause in sub-s (1) of s. 91 was added deliberately by the Legislature in spite of the decision in the *Majoor Sahakari Bank's* case. We may also add here that that very clause was, due to a grammatical error, subsequently amended by the Bombay Act No. XXXIII of 1963. Originally the wording was "Notwithstanding anything contained in any other law for the time being in force", which obviously was bad grammar, and therefore the amending Act had to be passed to make the clause read "Notwithstanding anything contained in any other law for the time being in force". Even at the time of this amendment—and that was in 1963—by which time questions of the comparative jurisdictions of industrial tribunals and Courts *vis-a-vis* the Co-operative Societies Act must have arisen and must have been actually debated the Legislature did not see it fit to limit the ambit of the *non-obstante* clause.

We may also refer to the provisions of s. 92 (1). That section lays down periods of limitation and certain rules for the application of periods of limitation, and in doing so, refers to a number of categories of disputes or subjects which are likely to come up before the Registrar for decision. Some of them are mentioned in cl. (b) of sub-s. (1) of s. 92 which runs as follows :

“92. (1) Notwithstanding anything contained in the Indian Limitation Act, 1908, but subject to the specific provisions made in this Act, the period of limitation in the case of a dispute referred to the Registrar under the last preceding section shall—

(a)

(b) *When the disputes between a society or its committee, and any past committee, any past or present officer, or past or present agent, or past or present servant or the nominee, heir or legal representative of a deceased officer, deceased agent or a deceased servant of the society,.....and when the dispute relates to any act or omission on the part of either party to the dispute, be six years from the date on which the act or omission with reference to which the dispute arose, took place.*”
(The italics are ours.)

Therefore, given the pre-requisite condition that a dispute relates to any act or omission on the part of either party to the dispute, a dispute between a past or present servant of a society can be adjudicated upon by the Registrar, and obviously when the words used are “past or present servant of the Society”, no exclusion is made of a dispute which may arise between a co-operative society which would be an industrial establishment and its employee which may be in the nature of an industrial dispute within the meaning of sub-s. (12) of s. 2 of the C. P. and Berar Industrial Disputes Settlement Act. These are some of the indications which are to be found in the provisions of the new Co-operative Societies Act, which, in our opinion, strongly militate against the principle of the *Majoor Sahakari Bank's* case and suggest that it was the intention of the Legislature not to allow considerations of industrial law to prevail in the co-operative field or in the implementation of the law for co-operative societies.

Various contentions were advanced as to possible object of the Legislature in making these provisions. It was urged on behalf of the petitioner that having regard to the principles of social justice and the extreme care which Legislatures have taken in the post-Constitution period to protect the interests of industrial workers, the intention of the Legislature could not be to exclude the operation of industrial laws from the co-operative field. But it was urged on behalf of the respondents and it may be equally true that the Legislature considered the co-operative field of every special importance. In view of the necessity to introduce the principle of co-operation even in industrial and agricultural matters and in order to encourage larger production, both industrial and agricultural, from co-operative societies, it may have been that the Legislature intended deliberately to exclude the principles governing the settlement of industrial disputes from the co-operative field and not to allow unions to interfere in co-operative societies—at least for a few years. It seems to us *prima facie* that considerations like these are equally strong on either side and that under these circumstances the plenary words of the *non-obstante* clause ought to be allowed to prevail. They were deliberately put in, in spite of the clear previous view of this Court that the provisions of the Co-operative Societies Act cannot be allowed to interfere in industrial matters. If the Legislature had intended to exclude industrial matters from the operation of the Co-operative Societies Act, they would have certainly said so in the Act. On the other hand, if one thing is remarkable about this Act, it is that it is silent in the matter of excluding industrial matter from the purview of the Registrar of Co-operative Societies after providing that the operation of all other laws is excluded in the cooperative field.

It may also be—and that was a view which we merely express here—that all this conflict could well be avoided by adequate notifications made by the State Government under the C. P. and Berar Industrial Disputes Settlement Act itself and that if industrial disputes arising in co-operative societies come up before the Registrar, the State Government can by an appropriate notification under the provisions of the C. P. and Berar Industrial Disputes Settlement Act provide that the Registrar shall refer them to a stated class of nominees who may be experts in industrial law or appoint those nominees themselves. The notifications issued at present under the C. P. and Berar Industrial Disputes Settlement Act are to be found at page 106 of

the Madhya Pradesh Labour Manual, volume 1, 1957 edn. and those notifications show that generally all disputes arising in industries were referred to the Labour Commissioner for decision. The entire difficulty could be avoided if the Registrar under the Co-operative Societies Act were directed to refer disputes which could clearly fall under the C. P. and Berar Industrial Disputes Settlement Act to a nominee who was of the status of a Labour Commissioner or the Labour Court and thereby removing the major difficulties pointed out above in the implementation of the two laws. It was also suggested in the arguments before us that the Registrar himself could decide industrial disputes. While we see the practical difficulty of such a suggestion, *prima facie* of course there does not appear to be any bar to his doing so.

We think we have said enough to show that the question which we propose to refer to a Full Bench is a question of importance to co-operative societies and of grave import to industrial workers. It is better that in a matter like this, the law should be made certain once and for all and that all doubt as to the implementation of the two Acts should be removed. We, therefore, refer the following question for decision by a Full Bench:

Whether having regard to the circumstances of this case the petitioner's application could have been decided by the Labour Commissioner and by the State Industrial Court in appeal?

The question was considered by a full bench composed of Chainani C.J. and Tambe and Abhyankar JJ.

Special Civil Application No. 765 of 1964.

S. G. Kukday and *V. P. Kukday*, for the petitioner.

P. S. Badiye, for respondent No. 1.

R. B. Kotwal, Government Pleader, Bombay, and *G. R. Mudholkar*, Additional Government Pleader, Nagpur, for the State, respondent No. 4.

S. W. Dhabe, *B. A. Masodkar* and *N. N. Deshpande* for the Intervener Dinkar.

Special Civil Application No. 161 of 1965.

S. W. Dhabe, for the petitioner.

B. A. Masodkar, for respondent No. 3.

G. R. Mudholkar, Additional Government Pleader, for respondent No. 4.

Special Civil Application No. 443 of 1964.

R. W. Adik, for the petitioner.

P. D. Kamerkar, for the respondent Union.

R. B. Kotwal, Government Pleader, for the State.

CHAINANI C. J. The question which has been referred to us for our consideration, as re-drafted by us in consultation with the learned counsel for the parties, is as under :—

Whether s. 91 of the Maharashtra Co-operative Societies Act, 1960, operates as a bar to a dispute between a co-operative society and its employee or employees in regard to a demand for a change in the terms of employment or for reinstatement of the employee, whose services had been terminated, being decided under the C. P. and Berar Industrial Disputes Settlement Act, 1947, or the Industrial Disputes Act, 1947?

The facts in Special Civil Application No. 765 of 1964, which has given rise to this reference, briefly are that the petitioner was employed by respondent No. 1, which is a co-operative society originally registered under the Co-operative Societies Act, 1912. On November 14, 1962, his services were terminated with effect from December 15, 1962. On June 4, 1963, he made an application to the Assistant Commissioner of Labour under sub-s. (2) of s. 16 of the C. P. and Berar Industrial Disputes Settlement Act, 1947, in which he prayed that an order should be made for his reinstatement and for payment to him of back wages. This application was dismissed. The petitioner filed a revision application before the State Industrial Court under sub-s. (5) of s. 16 of the Act. Before the State Industrial Court, an objection was raised that neither the Assistant Commissioner of Labour nor the State Industrial Court had jurisdiction to entertain the application made by the petitioner, as under s. 91 of the Maharashtra Co-operative Societies Act, only the Registrar of Co-operative Societies or his nominee was competent to decide the dispute between the petitioner and respondent No. 1. This objection was upheld by the

State Industrial Court, which held that only the Registrar had jurisdiction in the matter. The State Industrial Court, therefore, dismissed the application made by the petitioner. Thereafter the petitioner filed the special civil application in this Court, which has given rise to this reference.

The parties in two other special civil applications—Special Civil Application No. 161 of 1965 and Special Civil Application No. 443 of 1964 filed in Bombay have been allowed to intervene. The facts of Special Civil Application No. 161 of 1965 are similar to those of Special Civil Application No. 765 of 1964. The petitioner in that application was an employee of respondent No. 3, which is a co-operative society. The petitioner had resigned from his service. Subsequently, he made an application under sub-s. (2) of s. 16 of the O. P. and Berar Industrial Disputes Settlement Act, alleging that he had been forced to resign from service. He prayed that he should be reinstated in service. That application was rejected. A revision application to the State Industrial Court also failed on the same ground that the Court had no jurisdiction in the matter.

The third Special Civil Application No. 443 of 1964 arises out of a reference made by the State Government under s. 10 (2) of the Industrial Disputes Act, 1947, to the Industrial Tribunal, by which a dispute between the petitioner, which is a co-operative society registered under the Maharashtra Co-operative Societies Act, 1960, and its workmen represented by respondent No. 1, was referred for adjudication to the Industrial Tribunal. The dispute related to the demands made by the workers, for higher pay scales, for additional leave benefit, for contributory provident fund, for bonus etc.

In order to determine the question, which arises for our consideration, it is necessary to first consider what an "industrial dispute" means and the nature of reliefs, which the authority adjudicating such dispute can grant. The term "industry" is defined in cl. (j) of s. 2 of the Industrial Disputes Act as meaning any business, trade, undertaking, manufacture or calling of employers and includes any calling, service, employment, handicraft, or industrial occupation or a vocation of workmen. "Workman" is defined in cl. (s) as meaning any person employed in any industry. The remaining part of the definition is not material for our purpose. "Industrial dispute" is defined in cl. (k) as meaning any dispute or difference between employers and employees, or between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of employment or with conditions of labour, of any person. Any dispute raised by employees to alter or better the terms of their employment, is, therefore, an industrial dispute. In order to be an industrial dispute, it is not necessary that the demand must be made or the relief claimed under a contract of employment. An industrial dispute also arises when employees seek higher scales of pay, reduction in hours of work or workload, share in the profits of the concern by way of bonus, or other changes in the terms of their employment or conditions of service, and these demands are not agreed to by the employer. The definition of "industrial dispute" in the O.P. and Berar Industrial Disputes Settlement Act is wider, but the essential feature of an "industrial dispute" is that it is not restricted to a claim under the contract or agreement of employment.

It is well-settled that an Industrial Tribunal or authority adjudicating an industrial dispute, who may conveniently be referred to as an industrial arbitrator, is, unlike a Civil Court, not fettered by the agreement between the parties. He is required to decide the matter not according to the agreement or contract between the parties but according to what, having regard to all circumstances, he considers to be just and fair. In order that the workers get a proper wage, that they are not victimised or unfairly treated and that their terms of employment generally are such as will secure industrial peace, an industrial arbitrator has the power and the authority to radically modify or alter the agreed terms of employment and to impose new obligations. In a sense, he may make a new contract for the parties. No authority is necessary in support of these propositions, but I will refer to one of them, the decision of the Supreme Court in *Rohitas Industries Ltd. v. Brijnandan Pandey*¹.

At pages 809 and 810, it was observed :

"...There is undoubtedly a distinction between commercial and industrial arbitration. As has been pointed out by Ludwig Teller (Labour Disputes and Collective Bargaining) Vol. 1, page 535 :

'Industrial arbitration may involve the extension of an existing agreement, or the making of a new one, or in general the creation of new obligations or modifications of old ones, while commercial arbitration generally concerns itself with interpretation of existing obligations and disputes relating to existing agreements.'

A Court of law proceeds on the footing that no power exists in the courts to make contracts for people; and the parties must make their own contracts. The Courts reach their limit of power when they enforce contracts which the parties have made. An Industrial Tribunal is not so fettered and may create new obligations or modify contracts in the interests of industrial peace, to protect legitimate trade union activities and to prevent unfair practice or victimisation." An Industrial Tribunal has also jurisdiction to order reinstatement of a dismissed or discharged employee, see *W. I. Assn. v. Industrial Tribunal, Bombay*². In view of s. 21 (b) of the Specific Relief Act, no such relief can be granted by a Civil Court or a private arbitrator, see *Dr. S. B. Dutt v. University of Delhi*³.

I will now refer to the relevant provisions of the Maharashtra Co-operative Societies Act, 1960. This Act repealed the earlier Bombay Co-operative Societies Act, 1925, which was previously in force. Sub-section (1) of s. 54 of that Act, in so far as it is material, was in the following terms :—

"54. (1) (a) If any dispute touching the constitution or business of society arises between members or past members of the society or persons claiming through a member or past member or between members or past members or persons so claiming and any officer, agent or servant of the society past or present or between the society or its committee, and any officer, agent, member or servant of the society past or present, it shall be referred to the Registrar for decision by himself or his nominee...

Provided that if the question at issue between a society and a claimant, or between different claimants, is one involving complicated questions of law and fact, the Registrar may, if he thinks fit, suspend proceedings in the matter until the question has been tried by a regular suit instituted by one of the parties or by the society. If no such suit is instituted within six months of the Registrar's order suspending proceedings the Registrar shall take action as laid down in paragraph 1 of this section."

Sub-section (1) of s. 91 of the Maharashtra Co-operative Societies Act, 1960, in so far as it is relevant provides that notwithstanding anything contained in any other law for the time being in force, any dispute touching the...management or business of a society shall be referred by any of the parties to the dispute...to the Registrar, if both the parties thereto are of one or other of the categories of persons specified in cls. (a) to (e) of this sub-section. The material change from s. 54, which has been made in this sub-section, is the addition of the *non obstante* clause "Notwithstanding anything contained in any other law for the time being in force." Sub-section (2) of s. 91 states that when any question arises whether for the purpose of sub-s. (1), any matter referred to for decision is a dispute or not, the question shall be considered by the Registrar, whose decision shall be final. The Registrar is, therefore, required to decide as a preliminary issue the question whether the dispute is of the kind and between the parties mentioned in sub-s. (1). Unless he finds that the dispute falls within sub-s. (1) of s. 91, he will have no jurisdiction to decide it. This sub-section also gives finality to the decision of the Registrar on this preliminary issue. Sub-section (3) of s. 91 states that save as otherwise provided under sub-s. (3) of s. 93, no Court shall have jurisdiction to entertain any suit or other proceeding in respect of any dispute referred to in sub-s. (1). Clause (b) in sub-s. (1) of s. 163 provides that save as expressly provided in this Act, no Civil or Revenue Court shall have any jurisdiction in respect of any dispute required to be referred to the Registrar, or his nominee, or board of nominees, for decision. This provision bars the jurisdiction of any Civil or Revenue Court, whereas sub-s. (3) of s. 91 ousts the jurisdiction of any Court.

Sub-section (1) of s. 92 prescribes periods of limitation for matters of the kind mentioned in cls. (a) to (d) which are referred to the Registrar. Sub-section. (2) of this

section states that the period of limitation in the case of any other disputes except those mentioned in sub-s. (1), which is required to be referred to the Registrar, shall be regulated by the provisions of the Indian Limitation Act, as if the dispute were a suit and the Registrar a Civil Court. This sub-section, therefore, makes the Registrar a Civil Court for the purpose of determining the period of limitation. Sub-section (1) of s. 93 provides that if the Registrar is satisfied that any matter referred to him or brought to his notice, is a dispute within the meaning of s. 91, the Registrar shall, subject to the rules, decide the dispute himself, or refer it for disposal to a nominee, or a board of nominees, appointed by the Registrar. Sub-section (3) of s. 93 provides that notwithstanding anything contained in s. 91, the Registrar may, if he thinks fit, suspend proceedings in regard to any dispute, if the question at issue between a society and a claimant, or between different claimants, is one involving complicated questions of law and fact, until the question has been tried by a regular suit instituted by one of the parties or by the society, and that if any such suit is not instituted within two months from the Registrar's order suspending proceedings, the Registrar shall take action as is provided in sub-s. (1). This sub-section is substantially in the same terms as the proviso to sub-s. (1) of s. 54 of the Act of 1920. If the Registrar finds that the matter referred to him raises complicated questions of law and fact, he may ask the parties to get the dispute resolved in a Civil Court. Section 95 states that when a dispute is referred to arbitration, the Registrar or his nominee, or board of nominees, may, after giving a reasonable opportunity to the parties to be heard, make an award on the dispute.

The words "touching the business of a society" are very wide and include any matter which relates to, concerns or affects the business of the society, see *Farkhundali v. Poldar*.⁴ A dispute in which the employees of a co-operative society demand a change in their conditions of service or ask for reinstatement of the employees, whose services have been terminated, therefore, touches the business of the society. It would, therefore, in the absence of anything more, fall within sub-s. (1) of s. 91. It has been contended on behalf of the workers that the Registrar or his nominee functions like a Civil Court, that like a Civil Court he is bound by the contract between the parties, that he cannot travel outside the contract and that an industrial dispute is, therefore, not within his jurisdiction. In support of this argument, the decision of this Court in *Majoor Sahakari Bank v. Majumdar*⁵ has been cited. In that case, a workman, who was employed as a watchman by a co-operative society registered under the Co-operative Societies Act, 1925, and doing banking business, had been discharged from service. He then made an application to the Labour Court seeking reinstatement and compensation. A preliminary objection was raised that the provisions of the Bombay Industrial Relations Act, 1947, did not apply and that the dispute could only be decided by the Registrar under s. 54 of the Co-operative Societies Act, 1925. This contention was negatived. Chagla C. J. observed (p. 1099):

"...It is further pointed out that... s. 54 provides for compulsory arbitration when there is a dispute between a society and its employee, ... Mr. Rane has very rightly pointed out that the disputes contemplated by s. 54 are disputes of a civil nature which could have been decided by civil Courts but for the provisions with regard to compulsory arbitration provided in s. 54. Mr. Rane has also rightly pointed out that the present dispute between respondent No. 2 and the petitioners could not have been the subject-matter of a reference to arbitration under s. 54. Respondent No. 2 is not claiming to assert any civil rights against the petitioners. What he is claiming is certain rights which are now conferred upon workmen and employees as a result of principles of social justice which are now almost universally acknowledged all the world over. There is no right of re-instatement under civil law which can be enforced by an employee against his employer. No contract of personal service can be specifically enforced by a civil Court nor does a civil Court determine whether the wages paid to an employee are proper wages or not. Civil Courts are bound down by the law of contract and it is under the law of contract that the Civil Courts decide disputes between a master and his servant."

In *Asbestos Cement Cooperative Consumers' Society Ltd. v. The State of Bombay*⁶

⁴ (1961) 63 Bom. L.R. 985.

⁵ (1955) 57 Bom. L.R. 1097.

⁶ (1960) O. C. J. Misc. Application No. 344

of 1959, decided by Tarkunde and Patwardhan JJ., on September 13, 1960 (Unrep.).

another Division Bench of this Court has held that a claim for bonus made by employees of a co-operative society did not come within the ambit of s. 54. Tarkunde J. in his judgment observed :

"The question is whether an industrial dispute which arises from a demand made by employees outside the terms of the contract of their employment, and not based upon any existing statutory obligation or legal liability of the employer, could be regarded as a dispute touching the business of the Society as mentioned in sec. 54. We are of the view that sec. 54 does not comprise such disputes. Normally, the Registrar or his nominee, when a dispute is referred to him under sec. 54, decides that dispute according to the civil rights of the parties. The claim for bonus made by the employees of the society is not a claim arising out of any contract between themselves and the Society, nor is there any statute by which an obligation has been imposed on an employer to pay a particular bonus. Under the ordinary law, a claim like the one made by the Union, being contrary to the terms of the contract between the parties, and not being founded on any statute, would have to be rejected by any Court or Arbitrator dealing with civil disputes. Tribunals set up under the Industrial Disputes Act, however, are entitled, and often required, to go beyond the contractual and statutory rights of the parties for the purpose of the settlement of industrial disputes and the maintenance of industrial peace."

Counsel for the co-operative societies have contended that this position has been substantially altered by the *non obstante* clause in s. 91. It has been argued that this change was made deliberately, that it was intended to get round the decision in *Majoor Sahakari Bank v. Majumdar*, and other similar decisions, that the application of the Industrial Disputes Act is, therefore, excluded, that there is no justification for limiting the words "any dispute" in sub-s. (1) of s. 91 and that the Registrar is also competent to adjudicate upon industrial disputes.

There has been some argument in regard to the meaning of the word "law" in the *non obstante* clause. It has been urged that the word "law" would include every other law including laws affecting substantive rights of parties. There is no force in this argument. The *non obstante* clause must be read in its context. Sub-section (1) of s. 91 in effect provides that the disputes mentioned therein shall be tried by the Registrar. It, therefore, provides for the forum of trial. The *non obstante* clause excludes the operation of other laws, which confer jurisdiction on some other Court, authority, or Tribunal to try such disputes. If there is any other law, which lays down that a matter, which under s. 91 the Registrar has jurisdiction to decide, may be tried by some other Court, authority or Tribunal, then the application of that law is excluded by the *non obstante* clause. But this clause does not alter or modify the substantive rights of the parties, nor does it confer any additional powers on the Registrar.

It has been held in several cases that the jurisdiction conferred by s. 54 of the Act of 1925 was exclusive and that the civil Court could not deal with any matter which under s. 54 had to be referred to the Registrar. What was, therefore, implicit in s. 54 has now been expressly stated in the *non obstante* clause. It may also be pointed out that the decision in the *Majoor Sahakari Bank's* case was not based on the ground that s. 54 did not confer exclusive jurisdiction on the Registrar in the matters referred to therein. The ratio of this and other similar decisions is that the Registrar cannot determine an industrial dispute, because like a Civil Court, he is bound by the contract of employment and cannot grant any relief outside the contract. These decisions, therefore, are not affected or got rid of by the addition of the *non obstante* clause, which only excludes the application of other laws in regard to the forum of trial.

The learned Government Pleader has referred to three propositions laid down by Willes J. in *The Wolverhampton New Water Works Co. v. Hawkesford*⁷, which has been approved by the Supreme Court in *N. P. Ponnuswami v. Returning Officer, Namakka Constituency*⁸ :

"There are three classes of cases in which a liability may be established founded upon statute. One is, where there is a liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law; there, unless the statute contains words which expressly or by necessary implica-

7 (1859) 6 C.B. (N.S.) 336, at p. 356.

8 [1952] S.C.R. 218, at pp. 231, 232.

tion exclude the common law remedy, the party suing has his election to pursue either that or the statutory remedy. The second class of cases is, where the statute gives the right to sue merely, but provides no particular form of remedy: there, the party can only proceed by action at common law. But there is a third class, *viz.*, where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it... The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to."

The learned Government Pleader has contended that the present case falls under the third category of cases mentioned by Willes J. in which a liability not existing at common law is created by a statute, which at the same time gives a special and particular remedy for enforcing it. He has urged that the Industrial Disputes Acts have created new rights in favour of workers and also provided machinery for the adjudication of those rights. Only the Tribunals constituted under these Acts can, therefore, decide the disputes in regard to those rights. If we had come to the conclusion that the Registrar can try industrial disputes and grant appropriate relief, we would have found it difficult to accept this argument, in view of the *non obstante* clause, the word "law" in which would also include the Industrial Disputes Acts.

It has been argued that as a dispute between a cooperative society and its employees touches the business of the society and, therefore, falls under s. 91 (1), every such dispute must first be referred to the Registrar and his decision obtained under sub-s. (2) of s. 91 and that it is only if the Registrar decides that it is not a dispute within s. 91, that any other Tribunal will have jurisdiction to decide it. Sub-section (2) of s. 91, however, only empowers the Registrar to determine a jurisdictional issue. It does not enlarge the jurisdiction conferred on the Registrar by sub-s. (1). If, therefore, the other provisions of the Act indicate that some industrial disputes do not come within the ambit of sub-s. (1) of s. 91, such matters need not be referred to the Registrar, either under sub-s. (1) or sub-s. (2). In any case, this provision does not furnish any assistance in deciding the question whether an industrial dispute arising out of a demand made by employees outside the terms of their employment can be tried by the Registrar.

An indication of the nature of disputes which the Registrar can determine is furnished by sub-s. (3) of s. 93 of the Act. This sub-section empowers the Registrar to stay the proceedings before him and to ask the parties to approach a civil Court by a regular suit for deciding the dispute between them. A party can be asked to go to a civil Court only if the dispute is one which can be decided by a civil Court. The matter referred to the Registrar must, therefore, be necessarily such in which a civil suit can lie, but for the special provision contained in s. 91. It is, therefore, clear that the dispute covered by s. 91 must be one which is capable of being tried by a civil Court. This conclusion also finds support in cl. (b) of sub-s. (1) of s. 163 which ousts the jurisdiction of the civil Court in respect of any dispute which is required to be referred to the Registrar. A civil Court cannot try an industrial dispute, in which a relief is claimed outside the terms of employment. It follows, therefore, that the Registrar cannot also try such a dispute.

The matter may be looked at from another point of view, that is, by considering the nature of relief which the Registrar can grant in a matter referred to him. There is no provision in the Co-operative Societies Act investing the Registrar with the power to decide the matter otherwise than in accordance with the ordinary civil rights of the parties. Under sub-s. (1) of s. 93, the Registrar is given the power to decide a dispute himself or refer it to a nominee or a board of nominees, if he finds that the matter referred to him is a dispute within the meaning of s. 91. Section 96 empowers the Registrar to make an award. Clause (m) in s. 146 states that it shall be an offence if any officer or a member of a society wilfully fails to comply with any decision, award or order passed under s. 93. It has, therefore, been contended that the power conferred on the Registrar to decide the dispute and to make an award necessarily includes the power to grant such relief as the circumstances of the case may require. In the absence of any provision in the Act conferring any such power on the Registrar, the Registrar cannot, however, decide the matter

referred to him except according to the ordinary law applicable to that matter. To any dispute between a society and its workmen, the Registrar must, therefore, apply the ordinary law of master and servant, which does not recognise a right in an employee to continue in service if his employer does not want him. Similarly, the Registrar cannot go outside the terms of employment and change or alter the conditions of service. He can enforce the contract between the parties but he cannot impose any new obligations. As he cannot grant such a relief, it follows that he cannot try an industrial dispute to which demands, not covered by the contract of employment, are made.

Our attention has been invited to some other provisions of the Co-operative Societies Act to which I will now refer. Clause (4) in s. 2 contains a definition of the word "bonus". Sub-section (2) of s. 65 states that a society may appropriate its profits to the payment of bonus on the basis of support received from members and persons who are not members to its business. Section 71 authorises a society to establish for its employees a provident fund. Sub-section (3) of s. 75 states that there shall be attached to every balance sheet laid before the society in the general meeting a report by its committee with respect to the amounts, if any, which it recommends, shall be paid by way of bonus. Clause (xxxi) in sub-s. (2) of s. 165 states that the State Government may make rules prescribing the conditions under which profits may be distributed as bonus among the members and non-members of the society. Clause (xl) authorises the making of the rules prescribing the qualifications for employees of the society and the conditions of service subject to which persons may be employed by societies. These provisions only show that a society may establish a provident fund or pay bonus to its employees and that rules may be made in regard to their conditions of service. They have no bearing on the question whether an industrial dispute can be decided by the Registrar. The preamble of the Act to which a reference was made during the course of the argument is also not of any assistance in deciding this question.

In *Farkhundali v. Potdar*, this Court was inclined to take the view that a claim for retrenchment compensation can be entertained by the Registrar. A contract between an employer and his employees can be modified by law. The Industrial Disputes Act, 1947, imposes a liability on an employer to pay retrenchment compensation to his employees. This is, therefore, one of the terms inserted by law in the contract of employment. A claim for retrenchment compensation can, therefore, also be said to be a claim under the contract of employment, and can consequently be tried by the Registrar. This authority cannot, therefore, be relied upon in support of the argument that the Registrar can decide every industrial dispute.

Sub-section (3) of s. 19 of the Industrial Disputes Act prescribes that the award of a Labour Court, Tribunal or National Tribunal, which has become enforceable, shall be binding on—

- (a) all parties to the industrial dispute;
- (b) all other parties summoned to appear in the proceedings as parties to the dispute, unless the Board, arbitrator, Labour Court, Tribunal or National Tribunal, as the case may be, records the opinion, that they were so summoned without proper cause;
- (c) where a party referred to in clause (a) or clause (b) is an employer, his heirs, successors or assigns in respect of the establishment to which the dispute relates;
- (d) where a party referred to in clause (a) or clause (b) is composed of workmen, all persons who were employed in the establishment or part of the establishment, as the case may be, to which the dispute relates on the date of the dispute and all persons who subsequently become employed in that establishment or part.

Under cl. (d) an award made under this Act, therefore, binds not only the parties to the dispute but all workmen employed in the establishment. Similar provisions are contained in ss. 22, 23 and 54 of the C. P. and Berar Industrial Disputes Settlement Act. Other Industrial Disputes Act also contain similar provisions. There is no similar provision in the Co-operative Societies Act. These provisions have been made evidently in order to prevent frequent industrial disputes, to encourage collective bargaining and to secure industrial peace. As there is no similar provision

in the Co-operative Societies Act, it is unlikely that the Legislature intended that the industrial disputes should be tried by the Registrar.

Under s. 10 of the Industrial Disputes Act, Government may refer an industrial dispute to an Industrial Tribunal for adjudication. Such a reference may be made in order to secure industrial peace, even when the contesting parties are unwilling to apply for such a reference. Under s. 91 of the Co-operative Societies Act, the Registrar, however, gets jurisdiction if he is approached by a party to the dispute. A difficulty may, therefore, arise if after Government have made a reference, one of the parties applies to the Registrar under s. 91. This difficulty will be eliminated in the view which we are inclined to take.

The Punjab and Kerala High Courts have taken the same view. In *Jullundur T. C. Society v. Punjab State*⁹, it was held that an industrial dispute between a co-operative society registered under the Punjab Co-operative Societies Act, and its workmen can be referred to an Industrial Tribunal set up under the Industrial Disputes Act. Section 50 (1) of the Punjab Co-operative Societies Act was substantially in the same terms as s. 54 (1) of the Bombay Act of 1925. It contained a proviso almost in the same terms as sub-s. (3) of s. 93 of the present Maharashtra Co-operative Societies Act. At page 35, the learned Judges observed that the dispute contemplated by s. 50 were not intended by the Legislature to cover all kinds of disputes and this provision was not meant to be all embracing as was contended by the learned counsel. It was further observed that a reading of sub-s. (1) of s. 50 clearly showed that though the words "touching the constitution or business of the society" were unqualified and extremely wide and comprehensive, still the Legislature did not intend to include in this expression "industrial disputes" for the adjudication of which the Parliament had enacted the Industrial Disputes Act. The learned Judges then referred to the proviso and observed (p. 36) :

"...Indeed this proviso supplies a key to the intention of the Legislature and it almost conclusively suggests that it is only such disputes as are capable of being tried by a regular suit which are covered by the provisions of S. 50.

It has not been suggested by the learned counsel for the petitioner (and it could not be suggested) that an industrial dispute as defined in the Industrial Disputes Act is capable of being tried by a regular suit."

In *Kerala State Handloom Weavers' Co-operative Society v. State of Kerala*¹⁰, the Kerala High Court has held that the provisions of s. 60 (1) of the Travancore-Cochin Co-operative Societies Act, 1951, did not preclude a reference to adjudication under s. 10 of the Industrial Disputes Act of the industrial disputes between a co-operative society and its workmen. At page 561 was observed :

"The question in cases like this is not whether the dispute referred for adjudication touches the business of a co-operative society; the question really is whether that dispute comes within the category of disputes covered by section 50 (1) of the Travancore-Cochin Co-operative Societies Act, 1951. The purpose of Chapter XIII of the Travancore-Cochin Co-operative Societies Act, 1951—the chapter in which section 60 (1) occurs—is not to resolve all controversies touching the business of co-operative societies under the provisions of that chapter; but resolve only such controversies as can be resolved in an ordinary Court of law. In other words, the arbitration provided by Chapter XIII is an alternative to the normal processes of the ordinary Courts and not to the extraordinary process of adjudication under the Industrial Disputes Act, 1947, which has been designed to deal with controversies which by their very nature are outside the purview of ordinary litigation."

The position, therefore, is that the dispute referred to the Registrar under sub-s. (1) of s. 91 must be such as a civil Court can take cognizance of and try. Like a civil Court, the Registrar cannot grant any relief outside the contract of employment. He cannot, therefore, try any matter in which a demand is made for a change in the conditions of service or for reinstatement of an employee whose services had been terminated. By and large, the Co-operative Societies Act and the Industrial Disputes Act provide for the settlement of different classes of disputes. Even though, therefore, the words "any dispute" in sub-s. (1) of s. 91 are very wide, they will have to be given a limited meaning, for the reasons which I have given

above. These words mean any dispute which the Registrar is competent to try and decide.

Our reply to the question referred to the Full Bench will, therefore, be in the negative. The matters may now be placed before a Division Bench for further orders.

Answer accordingly.

APPELLATE CIVIL.

Before the Hon'ble Mr. H. K. Chhainani, Chief Justice, and Mr. Justice Kotwal.

KAZI FAIZUDDIN v. KASHINATH DADA DHANGAR.*

Hyderabad Abolition of Inams and Cash Grants Act (Hyd. VIII of 1955), Sec. 1(2)—Land granted as inam for performance of Kazat—Whether such inam excluded under s. 1(2).

Land granted as inam for the performance of services of Kazat i.e. the functions or office of a Kazi, is not a grant to any institution or for the benefit of any institution and is, therefore, not excluded from the application of s. 1(2) of the Hyderabad Abolition of Inams and Cash Grants Act, 1954.

Shaikh Omar v. Mohammadji¹, referred to.

THE facts appear in the judgment.

G. H. Guttal, for the petitioner.

A. V. Savant for *R. W. Adik*, for opponent No. 1.

V. S. Deshpande, Assistant Government Pleader, for opponent No. 2.

CHHAINANI C. J. The petitioner was the holder of an inam land, which had been granted as inam for the performance of services of Kazat. An inquiry was held by the Deputy Collector as to whether this inam was abolished by the Hyderabad Abolition of Inam and Cash Grants Act, 1954. It was urged on behalf of the petitioner that the land was held in inam for the benefit of a religious institution, viz., Kazat, and that the Act did not apply to it, as sub-s. (2) of s. 1 of the Act excludes from its application inams held by or for the benefit of charitable and religious institutions. This contention was not accepted by the Deputy Collector. He was of the opinion that the Kazat is not religious institution but that it is a community service. He, therefore, held that the inam had been abolished and that the inam land vested in the State with effect from July 1, 1960. This order was confirmed in appeal by the State Government.

The Muntakhab shows that the inam had been granted for performing the services of "Kazat". According to Blatt's Urdu English Dictionary, "Kazat" means "the functions or office of a Kazi". Some of the functions of a Kazi are officiating at marriages, keeping marriage records, attesting divorce deeds, etc. It is not in dispute that these services were not required to be performed in any particular place or in any mosque, dargha or other institution. They could be performed at any place where they were required. The grant was not, therefore, to any institution or for the benefit of any institution. It was made to an individual as remuneration for certain services to be rendered to the community. The fact that the services to be performed were of a religious nature would not make it a grant for the benefit of a religious institution. The inam was, therefore, a community service inam, as held by the Deputy Collector.

This view is in accordance with that taken by us in *Shaikh Omar v. Mohammadji¹*.

The orders passed by the Deputy Collector and by the State Government are consequently correct.

Rule discharged. No order as to costs.

Rule discharged.

Decided, August 23, 1965. Special Civil
Application No. 1893 of 1964.

1 (1965) 67 Bom. L.R. 815.
1 (1965) 67 Bom. L.R. 815.

Before Mr. Justice Patel and Mr. Justice Bal.

MAHARASHTRA SUGAR MILLS LTD. v. ASHRU JAIWANT TRIBHUVAN.*

Workmen's Compensation Act (VIII of 1923), Secs. 2(m), 4, 5—Industrial Disputes Act (XIV of 1947), Sec. 2(rr)—Bonus whether included in "wages" in s. 2(m) of Act VIII of 1923.

Bonus forms part of "wages" as defined in s. 2(m) of the Workmen's Compensation Act, 1923.

Godavari Sugar Mills Ltd. v. Shakuntala,¹ explained.

Meenakshi Mills Ltd. v. Their Workmen,² *Skailes v. Blue Anchor Line Limited*,³ *Jivan Lal v. Ramtaji Bhaiji*⁴ and *Ohitru Tanti v. Tata Iron and Steel Co.*⁵, referred to.

THE facts in the First Appeal No. 297 of 1964 were that one Ashru (respondent) was employed by the Maharashtra Sugar Mills Ltd. (appellant) as a labourer. An accident occurred on September 25, 1962, in the course of the respondent's employment. As a result of this accident, the respondent suffered a simple fracture of the right and left calcaneum bones of the feet. This injury, even after recovery, made him practically unfit to do the work which he was accustomed to do. He, therefore, made an application for compensation under the Workmen's Compensation Act in respect of this injury. The Civil Surgeon who examined him on May 8, 1963, issued a certificate where he described the injuries as simple fractures of the right and left calcaneum, and the doctor gave evidence to suggest that the disability was a permanent partial disability only to the extent of 10 per cent. The Commissioner held that the disability was 90 per cent. and awarded compensation on that basis.

The facts in First Appeal No. 298 of 1964 were that one Sonawane (respondent) was employed by the appellant also as a labourer. The accident occurred on November 5, 1962. He suffered injuries in the course of the employment, as a result of which both the middle and index fingers of his left hand were rendered useless even though some stubs were left. The percentage of disablement was 18. The Commissioner ordered compensation accordingly.

In both these cases, in calculating the quantum of compensation, the Commissioner included in the wages of the workmen the bonus which was earned in the prior year and calculated the compensation in accordance with the figures arrived at by inclusion of the same. In the first case, on this basis, the Commissioner awarded a sum of Rs. 2,585 and in the second case he awarded a sum of Rs. 641.

The appellant appealed

B. A. Pandya, for the appellant.

D. S. Nargolkar, for the respondents.

PATEL J. [His Lordship after setting out the facts, proceeded.] The first contention that is raised by Mr. Pandya is that the learned Commissioner was in error when he included bonus in the wages while calculating the amount of compensation to be paid to the workmen. He relies upon *Seodutt Singh v. Ali Mahammad*¹ in support of his contention. In this case the learned Judge held that as bonus is not deferred wages and is a cash payment in addition to wages as ruled by our Supreme Court, it is not a part of the wage at all. He referred to the observations of the Supreme Court in *Muir Mills Co. v. Suti Mills Mazdoor Union*² and *Meenakshi Mills Ltd. v. Their Workmen*³, to which we will presently refer. It is sufficient at this stage to say that in these two cases the claim for bonus was made under the Industrial Disputes Act, 1947, which by its very definition in s. 2 excludes bonus from the definition of wages.

The question as to whether bonus should be included in the wages for this purpose depends essentially upon the definitions given in the Workmen's Compensation Act itself. Section 4 provides the manner of determining compensation payable to workmen in the stated cases. Clause (a) deals with compensation payable in case

*Decided, June 16, 1965. First Appeal No. 297 of 1964 and First Appeal No. 298 of 1964.

¹ [1947] 49 Bom. L.R. 791.

² [1958] A.I.R. S.C. 153.

³ [1911] 1 K.B. 360.

⁴ [1945] A.I.R. Bom. 119, s.o. 46 Bom. L.R. 795.

⁵ [1946] A.I.R. Pat. 437.

¹ (1958) 63 C.W.N. 207.

² [1955] A.I.R. S.C. 170.

³ [1958] A.I.R. S.C. 153.

of death and is fixed on the basis of monthly wages earned by a workman. Clause (b) relates to permanent total disablement by reason of the injury, and this also is based on the monthly wages and is to be determined in accordance with the Schedule given in the Act. Clause (c) deals with permanent partial disablement and prescribes a certain percentage in cases of certain specified injuries mentioned in the Schedule, as being the percentage of the loss of earning capacity caused by the disablement. The second part of that clause relates to injuries not specified in Schedule I and again refers to the loss of earning capacity permanently caused by the injury. It is no doubt true that monthly wages have been referred to in cls. (a) and (b), but there is no doubt that what was intended to be laid down was the fixing of compensation on the basis of the earning or the loss of the earning capacity of the workman. It seems that this was the reason why the word "wages" has been defined in the manner in which it has been done by s. 2, cl. (m). It says :

"wages" includes any privilege or benefit which is capable of being estimated in money, other than a travelling allowance or the value of any travelling concession or a contribution paid by the employer of a workmen towards any pension or provident fund or a sum paid to a workman to cover any special expenses entailed on him by the nature of his employment."

The first thing that must be noticed in connection with this definition is that it does not actually purport to limit the meaning of the word "wages". It merely seeks to include what ordinarily may not be included in the concept of wages and leaves the meaning at large. What is included, however, gives a clue to what was actually intended to be conveyed by the word "wages". It is true that, in its ordinary significance, the word "bonus" would merely mean a gratuitous payment made by the employer to his employee as a matter of pleasure. And, if that were so, it is possible to argue that the bonus that is paid to an employee by his employer ought not to be included in wages.

In industrial employment, however, bonus can no longer be regarded as merely a gratuitous payment by the employer. In this connection, we may refer to the decision of the Supreme Court in the case of *Meenakshi Mills Ltd. v. Their Workmen*, where the nature of bonus is considered by the Supreme Court. Mr. Justice Gajendragadkar speaking for the Court says (p. 156) :

"The true nature and character of the workmen's claim for bonus against their employers is now well settled. Bonus is not, as its etymological meaning would suggest, a mere matter of bounty gratuitously made by the employer to his employees; nor is it a matter of deferred wages.... the term 'bonus' is applied to a cash payment made in addition to wages. It generally represents the cash incentive given conditionally on certain standards of attendance and efficiency being attained."

The Court then lays down certain formulae for calculation of bonus payable by the employers. The observations in this case would suggest that the claim for bonus is a matter of right of the workman, and it is not dependent upon the willingness or otherwise of the employer to pay the same. If it is a matter of right, then we do not see why it is not a "benefit" within cl. (m) of s. 2 of the Workmen's Compensation Act. While construing these words, we must bear the purpose for enacting this provision in mind. Evidently, it was intended as a provision for workmen who suffered employment injuries and who would be rendered without any means of sustenance if they could not make the same earnings as before or fell completely out of employment. Even if it was a matter of some doubt, we would have been bound to construe the words liberally in order to advance the purpose of the Act. The word "benefit" must be construed to mean all such benefits as a workman is entitled to have as of right.

That "bonus" can be included in wages is clearly demonstrated by the definition of "wages" in cl. (rr) of s. 2 of the Industrial Disputes Act, 1947. It defines "wages" to mean all remuneration capable of being expressed in terms of money... and includes... but does not include (a) any bonus, (b) any contribution paid or payable by the employer to any pension or provident fund... (c) any gratuity payable on the termination of his service. In the scheme of that Act, the last three could not be included within the meaning of "wages". It only illustrates that the word "wages" can have a very wide significance and can include bonus.

Mr. Pandya relied particularly on the observations in *Meenakshi Mill's* case to the effect that "bonus" represents the cash incentive conditional on certain standards of attendance and efficiency being attained. Mr. Pandya argued that after all it is a contingent payment and, therefore, never a certainty and cannot, therefore, be regarded as a benefit available to the employee. He also contended that the payment of bonus must depend upon the profits made by the employer, and it is possible that when in a given year no profit is made there would be no bonus. It is said, therefore, that even if it can be regarded as "benefit" it yet cannot be said that it is capable of being estimated in money.

In this connection, we must observe that bonus is paid in most cases to-day on the collective efficiency of the employees as a whole, and it is not dependent upon the efficiency of any individual employee. Even apart from this, merely because, to some extent, it may depend upon the efficiency of a particular employee and may also depend upon the employer making some profit, it is impossible to sustain the contention that it is not a benefit which is capable of being estimated in money. Even the future earnings of an individual are difficult of being estimated exactly, because his being able to work continuously would be a matter of assumption. Section 5 of the Act has provided a method for the calculation of wages, and the principle would apply to the earning of bonus. It is well-known that in trades and industries over and above the fixed wages an employee or agent is paid commission on sales and the employer cannot suggest that the commission is not part of the earning of the employee or agent.

In this connection, Mr. Nargolkar referred us to a decision in *Skales v. Blue Anchor Line, Limited*⁴, where the word "remuneration" used in s. 13 of the Workmen's Compensation Act, 1906, came to be construed. While answering the contention similar to the present on behalf of the employee in that case, Cozens-Hardy, M. R., said (p. 364) :

"...I am unable to follow this. Nothing is more common than that remuneration should vary according as the gross takings or the net profits of a business do or do not exceed a certain figure."

Lord Justice Farwell observed (p. 375) :

"...Agreed additional remuneration contingent on a quick passage, or on a dividend exceed ing 5 per cent., would clearly fall within the word 'remuneration' in the Act, although the quickness or the increased dividend depended on luck and were independent of the employee's own conduct."

Mr. Pandya relied on a decision of this Court in *Godavari Sugar Mills, Ltd. v. Shakuntala*⁵, where he says the Court held that bonus would not be included within "wages". The question that fell for consideration in that case was whether dearness allowance formed part of wages for the purpose of computing compensation. The Court observed (p. 792) :

"...But, in our opinion, the dearness allowance must clearly be included. It is in no sense a bonus, but it is something which attaches continuously to the wages in order to enhance it, so as to be on a more comparative basis with the cost of living."

The case was decided in 1947, and it is hardly likely that the word 'bonus' has been used by the learned Judges in the technical sense which it has now acquired. In any event, that question was not before the learned Judges, and, therefore, it cannot be treated as a decision on the point. On the other hand, in the decisions in *Jivan Lal v. Ramtaji Bhairji*⁶ and *Chitru Tanti v. Tata Iron and Steel Co.*⁷, the learned Judges have taken the view that bonus paid to an employee must be regarded as wages. It is true that in both these cases, there was an agreement to pay bonus, but inasmuch as the bonus is payable whether or not there is an agreement, its existence would not make any difference in principle.

It was also argued that when the Act of 1923 was framed, it is hardly likely—having regard to the nature of the then concept of bonus—to include bonus within the word "wages", and the Court should not now construe the word in such a way

4 [1911] 1 K.B. 360.

5 (1947) 49 Bom. L.R. 791.

6 [1945] A.I.R. Bom. 119, s.c. 46 Bom.

L.R. 795.

7 [1946] A.I.R. Pat. 437.

as to include bonus. In the first place, even assuming that the concept of bonus was what Mr. Pandya contends it was under the old civil law, we are bound to give a reasonable meaning to the words used in the statute and include within wages every benefit which is available to the workman, to which he is entitled as a matter of right, by reason of his employment. Having regard to the decision of the Supreme Court, we cannot but say that bonus must form part of the wages as defined by the Act. We are also not impressed by the argument that if we include bonus in the wages payable to the workman, it may be that some workmen may fall outside the category of workmen entitled to compensation in the case of accidents and deaths, because the remuneration would be more than the defined limits. Some inconvenience that may be caused in a rare set of circumstances cannot deter us from giving the section its proper meaning, and the only meaning which is capable of being attached to it. In our view, therefore, the learned Commissioner was right in including bonus while computing the compensation payable to the workmen.

The second point arises only in First Appeal No. 297 of 1964. Mr. Pandya contended that the Civil Surgeon had certified the disability as 10 per cent., and in his evidence in Court he explained to mean 10 per cent., for each limb, which means the disability was 20 per cent., while the learned Commissioner held that the disability was 90 per cent. It is argued that he was not justified in taking this view. It is not necessary to consider this contention in details. In the case of *Ahmed Abdul v. H. K. Sehgal*⁸, sitting singly, I had occasion to deal with a similar question. In that case authorities were considered and the following propositions were formulated by me (p. 450) :

"The words 'incapacitates a workman for all work' in s.2(1) of the Workmen's Compensation Act, 1923, do not mean any and every work which he may do but means such work as is reasonably capable of being sold in the market. The words do not mean 'incapacitate to work' and have no reference to physical disability.

...The certificate of a medical expert can only say what the injury is, its effect temporary or total on the limb and to an extent the physical incapacity of the man. It is, however, for the Court to find having regard to the evidence before it whether the workman has suffered partial or total disablement. The Court must take into account the nature of the injury, the nature of the work which the workman was capable of undertaking and its availability to him."

Having regard to the principles involved in the determination of the relevant questions under the Act, we have no doubt that the learned Commissioner was justified in taking into account the nature of the injury suffered by the workman, the nature of the work which he was doing before his injury and the work which he was capable of doing after the injury, and then in determining his disablement at 90 per cent.

In the result, both the appeals fail and are dismissed with costs.

Appeals dismissed.

ORIGINAL CIVIL

Before Mr. Justice Patel and Mr. Justice Bal.

RE : KHUSHALCHAND B. DAGA. *

Presidency-Towns Insolvency Act (III of 1909), Sec. 78 ; Sch. II Rule 25—Whether Official Assignee in inquiry before him entitled to receive evidence on oath—Practice—Creditors or debtors whether should be allowed at such inquiry to cross-examine witness of proving creditors—Construction of s. 78.

Under rule 25 of the rules contained in the Second Schedule to the Presidency-towns Insolvency Act, 1909, the Official Assignee is entitled to hold an inquiry and for that purpose receive evidence on oath to decide whether the debt is genuine and owing to the creditor.

The Official Assignee ought not to allow the creditors or the debtor—the latter except under special circumstances—to cross-examine the witnesses of the proving creditor and

⁸ (1964) 66 Bom. L.R. 450.

vency No. 65 of 1960.

*Decided, September 9, 1965. O.C.J. Insol.

THE SIGNIFICANCE OF ROBES

AN Australian professor of jurisprudence has recently suggested that judges should discard what he calls their 'eighteenth century fancy dress', suggesting that 'if they must wear a uniform' it should be one (here come the inevitable ritual phrase) 'appropriate to this day and age'. One would have thought that a writer who dresses up his opinions in the uniform of poor, tired, worn-out, clichés or catch-phrases would have appreciated the advantages of not eliminating from the legal world the settled symbols of legal continuity. The judges' robes are not in fact eighteenth century, but a harmonious hybrid produced by many periods. The wig dates from the age of Lord Mansfield and Lord Hardwicke (which is no particular disgrace), but a study of judicial portraits from Tudor days to our own times reveals a steady process of adaptation and modification. In his quaint non-eighteenth century phraseology the professor says 'that the psychological impact of the change would propel us to divest ourselves of the eighteenth century mentality'. Actually, precious little of anything that Dr. Johnson would recognise as an eighteenth century mentality has survived, in our law, the tidal wave of the Judicature Acts and of twentieth century legislation, but the English law has preserved a sense of continuity which is an essential quality of the development of all living things. It is of that timeless continuity that the robes of the judges speak, for human beings express themselves not only in words, written or spoken, and a man can represent an idea or a philosophy just as much in his hat as in his handwriting. If his clothes, if his house, if his furniture, do not express his basic attitudes to ultimate reality, they are in the essential sense insignificant; they signify nothing.

Even a person obsessed with the idea of obliterating our entire law and starting afresh would be obliged to admit the practical convenience of robes, if only as marks of identification. In a railway station it is important for the traveller to be able to tell at a glance a porter from a ticket collector or a guard or a station master and he will do so the more readily if the dress of each somehow signifies his function. So in a court of justice it is (to put the thing at its lowest) convenient to be able to tell the judges and barristers and ushers from the milling mass of witnesses, clerks, parties, stenographers and accused persons, and since part of the function of judges and barristers is to assert themselves in an atmosphere of conflict and controversy, it is practical that what they wear should symbolise and enhance their authority. Robes, and in particular the wig and gown, fulfil the very practical function of asserting the basic professional equality of barristers *inter se* so that the impecunious beginner is not put out of countenance by a Savile Row suit flaunted by some fashionable leader.

Those who would strip the judges of their robes also ignore the universal human instinct for dressing up, for making declarations of independence, for communicating ideas in terms of personal adornment. The congenital practicability of women leads them to do it the whole time; but men feel the same need, even when they do not admit it. Freemasonry appeals to the ritualist latent even in the most prosaic looking people. Teenage fashions are a roar of revolt against the dreary monotony of office and factory life. The melodramatic secrecy of the Ku Klux Klan clothes itself in a tradition of hooded terror. The kilt of the highlander, the white robes at a Welsh Eisteddfod, just as much as the vestments of the priests, are statements in a universal language, and life would be more expressive and more significant and more interesting if the members of more trades or callings used it fluently and naturally, so that the butcher, the baker and the candlestick-maker proudly proclaimed themselves at a glance for what they were, instead of accepting the anonymity of an age of mass-production. The Bench and Bar set an excellent example to their contemporaries.

—S.J. (RICHARD ROE).

WHAT PRICE THE JUDGE?

OUR policemen may be wonderful, but our judges are valuable. At least, one has recently achieved a price tag of £300,000. It has been reported that

Mr. Justice Scarman has been insured for this sum lest he fail to give his reserved judgment in *In re Fuld, deceased*. It is a sobering reflection that no one else involved in a case holds such a vital position that, should they be unable to continue, the trial would have to be abandoned. Certainly the lawyers do not, and probably not the litigants either. With so much at stake perhaps one should be able to influence which judge should conduct a case. An addition to the summons for directions could allow the parties to argue that the case was a long one, justifying a judge who was a good insurance risk. The younger the judge, the cheaper to insure. Indeed, it is now relevant that women are less expensive to insure than men, having a longer expectation of life. Not that that is all that would be involved in choosing a judge. Given the choice, the experienced litigator would hesitate before selecting a runner without much of an entry in the form book. Perhaps the present system is better. It is questionable whether the litigants have an insurable interest in the judge's life. The person taking out an insurance policy must be so circumstanced as to have a benefit from the existence of the person concerned, a mere hope of profit is not insurable: *Lucena v. Craufurd* (1806), 3 Bos. & P. 75. If the insuring party were sure of the result, why insure? On the other hand, should the insurance have been void *ab initio* perhaps the premium is repayable on demand.—*S. J.*

HEARING IN CAMERA

AN unusual position was created by an application for a hearing in camera of a case in which a mother sought declarations of legitimacy in regard to her two children: *B. v. Attorney-General* (*The Times*, 16th June). Indeed, the mother took the view that public discussion of the evidence which would be given in support of the petition would be so harmful to the interests of the children that she did not think it right to persevere unless the hearing was held in private. The court was informed that the mother might be prepared to revise that view if the court invited the public to leave, and the press to abstain from publishing any details which might identify the parties. Wrangham J. took the view that the litigants would be deterred from proceeding if the hearing were not in private and proceeded to deal with the question whether that was in law a sufficient ground for granting the application.

His lordship recalled that in *Scott v. Scott* (109 L. T. 1; (1913) A.C. 417) Lord Loreburn appeared to be of the opinion that, where there was a real danger of supposing that a litigant would be deterred from pursuing his claim, that would be just cause for holding the trial in private. Lord Shaw, on the other hand, had clearly taken the view that that would not be a sufficient ground for making an order for a trial in camera, and the other three members of the House, Lord Haldane L.C. and Lords Halsbury and Atkinson, had expressed no clear opinion on this point. Those speeches had been considered in *In re C. D.'s Petition* (1927, 138 L. T. 208) by Lord Merrivale, who had decided that there was no power to make an order for trial in camera. That decision had stood unaltered for many years and Wrangham J. followed it. The fact that courts which dealt in an administrative or parental capacity with infants usually conducted their proceedings in private did not give infant litigants in other cases the right to have their suits tried in private, and the mother's application was refused.—*L.T.*

REVIEWS.

Direct Tax Laws. Volume I. By S. E. DASTUR, B.COM. (HONS.), B.A., LL.B., Advocate, H. M. DAMANIA, M.COM., F.C.A. and J. E. DASTUR, B.COM., B.A., LL.B., A.S.A.A., F.C.A. BOMBAY: N. M. Tripathi Private Ltd., Princess Street. Second Edition (1965-66). Roy. 8vo. Pages 530. Rs. 30 (for both volumes).

SINCE the enactment of the Income-tax Act, 1961, the Act has been amended ten times and the authors of the present work have with commendable zeal kept pace with the various statutory changes except the last one which

was on the legislative anvil when this book was in press. This edition which consists of two volumes deals with some three hundred changes effected in the direct taxation law since the last edition was published. This volume contains the up-to-date text of the Income-tax Act, 1961, with detailed commentaries on the changes made in the Act by the Direct Taxes (Amendment) Act, 1964, the Income-tax (Amendment) Act, 1965 and the Finance Act, 1965. A section of the book deals with s. 2 and Schedules 1 and 2 of the Finance Act, 1965, which provide for the rules of income-tax, the rates of deduction of tax at source for the assessment year 1965-66 and the rates of annuity deposits. Though this volume is self-contained, with the publication of the second volume which will deal with the remaining direct tax Acts, both these will give an exhaustive survey of the direct tax laws in force in the assessment year 1965-66. The process of patch-work legislation which made it necessary to overhaul the Act of 1922 has started once again with the new Act and as a result the law of income-tax has, as before, become a bugbear to the layman and a source of endless hair-splitting to the income-tax practitioner. The authors in their commentary have laid bare with brevity and clarity the implications of the new amendments to the Act and, what is of more importance to the tax payer, they have given actual tax calculations involved in arriving at the rates of tax and annuity deposit.

Digest of Reported and Unreported Decisions on Revenue Laws, 1960-64. Compiled by H. B. VAISHNAV. AHMEDABAD: Gujarat Law House, Bhadra. Demi 8vo. Pages 237. Price Rs. 11.

THIS digest contains the points decided in some thousand reported and unreported decisions of the Gujarat High Court and the Gujarat Revenue Tribunal on laws administered by the Tribunal. The digest which is prepared by a member of the Gujarat Revenue Tribunal bears the mark of an experienced hand. Decisions under the main Acts are digested in chronological order of the sections, succinctly and lucidly. An index of cases is a *sine qua non* of a good digest and the compiler would have done well to include one. Some important decisions of the Rajkot Bench of the High Court of the quondam Bombay State dealing with the Saurashtra Acts could have found place to make the digest more useful to the profession. However, this digest will come in very handy to practitioners and especially to officers of the Revenue Department.

A Dealer's book on Central and Maharashtra Sales Tax Laws. By P. L. CHOUDHARY, B.COM., LL.B., F.C.A. BOMBAY-2: Taxation Information Bureau, 187, Dadyseth Agiary Lane. Roy. 8vo. Pages 245. Price Rs. 8.

THIS book as its title indicates is a popular exposition of the provisions of the Bombay Sales Tax Act, 1959 and the Central Sales Tax Act, 1956. It covers the entire ground in a rapid survey under such heads as incidence and levy of tax, registration, returns and assessments and offences and penalties. It contains some useful appendices which contain notifications issued under s. 41 of the State Act brought down to July 1, 1965; important public notices, press notes, circulars and orders issued by the Sales Tax authorities and important notifications issued under the Central Act. Included at the end are "a few golden advice for the dealers," one of which runs: "Love thy tax officer but don't grease his palms"—which might well prove irksome!

Law and the Insurance Contract. By M. N. SRINIVASA, B.SC. (HONS.), LL.B. Advocate. CALCUTTA: Eastern Law House Private Ltd., 54 Ganesh Chander Avenue. First edition, 1965. Demi 8vo. Pages 213. Price Rs. 7.50.

THIS is an interesting study of life insurance business in India considered in all its ramifications. In his exposition the author has referred to a number of

Indian, English and American decisions bearing on the subject. He has stressed the need for the enactment of a comprehensive statute governing the entire field of life insurance contract and he has indicated the lines on which this could be effected by referring to the law and practice prevailing in England and America. This is a lucid and concise presentation of a subject of ever growing importance to the community and could hardly be bettered as an overall view of the different aspects of the life insurance contract.

Law relating to Women in India. By MISS JYOTSNA TRIBHUVAN, B.A., LL.B., Advocate. Published by the Author at Dr. Ambedkar Road, AHMEDNAGAR. Pages 112. Price Rs. 6.

THIS appears to be the first publication of its kind which in a nut-shell deals with legislation affecting women in India. The subject is considered under different heads, such as, law of marriage, economic rights of women, immoral traffic in women and girls, dowry and labour legislation affecting women. In the course of the discussion the author has given relevant extracts from Indian and English decisions and has referred to statutory law bearing on the subject. The exposition is lucid and precise and may be recommended as an intelligent woman's guide to her legal rights.

Journal of the International Commission of Jurists. Summer 1965. Vol. VI, No. 1. Edited by Sean Macbride. GENEVA (SWITZERLAND): International Commission of Jurists. 2 Quai Du Cheval-Blanc. Roy 8vo. Pages 187. Price \$ 1.00.

THIS latest issue of the Journal contains some interesting articles including one on "Outline of Modern Soviet Criminal Law" by Professor Tomaso Napolitano of the Eastern University Institute at Naples and another on "Recent retrospective legislation in Ceylon" by C. F. Amerasinghe, a Lecturer in Law at the University of Ceylon, in which the writer has examined legislation which is predominantly violative of the essential principle of the Rule of Law against retrospective legislation, in that it purports to impose burdens on individuals retrospectively or grants benefit to individuals at the expense of other individuals retrospectively. This Journal which maintains a high standard of scholarship continues to eminently fulfil the object of the Commission which is "to foster understanding of and respect for the Rule of Law."

A Critical Study of the Law of Prevention of Food Adulteration in India. Part I. By BIBHOR KUMAR LAHIRI, Senior Advocate, Supreme Court of India. CALCUTTA-1: Published by the Author at 6, Old Post Office Street, Roy. 8vo. Pages 22. Price Rs. 2.

THIS brochure contains the bare text of the Prevention of Food Adulteration Act, 1954, and an analysis of the Rules made thereunder. Annotations on the provisions of the Act are promised in future parts. In the meantime the author in his preface states that he will be able to show "some aspects of the said Act calling for amendment in conformity with the Constitution of India, and fundamental principles of Criminal justice."

Illegality of the Security Council's Actions & Resolutions on Kashmir. By JUSTICE V. B. RAJU, High Court Judge, Ahmedabad. AHMEDABAD-1: Bharat Sevak Samaj (Gujarat), Pankor Naka. Pages 32. Price One Rupee.

IN the present impasse in which the U.N.O. finds itself, His Lordship's incursions into the realms of International Law and politics can be of academic interest only.

convert the process into a long drawn out proceeding. He must act as a "man of business" and consider the matter from a practical point of view.

Yokohama Specie Bank Ltd. v. Ourlender & Co.,¹ agreed with.

Sooniram Ramniranjandass v. Alagu Nachiyar Koil,² explained.

Van Laun In re, *Chatterton*, Ex parte,³ *Govind Prasad v. Pawankumar*,⁴ *A Debtor v. Dodwell*⁵ and *Re. A Debtor*,⁶ referred to.

Section 78 of the Presidency-towns Insolvency Act, 1909, must be read as enabling the Official Assignee to administer oath for the purpose of (1) affidavits for the proof of debts, (2) affidavits for petitions and (3) affidavits for legal proceedings.

THE facts appear in the judgment.

F. S. Nariman, for the insolvent.

H. M. Seervai, Advocate-General, with *Atul Setalvad*, for the Punjab National Bank Ltd.

PATEL J. The matter has been referred to a Division Bench as it involves an important question of the practice and procedure followed in the Insolvency Court.

The facts are few and may shortly be stated. On the petition by B. R. Herman and Mohatta (India) Private Ltd., the applicant before us, Khushalchand B. Daga, was adjudicated insolvent on July 6, 1960. On September 2, 1960, the insolvent took out a notice of motion for annulment of the adjudication. Apparently, the notice of motion is yet not disposed of but, the insolvency proceedings were stayed by the Court. The Punjab National Bank Ltd., who is the opponent before us, made a claim against the insolvent in the sum of Rs. 58,56,000 on the basis of guarantee furnished by him against a loan to Model Mills. The bank also accepted that it held security of debentures of the Model Mills of the face value of Rs. 22,25,000. Before the applicant was adjudicated insolvent, on October 4, 1958, a petition for winding up of the Model Mills was filed. On July 7, 1959, the Government appointed the Authorised Controller by a notification and on July 28, 1962, the Company Court sanctioned a Scheme framed by him. This Scheme was supported by the Bank. The Bank it seems agreed to accept the debt due to it after deducting the value of the debentures which it held, that is Rs. 38,31,000, to be paid by 25 per cent. in cash and the balance of 75 per cent. in five yearly instalments secured by fresh debentures. On March 27, 1962, the bank filed proof of the present claim and desired that the same should be admitted by the Official Assignee, so that its claim against the insolvent may not be barred by time. The Insolvency Court permitted the same, and an appeal against its judgment has failed. Consequent upon this order, the Official Assignee started investigation of the claim. For this purpose, he examined Kidar Nath Suri, Manager of the Bank, after issuing a notice to the insolvent. After the proceedings had gone on for some time, a preliminary objection was raised on behalf of the insolvent that the Official Assignee had no jurisdiction to investigate the claim as tribunal by recording evidence of witnesses, by relying on the decision in *Sooniram Ramniranjandass v. Alagu Nachiyar Koil*.¹ The Official Assignee ruled otherwise and proposed to proceed with the investigation.

The insolvent took out a notice of motion questioning the decision of the Official Assignee which came up for hearing before our brother Tarkunde J. on March 16, 1965, and he directed that as the matter involved an important question it should be heard by a Division Bench. It has now accordingly been placed before us.

The answer to the question in issue depends upon the relevant provisions of the Presidency-towns Insolvency Act, 1909. In the Act, there is a clear distinction between the Insolvency Court and the Official Assignee, the Court, being this High Court. Section 6 enables the Chief Justice to delegate some of the functions which the Court is entitled to perform to a subordinate officer of the

1 [1926] A.I.R. Cal. 898.

2 (1938) 40 Bom. L.R. 1236, P.C.

3 [1907] 2 K.B. 23.

4 (1943) 46 Bom. L.R. 306, P.C.

B.L.R.—57.

5 [1949] 1 All E.R. 510.

6 [1949] 1 All E.R. 652.

1 (1938) 40 Bom. L.R. 1236, P.C.

Court, and the decision or order of such officer is deemed to be that of the Court. Section 8 deals with review and appeals. Sub-section (2) provides for an appeal against the order of a subordinate officer who is delegated the functions of the Court, to the Insolvency Judge and a further appeal, by his leave, to a Bench; and cl. (b) provides for an appeal against the decision of the Insolvency Judge without his leave. Section 7 vests in the Court the fullest power to determine all questions, whether of priority or otherwise, whether of law or facts, for the purpose of doing full justice or making complete distribution of property in any case. With the limitation, we are not concerned. Consistently with the purpose of the Insolvency Act, immediately on the order of adjudication, it vests the property of the insolvent in the Official Assignee by s. 17—but it vests in him for the sole purpose of its becoming divisible amongst his creditors.

The Official Assignee is appointed by the State Government under s. 77, and is a corporation sole and has perpetual succession by reason of s. 77-A. He has well defined duties to perform under the Act. He has to realise all property of the insolvent capable of manual delivery and of documents and books of account, etc., belonging to the insolvent, and manage the same until distributed. Section 69 requires him to declare and distribute dividends amongst creditors who have proved their debts with all convenient speed. Section 48 provides that the method of proving debts would be as laid down in the Second Schedule. The Second Schedule consists of 27 Rules. The usual mode of proof of debt is by lodging with the Official Assignee an affidavit verifying the debt. Rule 4 enables the Official Assignee at any time to call for production of vouchers, and Rule 25 requires him to examine every proof and grounds of the debt and in writing admit or reject in whole or in part or require further evidence in support of it. If he rejects a proof, he is required to state in writing the grounds for his rejection. Section 78 of the Act provides that the Official Assignee may, for the purpose of affidavits, verifying proofs, petition or other proceedings under this Act, administer oaths. Presumably, the practice of investigating the claims of creditors, by even requiring them in some cases to take oath and subject themselves to cross-examination and produce witnesses is based on the wording of Rule 25 of the Second Schedule and s. 78.

In *Van Laun In re. Chatterton, Ex parte*³, the Court of appeal while considering the rejection by the trustee in bankruptcy of the proof of debt of a solicitor who refused to produce certain documents called for by the trustee, Cozens-Hardy, M.R. says: (p. 30).

"All that we now decide is, that the trustee is entitled to say, 'I will not admit your proof until you have given me reasonable means of satisfying myself whether the debt in respect of which you are proving is to any and what extent justifiable and reasonable.'"

He then observes that no estoppel available against the insolvent operated against the assignee, and says (p. 30):

"No judgment recovered against the bankrupt, no covenant given by or account stated with him, can deprive the trustee of this right."

Buckley L. J. puts it this way (p. 31):

"... [He] is entitled to say 'It is my business to see that' those who seek to rank against this estate are persons who are really creditors of that estate."

In the case of a judgment, he observed (p. 31):

"... It is not necessary to show fraud or collusion. It is sufficient, ... to show miscarriage of justice—that is to say, that for some good reason there ought not to have been a judgment... and that that was also true of an account stated or of a covenant."

This seems to be settled law in England. There are decisions in India which have followed the same principles, and for sound reasons. The Official Assignee should have the right of scrutinizing the claims, so that collusive claims or untenable claims may be avoided in the interest of fair distribution of the assets among the creditors. It is clear, therefore, that the Official Assignee, in order to decide whether or not the proof of debt affirmed before him as owing to the creditor should be accepted or rejected, should, from the nature of things, be in a position to

investigate the matter properly, and unless there is anything in the Act itself preventing him from taking evidence on oath in case of necessity, the right cannot be denied.

The first ground of attack on this practice is that the Official Assignee is not a judicial officer exercising judicial functions and, therefore, not entitled to embark upon such an enquiry. True that he is a Court neither by the definition section which defines "court" nor by delegation of the powers of the Court under s. 6. But merely because he performs, in some measure, administrative functions, it would not be proper to say that he is not entitled to hold an inquiry. It is true that when the Insolvency Act speaks of proving and proof of debts under s. 48, the words are not used as they are understood in the law of evidence. They have a technical meaning, as held in *Govind Prasad v. Pawankumar*,³ which was a case under the Provincial Insolvency Act. The creditor is said to have proved his debt when he lodges a proof as prescribed by the Act. Whether to accept the same or not is for the Official Assignee to consider, and for that purpose he must make a proper inquiry.

Another ground urged is that under Rule 25 of the Second Schedule, the Official Assignee is not required to give reasons if he accepts the proof of the debt but has to do so only if he rejects it. This can hardly be regarded as an indication of the fact that he is not entitled to make a proper inquiry into the debt, if necessary even by examining witnesses. His position is peculiar. He represents the estate of the insolvent who is expected to assist him in the realisation of the property. Where he accepts the proof the creditor proving it cannot be aggrieved, and any other creditor who may think that the debt has been improperly admitted is entitled under r. 27 to apply to the Court to expunge or reduce the proof. Even the insolvent would not probably be able to challenge the acceptance of the debt except under special circumstances, in view of the fact that he is given the limited power of applying to have the same expunged or reduced if there is a composition or scheme under the Act. See *A debtor v. Dodwell*⁴ and *Re. A Debtor*.⁵ See also Williams on Bankruptcy, 17th edn., p. 574. It may be that for these reasons he is not required to give reasons, if he accepts proof of the debt.

It is argued that the scope of an appeal against his decision under s. 86 is much different from the scope of an appeal under s. 8 from the decision of an officer with delegated powers of the Court and, therefore, we should deny him the power to take evidence. That seems hardly to be a ground for so doing, even assuming that there is a difference in the nature of the two appeals. Indeed, there is this difference that the decision of the Insolvency Judge on an appeal against the decision of the officer exercising delegated powers of the Court is subject to appeal only if he grants leave, while in the case of a judgment rendered by the Insolvency Judge in an appeal against the decision of the Official Assignee, an appeal would lie under cl. (b) of s. 8 (2). An argument was made that an appeal under s. 86 would be almost an original proceeding where everything will have to be gone into over again and there would be duplication of the process of the Court. It is said that there may be large number of creditors who would want to take part in the proceedings and the matter would assume undue proportions resulting in waste of time, and the same process may have to be gone through before the Court. This contention overlooks the fact that the creditors are represented by the Official Assignee, and that the matter is between himself and the proving creditors. They are not entitled to cross-examine the proving creditors or their witnesses, though they may instruct the Official Assignee. Interests of other creditors are safeguarded by r. 27 which enables any creditor disputing the debt to apply to the Court to expunge the same. Similarly, the debtor may help the Official Assignee by placing relevant matters before him to enable him to ask relevant questions to the proving creditor and decide whether he should accept or reject the proof. In the appeal, the Court would consider all the circumstances of the case and may or may not permit evidence to be taken before it. It must be remembered that, by the Act itself, no specific procedure has been laid down for determining an appeal under

3 (1943) 46 Bom. L.R. 306, P.C.

5 [1949] 1 All E.R. 652.

4 [1949] 1 All E.R. 510.

s. 86 of the Act, and the Judge will have, therefore, fullest jurisdiction to consider whether or not the party in default before the Official Assignee should be allowed to produce further evidence before him.

Another ground urged is that r. 116 framed under s. 112 of the Act prescribes a form of proof of debts. Under r. 119, the Official Assignee is required, within seventy days after receiving a proof in writing of the debt, either to admit or reject it wholly or in part or require further evidence in support thereof. No doubt, the whole procedure prescribed by the Insolvency Act and the Rules has the laudable purpose of administering the estate as quickly and effectively as possible. But this object has seldom been achieved. Merely because it is intended that the administration should be completed early, the power in the Official Assignee, if he has any, to take evidence, cannot be denied.

Mr. Advocate-General pressed into service s. 78 of the Act. He says that the section should be read as enabling the Official Assignee to administer oath for the purpose of (1) affidavits for proof of debts, (2) petitions or (3) legal proceedings, and he says the rule of *ejusdem generis* should be applied. Mr. Nariman asks us to construe it grammatically and read it as enabling him to administer oath for the purpose of (1) affidavits for the proof of debts, (2) affidavits for petitions, (3) affidavits for legal proceedings. We think it is more reasonable to construe the section in the latter way, as the first construction must involve the assumption that there are petitions or legal proceedings before the Official Assignee which he can try or hear, for which there is no justification.

Strong reliance has been placed on the decision of the Privy Council in *Sooniram Ramniranjandass v. Alagu Nachiyar Koil*. The facts in that case are that a firm of bankers and money-lenders was adjudicated insolvent. In the Schedule of creditors, they showed a Hindu temple as unsecured creditor. The debt was entered in the books of the firm as credit to the temple by way of charity held as deposit. Interest on that sum was computed as in the case of an ordinary customer. On behalf of the temple, a claim was made under s. 52 to recover the full deposit of the amount from the Official Assignee on the ground that the amount was held by the firm as a custodian of an endowment or a trustee. Evidence before the Official Assignee consisted of the books of the insolvent and some oral evidence. The Official Assignee upheld the claim of the temple. Against the order of the Official Assignee an appeal was made under s. 86, which was heard by Braund J. as Insolvency Judge who rejected the claim of the temple. In further appeal, which was heard by the Chief Justice and Dunkley J., there was a difference of opinion, and it was heard by another Judge who agreed with the Chief Justice. The appeal was allowed and the decision of the Official Assignee was restored. The Privy Council considered the matter from two points of view (1) as if the matter were under s. 52 of the Act and (2) as if it were one of proof of debts under r. 25 of the Schedule. We are not concerned with the first aspect of the matter. Referring to the second aspect, Sir George Rankin says (p. 1238) :

"...Even if the matter could be regarded as a mere question of admitting or rejecting a proof, when the Official Assignee acts under r. 25 of the second schedule, it seems more reasonable and more in accordance with a sound interpretation of s. 86 and with English practice under statutory provisions couched in the same terms that the 'appeal' from the 'act or decision' of the Official Assignee to the Judge should be by motion and that the oral evidence necessary should be taken before the Insolvency Judge himself."

Strong reliance has been placed by Mr. Nariman on this passage in support of his contention. It is wrong, however, to read the passage as laying down that the Official Assignee is not entitled to make such inquiry which he deems necessary for discharging his duty and that for that purpose he is not entitled to take evidence. The objection is to his determining the matter as if he were a tribunal. If their Lordships had intended to lay down anything like this, they would have straightway proceeded to overrule all the evidence received by the Official Assignee and have the matter re-heard by the Insolvency Judge in the first instance. It is clear, however, as pointed out by their Lordships in the later portion of the same paragraph, that the case cannot be concluded by regarding the Official Assignee as a

trial Judge whose estimate of the witnesses' evidence must, *prima facie*, be accepted. Subject to this caution, there can be no reason to deny the power claimed by the Official Assignee to take evidence.

Reliance is also placed on some observations in *Yokohama Specie Bank Ltd. v. Curlender & Co.*,⁶ on the question of proof. The judgment is of Rankin J., as he then was. The case arose out of an application for commission by the appellant-Company, the proving creditor, for examining witnesses in Japan. We have carefully read the observations of the learned Judge but we do not find anything in it to suggest that the Official Assignee is not entitled, if he deems it necessary, to take evidence.

If, as is contended on behalf of the insolvent, that the Official Assignee is merely entitled to call for documents and vouchers, r. 4 of the Schedule would as well have served the purpose. Having regard to r. 25 and the duty imposed upon him to decide whether the debt is genuine and owing to the creditor, we hold that he is entitled to hold an inquiry and for that purpose receive evidence on oath. We, however, agree, with respect, with the observations of Rankin J. in *Yokohama Specie Bank Ltd. v. Curlender & Co.*, that he ought not to allow the creditor, or the debtor—the latter except under special circumstances—to cross-examine the witnesses of the proving creditor and convert the process into a long drawn out proceeding. He must act as a "man of business" and consider the matter from a practical point of view. The object of the special procedure for proof of debts in the Insolvency Acts is to ensure that such matters are quickly disposed of and no needless harassment is caused to the proving creditors. We do not see why, in the present case, there should have been such a long hearing before the Official Assignee. The Secretary or Manager of the Bank should have been required to make relevant statement in his affidavit of proof and produce verified documents and statement of accounts. The Official Assignee could then have questioned the insolvent in respect of the same and if he thought clarification was necessary on any matter from the Bank he could have called for such additional material as he deemed necessary or called the manager of the Bank and examined him in the light of the insolvent's statements, and then made up his mind whether to accept or reject the proof. The long meetings and pointless examinations and cross-examinations were hardly necessary.

The Official Assignee will act in accordance with our judgment.

Subject to the above, the notice will stand discharged with costs. Costs to be tacked on to the security. We quantify the cost before us and Mr. Justice Tarkunde at Rs. 500.

Solicitors for the insolvent : *Vakil Dodabhoy & Co.*

Solicitors for the Bank : *Mulla & Mulla & Craigie Blunt & Caroe.*

APPELLATE CIVIL.

Before Mr. Justice K. K. Desai.

THE GOVERNMENT PLEADER, HIGH COURT, BOMBAY *v.* S. L. JAIN*.

Bombay Court-fees Act (Bom. XXXVI of 1959), Sch. II; Arts. 1 (iii), 34—Insurance Act (IV of 1938), Sec. 53(1)—Companies Act (I of 1956), Sec. 439—Petition filed under s. 53 (1) of Insurance Act—Applicability of art. 1 (iii) or 34 of Bombay Court-fees Act.

The provisions in art. 1 (iii) in Sch. II to the Bombay Court-fees Act, 1959, apply to a petition for winding up filed under s. 53(1) of the Insurance Act, 1938.

THE facts appear in the judgment.

K. J. Abhyankar, Assistant Government Pleader, for the Government Pleader (Petitioner).

⁶ [1926] A.I.R. Cal. 898.

*Decided, July 22, 1965. Civil Revision Ap-

plication No. 751 of 1961.

K. K. DESAI J. This Civil Revision Application arises out of the order dated February 20, 1961, passed by the Taxing Master of this Court on a reference made to him under s. 5 of the Bombay Court-fees Act, 1959. The Taxing Master was called upon to determine the Court-fees payable by opponent No. 1 on the petition for winding up that he had filed for winding up of opponent No. 2 company, i.e. Warden Insurance Co. Ltd. Doubts arose as to the Court-fees payable, because there is clear provision in art. 34 in Sch. II to the Bombay Court-fees Act that on a petition to the Court under s. 439 of the Companies Act for winding of a company the Court-fee is fifty rupees. The case of opponent No. 1 was that the petition in question had not been filed under the provisions of s. 439 of the Indian Companies Act. His petition for winding up was filed under s. 53(1) of the Insurance Act, 1938. His contention was that to his petition the provisions in art. 1(iii) in Sch. II of the Act were applicable. Article 1 (iii) in Sch. II runs as follows :

Number 1	 2	Proper fee 3
1. Application or petition	 (iii) in any other case not other- wise provided for by this Act.	

It is sufficient to state that Article 1 in its prior parts refers to several kinds of applications and petitions which are not petitions for winding up.

The learned Taxing Master held that to the petition of opponent No. 1 the provisions in art. 34 were not applicable.

Mr. Abhayankar for the Government Pleader has contended that on a true construction of the provisions in s. 53 of the Insurance Act it should be held that all petitions for winding up which can be instituted by reason of the provisions in s. 53 are petitions for winding up under the Indian Companies Act. To such petitions, the provisions in art. 34 referred to above are applicable. Section 53 of the Insurance Act *inter alia*, provides :

"53. (1) The Court may order the winding up in accordance with the Indian Companies Act 1913, of any insurance company and the provisions of that Act shall, subject to the provisions of this Act apply accordingly.

(2) In addition to the grounds on which such an order may be based, the Court may order the winding up of an insurance company—..."

The subsequent provisions give grounds for winding up of an insurance company under the Insurance Act. These grounds are not any of the grounds contained in s. 439 of the Companies Act. In connection with the above contention, it is sufficient to state that on a true construction of sub-s. (1) of s. 53 it is clear that the orders for winding up of insurance companies on petitions filed under s. 53 are made because the provisions of the Insurance Act apply to such winding up petitions. The winding up is to be carried out under the sub-section in accordance with the Indian Companies Act. It would not be possible to hold in respect of petitions made under s. 53 of the Insurance Act that the petitions are made "under" the Indian Companies Act. In other words, though the winding up is to be carried out "in accordance with" the provisions in "the Indian Companies Act", the petitions must be held to be made under s. 53 of the Insurance Act. The same is the finding of the learned Taxing Master. It is not possible to interfere with that finding, as I agree with the conclusions arrived at by him.

Rule discharged. No order as to costs.

Rule discharged.

Before Mr. Justice Patel and Mr. Justice Bal.

MRS. KHAIRUNNISSA A. K. SIDDIKI v. THE MUNICIPAL CORPORATION OF THE CITY OF BOMBAY*.

Bombay Municipal Corporation Act (Bom. III of 1888), Secs. 527, 517, 501—Motor Vehicles Act (IV of 1939), Sec. 110—Civil Procedure Code (Act V of 1908), Sec. 26—"Suit," meaning of word in s. 527, Bom. Act III of 1888—Whether application under s. 110, Motor Vehicles Act a suit within s. 527—Tribunal under Motor Vehicles Act whether a Court.

The word "suit" in s. 527 of the Bombay Municipal Corporation Act, 1888, means a proceeding which is commenced by the presentation of a plaint and, therefore, an application under s. 110 of the Motor Vehicles Act, 1939, does not come within the ambit of s. 527 of the Bombay Municipal Corporation Act.

Manjunath Badrabhat v. Venkatesh Govind Shanbhog,¹ doubted.

Hansraj Gupta v. Official Liquidators, Dehra Dun-Mussorie Electric Tramway Co.,² followed.

Venkata Chandrappa Nayanivaru v. Venkatarama Reddi,³ *Indrajitsinghji v. Rajendra-singhji*,⁴ *The Secretary of State v. Kundan Singh*,⁵ *Hafiz Qamar Din v. Nur Din*,⁶ *Bhagwat Singh v. The State of Rajasthan*,⁷ *Vajeram v. Purshotumdas*,⁸ *Assan v. Pathumma*,⁹ *Bhoopendro Narain Dutt v. Baroda Prosad Roy Chowdhry*,¹⁰ *Abdul Gani v. The Reception Committee, Indian National Congress*¹¹ and *Emperor v. Ezekiel*,¹² referred to.

The Tribunal constituted under the Motor Vehicles Act, is not a Court.

THE facts are stated in the judgment.

A. A. Omer, for the appellants.

D. P. Madan, and K. S. Cooper, instructed by *Crawford Bayley & Co.*, for respondents Nos. 1 and 3.

F. S. Nariman and S. T. Tijoriwala, instructed by *Mulla & Mulla & Cragie Blunt & Caroe*, for respondents Nos. 2 and 4.

S. B. Naik, for respondent No. 5.

PATEL J. This is an appeal by the widow and two children of one Siddiki who died as a result of a collision between a municipal car BMU 1274 in which he was riding and a bus No. 9481 belonging to the Bombay Electric Supply and Transport Undertaking of the Bombay Municipal Corporation.

The deceased was an employee of the Corporation in the Fire Brigade Department. The car BMU 1274 belonging to the Corporation was maintained for the transport of the Fire Brigade Chief Officer. On the day of the accident, i.e. February 10, 1960, the deceased Siddiki, appellant No. 1 and her two children were travelling in the car which was being driven by respondent No. 5. Near the Mahalaxmi Bridge, the bus collided against the car, as a result of which Siddiki and his two children died, while appellant No. 1 sustained serious injuries. On March 4, 1960, appellant No. 1 addressed two notices, one to the General Manager, B.E.S.T. Transport House, and the other to the Municipal Commissioner, Bombay Municipal Corporation, Municipal Head Office, Bombay, in connection with this accident, conveying in clear terms that the bus belonged to the Corporation, that the accident occurred by reason of the negligence of the bus-driver, that appellant No. 1 suffered monetary loss by the death of her husband, that the children were young and had to be brought up and that the two of her children were dead. In all, she claimed damages to the tune of Rs. 2,95,376. In the notice to the General Manager, B.E.S.T. Undertaking, it is made perfectly clear that they would be liable in law to pay to the appellant the said damages. The total claim made in both the notices was Rs. 2,96,376. Thereafter, she filed an application for compensation before the

*Decided, July 9, 1965. Appeal from Order No. 289 of 1962.

1 (1881) I.L.R. 6 Bom. 54.
2 (1932) L.R. 60 I.A. 13, s.c., 35 Bom. L.R.
319.
3 (1898) I.L.R. 22 Mad. 256.
4 (1955) 57 Bom. L.R. 962.
5 (1932) I.L.R. 13 Lah. 672.

6 [1936] A.I.R. Lah. 136.
7 [1964] A.I.R. S.C. 444.
8 (1904) 7 Bom. L.R. 138.
9 (1897) I.L.R. 22 Mad. 494.
10 (1891) I.L.R. 18 Cal. 500.
11 (1935) I.L.R. 60 Bom. 645, s.c. 38 Bom.
L.R. 380.
12 (1904) 6 Bom. L.R. 54.

Motor Accidents Claims Tribunal under s. 110 of the Motor Vehicles Act in April of 1960.

Defendant No. 1 is the Bombay Municipal Corporation, No. 2, is the General Manager, Bombay Electric Supply and Transport Undertaking, No. 3 is the Municipal Commissioner, No. 4 is the driver of the bus and No. 5 is the driver of the motor car in which the deceased was being driven.

The first contention raised on behalf of the defendants was that, inasmuch as a notice as required by s. 527 of the Bombay Municipal Corporation Act of 1888 was not given, the application was incompetent. The Tribunal was invited to hear this issue as a preliminary issue, which it did, and it held in favour of the defendants and dismissed the application. The appeal challenges the decision of the learned Tribunal.

It raises the question of interpretation of s. 527 of the said Act. The section, so far as relevant, is as follows :

"No suit shall be instituted against the corporation or against the Commissioner, the General Manager... in respect of any act done in pursuance or execution or intended execution of this Act or in respect of any alleged neglect or default in the execution of this Act—

(a) until the expiration of one month next after notice in writing has been, in the case of the corporation, left at the chief municipal office and, in the case of the Commissioner, the General Manager... delivered to him or left at his office or place of abode, stating with reasonable particularity the cause of action and the name and place of abode of the intending plaintiff and of his attorney or agent, if any, for the purpose of such suit ; nor

(b) unless it is commenced within six months next after the accrual of the cause of action."

Before the Tribunal, it was contended for the appellants that an application under s. 110 of the Motor Vehicles Act was not a suit. Secondly, it was contended that, in any event, it was not obligatory on the part of the Corporation to enter into the venture of Transport Undertaking, and it could not, therefore, be said that the suit related to an act done in pursuance or execution or intended execution of the Act. The Tribunal rejected both these contentions of the appellant. A reference to s. 527 clearly shows that it restricts the right of a citizen to take resort to a Court of law in the usual way and, therefore, it must ordinarily be construed strictly. It is often suggested that the Municipal Acts are for public good, and, therefore, their provisions should be construed liberally. But the rule cannot be applied to all cases and in all matters. Much depends upon the nature of the provision, the object to be achieved and its scope.

On the one hand, it is argued on behalf of the Corporation that the word "suit" has unrestricted meaning and it means any legal proceeding in respect of a civil right wherever taken. On the other hand, it is contended on behalf of the appellant that by the word "suit" is meant a proceeding which is commenced by a plaint in a civil Court. The question is, which of the interpretations is correct.

The law of civil procedure is contained in the Code of Civil Procedure, 1908, which replaces its earlier counterpart. Section 26 says :

"Every suit shall be instituted by the presentation of a plaint or in such other manner as may be prescribed."

The word "prescribed" has been defined in the same Code to mean "prescribed by the rules framed under the Code of Civil Procedure." It is obvious, therefore, that, so far as the Code of Civil Procedure is concerned, the word "suit" means a suit instituted in a civil Court by the presentation of a plaint, and it would not be possible to call any other proceeding a suit even if it is a proceeding instituted in a civil Court, if it is not done by a plaint. In *Hansraj Gupta v. Official Liquidators, Dehra Dun-Mussoorie Electric Tramway Co.*¹, the Privy Council had to deal with the meaning of the word "suit" as used in s. 3 of the Indian Limitation Act, while considering the question as to whether or not the claim was barred by time. Their Lordships said that the word "suit" ordinarily means, and apart from some context must be taken to mean, a civil proceeding instituted by the presentation of a plaint. In the Indian Limitation Act, the word "suit" as in the present case under the present Act

is not defined. Section 2 of the Limitation Act says, unless there is anything repugnant to the context, a suit does not include an appeal or an application. Their Lordships held that an application made by the Liquidator in respect of a claim was not a suit for the purposes of s. 3 of the Indian Limitation Act, and the application of the Liquidator could not, therefore, be dismissed as a suit instituted under s. 3 of the Act. In *Venkata Chandrappa Nayanivaru v. Venkatarama Reddi*², in relation to a proceeding in execution, the Court held that merely because it is capable of terminating in a decree or an order having the force of a decree, it could not on that ground alone be deemed to be a suit within the meaning of the Code, as a suit must, according to s. 48 (Civil Procedure Code of 1822), commence with a plaint. That the word "suit" can have a restricted meaning is illustrated by the decision in *Indrajitsinghi v. Rajendrasinghi*³, and *The Secretary of State v. Kundan Singh*⁴. In the first case, it was held that s. 86, Civil Procedure Code, is not attracted to an application for letters of administration in spite of s. 141, Civil Procedure Code. In the second case, it was held that a proceeding under para. 17 of the Second Schedule to the Civil Procedure Code was not a suit for the purpose of s. 80 of the Code. It was held that a notice was not required to be given to the Secretary of State for India in Council in respect of a contemplated proceeding of this nature. Shadi Lal, C. J., incidentally observed (p. 673) :

"...It may, therefore, be stated as a general proposition, that, unless there is any special provision to the contrary, a proceeding that does not commence with a plaint cannot be held to be a suit."

To the same effect is the decision in *Hafiz Qamar Din v. Nur Din*⁵, where it was held that an application under para. 20 of Schedule 2 of the Civil Procedure Code was not a suit. Section 86 of the Civil Procedure Code which protects the rulers and ruling princes of the former States from suits, came to be considered by the Supreme Court in *Bhagwat Singh v. The State of Rajasthan*⁶. Speaking for the Court, Shah J. said (p. 446) :

"...A proceeding which does not commence with a plaint or petition in the nature of plaint, or where the claim is not in respect of dispute ordinarily triable in a Civil Court, would prima facie not be regarded as falling within S. 86 Code of Civil Procedure."

It was held that a proceeding for adjudication under the Industrial Disputes Act does not fall within the word "suit" under s. 86.

In *Manjunath Badrabhat v. Venkatesh Govind Shanbhog*⁷, the question that fell for consideration was whether a decision in execution proceedings would be *res judicata* under s. 13 of the Procedure Code, Act X of 1877. While considering this question, the Court, in view of the fact that the decision under s. 47 corresponding to s. 244 of the old Code was deemed to be a decree, held that the execution application must be regarded as a suit and the decision thereon as in a suit. Holding so, the Court held that the principles of *res judicata* under s. 13 of the Code applied. In this connection, another decision also on the question as to whether a decision in execution proceedings was *res judicata* was referred to before us, where it was held that an execution proceeding was a suit within the meaning of that section. In view of the subsequent decision of the Privy Council in the case of *Ram Kirpal Shukul v. Mussumat Rup Kuari*⁸, it is difficult to hold that the reasoning given in these cases still holds good. The Privy Council has pointed out that the principle of *res judicata* enunciated in s. 11 of the Civil Procedure Code which corresponded to the earlier section are not exhaustive, and apart from that section on general principle a decision in the execution proceedings was *res judicata* in a subsequent proceeding between the same parties. In *Vajeram v. Purshotumidas*⁹, while considering the question under s. 43 of the old Code of 1882 which is similar to O. II, r. 2, of the present Code, Tyabji J. construed the words "to sue". Relying on the ordinary dictionary meaning of the words "to sue" which is to make a legal claim or

2 (1898) I.L.R. 22 Mad. 256.

3 (1956) 57 Bom. L.R. 962.

4 (1932) I.L.R. 13 Lah. 672.

5 [1936] A.I.R. Lah. 130.

6 [1964] A.I.R. S.C. 444.

7 (1881) I.L.R. 6 Bom. 54.

8 (1883) L.R. 11 I.A. 37.

9 (1904) 7 Bom. L.R. 138.

to take legal proceeding against any person, he held that the claim made before him in the execution proceedings was barred by that section. While considering the question of limitation in *Assan v. Pathumma*¹⁰, the Court held that the term "plaint" did not mean a plaint duly stamped and it refused to give a limited meaning to the word "plaint" being duly stamped. It was said (p. 495) :

"...A 'plaint' in law means merely a private memorial tendered to a Court, in which the person sets forth his cause of action; the exhibition of an action in writing."

Naturally, on behalf of the Corporation, much reliance has been placed on these observations. Then we have got the decision in *Bhoopendro Narain Dutt v. Baroda Prosad Roy Chowdhry*¹¹, where the case arose under the Court of Wards Act, and the Court held that the word "suit" included execution proceedings. The last case cited on behalf of the Corporation is that of *Abdul Gani v. The Reception Committee, Indian National Congress*¹². In this case, Wadia J. said (p. 645) :

"A suit is an original proceeding between a plaintiff and a defendant. The term 'plaintiff' includes every person asking any relief against any other person by any form or proceeding, whether the same be taken by cause, action, suit, petition, motion, summons or otherwise...."

The provisions of Order I, rule 8, of the Civil Procedure Code, 1908, are applicable to a petition filed under section 14 of the Indian Arbitration Act, 1899, to set aside an award on the ground of the misconduct of the arbitrator."

It is no doubt true that these cases illustrate that the word "suit" is capable of having a very wide connotation and may include, depending upon the context, any legal proceeding commenced by one person against another in order to enforce a civil right. From this, it cannot necessarily be held that the word "suit" must be given such a wide meaning wherever it occurs. In order to determine the ambit of the word used, the Court must consider the object which the provision was intended to achieve.

Under s. 527 of the Bombay Municipal Corporation Act, two things are contemplated, namely, that a notice of the intended suit must be given and that the suit must be filed within six months after the accrual of the cause of action. The two objects underlying the enactment are that the Corporation should have notice of the claims so that it may make amends and be saved from unnecessary costs and that fraudulent and stale claims should be prevented. The first object is achieved by the requirement of a notice and the second by reducing the period of limitation. It is clear that the intention is to apply the section to such proceedings as have a period of limitation of much more than six months and are suits—in other words to such proceedings as are regarded as suits under the Indian Limitation Act. It is proper, therefore, that the word "suit" should have the same meaning that it has in the Limitation Act. As decided in *Hansraj Gupta*, the ordinary meaning of the word "suit" as commonly understood is a proceeding which is commenced by the presentation of a plaint. There is nothing in the Act to suggest that the word "suit" should have a wider meaning. On the contrary, s. 517 indicates otherwise. Clause (g) of sub-s. (1) in terms refers to a suit or other legal proceeding brought against the corporation or against the commissioner or other officers. Similarly, cl. (h) also refers to a suit or legal proceeding brought against the corporation or against any of the named officers. When the Act itself makes this distinction between a suit and a legal proceeding, there could be no justification for us to construe the word "suit" in its wider sense conveyed by its dictionary meaning. We must, therefore, having regard to the fact that it is a section which restricts the ordinary and normal right of a citizen, give it the ordinary meaning in preference to the wider dictionary meaning of the word "suit".

Mr. Madan very emphatically argued that s. 2, cl. (10) in the original Limitation Act and s. 2, cl. (1) of the new Limitation Act, 1963, would suggest that a suit can include an appeal or an application. He says, if that is so, we should give to the word "suit" such a meaning as would include an application. To give such a wide meaning to the word "suit" is, in our view, not justified. If such a meaning is given, it may well mean that even when a person wants to file an appeal against the

10 (1897) I.L.R. 22 Mad. 494.

11 (1891) I.L.R. 18 Cal. 500.

12 (1935) I.L.R. 60 Bom. 645, s.c. 38 Bom. L.R. 380.

Corporation he must again give a notice, because even an appeal would amount to a suit. In any event, it may as well apply to execution proceedings since such proceedings are suits as was held in *Emperor v. Ezekiel*¹³, and *Vajeram v. Purshotumdas*. Again it may apply even to writ petitions which cannot be countenanced.

We are also not satisfied that the Tribunal under the Motor Vehicles Act, acts as a Court. It is undoubtedly true that, till 1960, in respect of such a cause of action, a suit could be filed. It is only in about 1960 that the said Tribunal was constituted for deciding claims of this nature. It is said that if those suits are replaced by applications before the Tribunal, we could still consider these applications as suits and the Tribunal as Court. We cannot accept this contention. The Legislature was entitled to take away certain matters out of the purview of s. 527 of the Act, and it has done so. The Tribunal is not a Court, and its constitution is not governed by any legislation applicable to civil Courts. The proceeding itself has to be commenced by an application in the prescribed form, and the resultant order is not even called a decree. Section 110C of the Motor Vehicles Act provides for the procedure and it shows that the Tribunal is entitled to follow such summary procedure as it may think fit, subject to the rules that may have been made. It also provides by s. 110E that the amount due under the Award shall be recovered through the Collector as arrears of revenue. Section 110F expressly bars the jurisdiction of civil Courts in places where Claims Tribunals have been constituted. The State, by reason of the powers conferred upon it by s. 111 of the Act, framed rules of procedure for the Tribunals, and it is only where no specific rules exist that the Tribunals are enabled to follow the provisions of the Civil Procedure Code. It is, therefore, impossible to hold that the Tribunal is a Court.

We, accordingly, hold that the present application is not a suit under s. 527 of the Bombay Municipal Corporation Act, and, therefore, there is no impediment in the applicants' way in proceeding with the same.

In view of what we have said above, it is not really necessary to consider the other contentions raised on behalf of the appellants. Incidentally, we may observe that two notices have been served by the appellants, one on the General Manager of the Bombay Electric Supply and Transport Undertaking and the other on the Municipal Commissioner. Both the notices are addressed to them in their official capacities and not to them as individuals. As to whether or not such notice is sufficient is a matter of construction of the notice itself. It is true that in *Nathubhai v. Municipal Corp., B'bay*¹⁴, a Bench of this Court held that a notice to be valid under s. 527, must be addressed to the Municipal Corporation, and, therefore, the Corporation could contend that the notices were bad. In *Pandurang v. Ramchandra*¹⁵, the notice which was addressed to the President of the District Local Board was held to be sufficient to satisfy the requirements of s. 136 of the Local Boards Act. In *G.-G. in Council v. G. S. Mills*¹⁶, a notice addressed to the "Chief Commercial Manager or Subordinate Officer" who is entitled to deal with the claims was held to be valid notice. In this connection we may refer to the decision in *Lady Dinbai Petit v. Dominion of India*¹⁷. While considering the question as to whether a notice under s. 80 was necessary for amendment of the cause of action in a suit against the Government, Chagla, C. J., after referring to the observations of the Judicial Committee in *Bhagchand Dagadusa v. Secretary of State for India*¹⁸, said (p. 243):

"...But even so, as pointed out by Sir John Beaumont in *Chandulal Vadilal v. Government of Bombay*,¹⁹ the section should be construed with some regard to commonsense and to the object with which it appears to have been passed."

We think the same principles apply in construing the notice. Moreover, under s. 501 of the Bombay Municipal Corporation Act, the Municipal Commissioner and the General Manager have to make payment of any compensation claimed by a person with the sanction of the respective Standing Committees. Therefore, the

13 (1904) 6 Bom. L.R. 54.

14 (1957) 60 Bom. L.R. 515.

15 (1930) 32 Bom. L.R. 1252.

16 [1949] A.I.R. Pat. 347, F. B.

17 (1950) 53 Bom. L.R. 229.

18 (1927) L.R. 54 I.A. 338.

19 (1942) 45 Bom. L.R. 197.

notices which have apparently reached the Corporation would appear to be proper notices.

In *Nathubhai's* case the observations of the Judicial Committee in *Bhagchand Dagadusa v. Secretary of State for India*, to the effect that that section (s. 80) is explicit and mandatory and admits of no implications or exceptions, were followed. In that case, however, there was no notice at all. Similarly, in *Vellayan Chettiar v. Province of Madras*²⁰, and in *Government of Bombay v. Wadia*²¹, where similar observation was made, only one plaintiff had given notice under s. 80 but he and another filed the suit and the suit was held to be bad. These cases are distinguishable. The Municipal Commissioner being the chief executive head of the Corporation received the notice and there can be no reason to hold that it is not a proper notice and thus provide a handle of oppression to the Municipality. With respect, it would appear that *Nathubhai's* case may require reconsideration. In this case, as we hold in favour of the plaintiff on the other point, nothing more need be said on the matter.

In the result, we set aside the order made by the Tribunal and direct the Tribunal to proceed with the application on its merits. The application will be heard and disposed of as early as possible.

The appellants will get costs from respondents Nos. 1 to 4. Respondent No. 5 to bear his own costs.

Order set aside.

Before Mr. Justice Patel and Mr. Justice Bal.

TUKARAM ZIPRU WANI v. BABAN DHONDU DESHMUKH.*

Bombay Paragana and Kulkarni Watans (Abolition) Act (Bom. LX of 1950), Secs. 4(2), 4(1)—Bombay Land Revenue Code (Bom. V. of 1879), Sec. 70—Occupancy of land regranted under s. 4(1) of Act whether could be sold or partitioned by order of Court—Whether decree-holder can apply to Collector to obtain sanction for sale of such land.

The combined effect of s. 4(2) of the Bombay Paragana and Kulkarni Watans (Abolition) Act, 1950, and s. 70 of the Bombay Land Revenue Code, 1879, is that the occupancy of land regranted under s. 4(1) of the Act is not liable to be sold or partitioned by execution of an order of a Court. A decree-holder during execution proceedings can, however, on behalf of the Court obtain sanction for sale of the land from the Collector under s. 4(2) of the Act.

Mrs. Chandnee Widya Vati v. Dr. O. L. Katiel¹ and Dy. Director of Consolidation v. Deen Bandhu², referred to.

THE facts appear in the judgment.

G. N. Vaidya, for the petitioner.

K. J. Abhyankar, for opponent No. 1.

V. H. Gumaste, Additional Government Pleader, for opponents Nos. 2 and 3.

PATEL J. This petition arises out of an execution proceeding commenced by the petitioner against his judgment-debtor respondent No. 1.

Respondent No. 1 was the owner of two lands survey numbers 204 and 221, measuring 6 acres 15 gunthas and 6 acres 4 gunthas, in the village of Bhadgaon in Jalgaon District. He held these lands as Class V Inam. In 1950, the Bombay Paragana and Kulkarni Watans (Abolition) Act was passed, as a result of which the lands became resumed by the Government. They were retransferred to respondent No. 1, on his paying occupancy price equal to twelve times the amount of the full assessment. The petitioner obtained his decree in Regular Suit No. 57 of 1950 and sought to proceed in execution against these two survey numbers by attachment and sale of the properties in Darkhast No. 218 of 1958. Respondent No. 1 contended that these lands could not be sold as they were re-granted to him on limited tenure

20 (1947) 49 Bom. L.R. 794.

21 (1949) 51 Bom. L.R. 635.

*Decided, July 20, 1965. Civil Revision

Application No. 389 of 1964.

1 [1964] A.I.R. S.C. 978.

2 [1965] A.I.R. S.C. 484.

and were inalienable under the provisions of s. 4, sub-s. (2) of the Act without the permission of the Collector for the transfer of the same. The learned Civil Judge, Junior Division, by his judgment and order dated April 1, 1960, directed the sale of the properties to proceed, deferring the matter of obtaining the permission of the Collector to a later date. Respondent No. 1 went in appeal to the District Court, being Appeal No. 185 of 1960. The learned District Judge by his judgment dated June 15, 1961, set aside the order of the Civil Judge, Junior Division, and held that the properties could not be sold as no sanction of the Collector was obtained. The petitioner filed a second appeal, being Second Appeal No. 1463 of 1961 which was heard by V. S. Desai J. on February 1, 1963. The learned Judge set aside the judgment of the District Judge and restored that of the Civil Judge, Junior Division, holding that the question of sanction could arise only after the sale was effected and before it was confirmed. He directed the learned Civil Judge, Junior Division, to proceed with the execution of the decree from the stage at which it was left.

After this judgment, the petitioner made an application to the Collector for sanction of the sale. The Collector after giving a hearing to the petitioner rejected his application on the ground that only a holder of the land could make an application for permission to transfer the land under s. 4(2) of the said Act, on paying Nazarana for the same, and that respondent No. 1 did not want permission to transfer the land. He also observed that he had rejected similar application previously and that he had no right under the Land Revenue Code to review his order. The petitioner went in appeal to the Commissioner who confirmed the judgment, rejecting it on almost the same ground. The petitioner seeks to challenge this order.

Section 4, sub-s. (2), of the said Act is as follows :

"The occupancy of the land regranted under sub-section (1) shall not be transferable or partible by metes and bounds without the previous sanction of the Collector and except on payment of such amount as the State Government may by general or special order determine." Section 70 of the Land Revenue Code which has got a bearing on this question is as follows :

"In any case where an occupancy is not transferable without the previous sanction of the Collector, and such sanction has not been granted to a transfer which has been made or ordered by Civil Court or on which the Court's decree or order is founded,

(a) such occupancy shall not be liable to the process of any Court, and such transfer shall be null and void, and

(b) the Court, on receipt of a certificate under the hand and seal of the Collector, to the effect that any such occupancy is not transferable without his previous sanction and that such sanction has not been granted, shall remove any attachment or other process placed on or set aside any sale of, or affecting, such occupancy."

It is true that in sub-s. (2) of s. 4, there is no reference to transfer or partition by execution process. But then, the combined effect of this sub-section and s. 70 of the Land Revenue Code is that, as the occupancy is made by statute non-transferable and non-partible, it is not liable to be sold or partitioned by execution of an order of a Court. This, however, does not mean that an application should be made only by the holder of the land.

It must at once be apparent that the provision as to non-transferability was not made in the interests of dishonest judgment-debtors. Paragana Vatandars were required to pay only twelve times the assessment as occupancy price, and in view of the fact that the price charged was low, it is possible that the Government intended to regrant the land on what is known as new tenure, which means non-partible and non-alienable tenure. But then it does not mean that, under no circumstances, the land was intended to be unalienable. The land could be alienated with the sanction of the Collector. Inasmuch as, by s. 70 of the Land Revenue Code, this provision was applicable also to sales and transfers by orders of Court, advisedly apparently no provision is made in s. 4 of the said Act that an application for transfer shall necessarily be made by the holder of the land.

As regards the question as to who should be able to make an application for this purpose, one has to consider the nature of execution process. Whenever a decree is being executed, it means that the judgment-debtor is not prepared to carry out

the terms of the decree, and it is the coercive process of the Court which enforces the execution of its decree. When property is sold by the Court in execution of a decree against the owner or holder of the land, it is against the will of the owner. The owner would never be willing to apply for sanction to transfer the land. In view of the fact that the Court is selling the property against the will of the owner who does not and will not co-operate, it is the Court who must obtain the sanction of the relevant authority. It is true that the Court, being in a peculiar position, cannot be required to file an application before the Collector but it can authorise someone or even the decree-holder to obtain the required sanction on its behalf. Since the Court has stayed the execution proceedings to enable the decree-holder to make this application, it must necessarily follow that, impliedly it permitted the decree-holder to obtain sanction for sale of the property from the Collector, and accordingly the petitioner filed the present application.

Having regard to the scheme of these provisions, and there being nothing in s. 4(2) of the Act which prevents any one on behalf of the Court from making an application, in our view, both the Collector and the Commissioner were in error in holding that the application must fail only on that ground.

Mr. Vaidya relies in support of his contention on two decisions of the Supreme Court in *Mrs. Chandnee Widya Vati v. Dr. C. L. Katial*¹ and *Dy. Director of Consolidation v. Deen Bandhu*². The first case arose out of a contract entered into by the appellant before their Lordships with the respondent to sell to the respondent a house which stood on a plot granted by the Government. According to the terms of the contract, the vendor had to obtain the necessary permission from the Government for the sale within certain time. She made an application for the necessary permission, but for some reason of her own she withdrew that application. Eventually, the respondent filed a suit for specific performance of the contract. The trial Court dismissed the suit but the High Court decreed the same. Their Lordships observed (p. 979) :

"...the Court has got to enforce the terms of the contract and to enjoin upon the defendant-appellant to make the necessary application to the Chief Commissioner. It will be for the Chief Commissioner to decide whether or not to grant the necessary sanction."

They confirmed on this ground the decree of the High Court. In the second case, a question arose under the United Provinces Consolidation of Holdings Act of 1954. An application for transfer of certain land was made by the owner for the purpose of an exchange. Section 13(a), (b) and (c) laid down the principles for granting or refusing the permission. The Settlement Officer, for reasons alien to that section, rejected the application. The Supreme Court held that the rejection was improper and directed that the application should be dealt with in accordance with the provisions of s. 13 of the Act.

In the first case, the rights between the parties arose out of a contract, and naturally, therefore, the Court insisted on the defendant being forced to make an application for permission for the transfer. The second case illustrates the point that the Revenue authority cannot refuse to make an order on arbitrary grounds but must act on the basis of the principle laid down by the relevant section and that if it acts on grounds other than those on which it is entitled to act, the order must necessarily be regarded as bad.

In the affidavit, the only ground in support of the orders under review that is mentioned is that the decree holder was not competent to make an application. No other reasons are suggested for rejecting the same and none is apparent from any of the orders of the authorities. It is clear, therefore, that the order cannot be allowed to stand.

Mr. Gumaste contends that the petitioner had made an application on September 29, 1961, and it was disposed of on February 5, 1962, and, therefore, the second application is not competent. Except for the reference to the order, none has been produced before us from the record. When we called upon Mr. Gumaste to produce the relevant record he only showed us the record which contains a copy of an intimation in Marathi to the petitioner, without there being an order as such by the

1 [1964] A.I.R. S.C. 978.

2 [1965] A.I.R. S.C. 484.

Collector. The real position is that the petitioner had filed an appeal against the decision of the Collector dated February 5, 1962, before the Commissioner. The Commissioner directed the Collector to give a hearing and thereafter decide the matter. If that is so, the Collector was bound to obey the order of the Commissioner and could not avoid deciding the matter as he did, saying that he had no power to review his prior order. It also appears from the order of the Collector now made that he refused to make the necessary order because respondent No. 1 who is the holder of the land did not want permission for transfer. This is not a case of voluntary transfer. The Court is selling the property against his will, and his volition in the matter has no place.

We have been read the affidavit of the Commissioner in answer to the rule. He has not referred to any principle or any rational reason on the basis of which the said prayer could possibly be rejected. If the law itself does not prescribe any principle on the basis of which the Collector has to make a decision or order, then the section itself may be of doubtful validity. If the principles are prescribed, then it is not the contention of Mr. Gumaste that any would be violated by the making of the order.

We, therefore, set aside the orders made by the authorities below and direct the Collector to issue the necessary sanction to transfer the property in order to enable the Civil Court to sell the same in execution of the decree on the petitioner paying the requisite amount. The petitioner will get his costs from respondent No. 2.

Orders set aside.

Before Mr. Justice Patel and Mr. Justice Bal.

GAGANDAS HOTOHAND v. J. S. BAJAJ.*

Displaced Persons (Compensation and Rehabilitation) Rules, 1955. Rules 23, 22, 18, 20, 34-D, 65, 49, 67, 87—Displaced Persons (Compensation and Rehabilitation) Act (XLIV of 1954) Secs. 8, 20, 40—Applicability of r. 23—Whether it applies to agricultural land—Amendment of heading of Chap. VIII of Rules whether retrospective.

Rule 23 of the Displaced Persons (Compensation and Rehabilitation) Rules, 1955, applies only to such classes of properties as were dealt with by rule 22 of the Rules but which could not be allotted under that rule, namely, urban houses, shops etc.

Bishan Singh v. Central Govt.,¹ agreed with.

The amendment made in the heading of Chapter VIII of the Rules is not retrospective.

Quaere : Whether Government can by notification amend rule 18 of the Rules so as to exclude agricultural land in rural areas only, retrospectively.

Whether Rule 65 is *ultra vires* in that it is in contravention of s. 8 of the Displaced Persons (Compensation and Rehabilitation) Act, 1954.

THE facts appear in the judgment.

H. G. Advani, with *J. Ramchandani*, for the petitioners.

G. N. Vaidya, for respondents Nos. 1 and 3 to 5.

M. A. Rane, Assistant Government Pleader, for respondents Nos. 2 and 3.

PATEL J. This petition under arts. 226 and 227 of the Constitution raises a question of construction of the provisions of the Displaced Persons (Compensation and Rehabilitation) Act, 1954, which hereafter will be called "the 1954 Act" and the rules framed under it. The facts leading to the petition are few and are as follows :

The two petitioners are father and son who are joint with five other sons of petitioner No. 1. When they came to India in the wake of the partition, they left agricultural land and some houses in West Pakistan. They made claims under the Displaced Persons Claims Act, 1950. The claims were assessed and verified at Rs. 20,000 for houses etc. and two and a half standard acres and five and a half

*Decided, July 20, 1965. Special Civil 1 [1961] A.I.R. Punj. 461.
Application No. 575 of 1961.

gunthas of agricultural land. The claim for houses became reduced to Rs. 17,111. It may be stated that all the properties were situated in rural area.

After migration here the petitioners carried on business in Bhir in the name of Awatrai Radhakishan. In January 1953 they applied in the name of Awatrai Radhakishan that they be allotted on lease two survey numbers being 75 and 77 being the land of an evacuee one Sardarkhan. In one of the survey numbers in a distinct portion there was a bungalow which was given to the State Government for the Civil Hospital. The application related to the rest of the agricultural land. It seems there were fruit trees in the land. The Deputy Custodian sent a memo to the Tehsildar with his recommendation that the request should be favourably considered. Accordingly the lands were granted to them on lease by the Tehsildar and this "allotment" was confirmed by the Assistant Custodian, Bhir, on April 28, 1953, as can be seen from the file produced.

On May 13, 1957, the Additional Settlement Commissioner, Delhi, Bombay Camp, on the basis of r. 65 under the Displaced Persons (Compensation and Rehabilitation) Act, 1954, rejected their claim for rural houses on the ground that they had been allotted agricultural lands S. Nos. 75 and 77 at Bhir. In the meantime the petitioners were asking that the land be permanently allotted to them and had also challenged the above order before the Chief Settlement Commissioner. In the meantime the State Government had started negotiating for the purchase of these pieces of land for the purpose of the Hospital which it was running in the bungalow. The Settlement Commissioner made an order agreeing to do so, and sought the approval of the Chief Settlement Commissioner who approved of the same. The price fixed was Rs. 1,13,000. It appears that on September 21, 1959, the petitioners came to know of the same. Petitioner No. 1, therefore, made representations against the proposal and when he did not get a satisfactory reply he filed Special Civil Application No. 591 of 1960 challenging the orders dated May 13, 1957, made by the Additional Settlement Officer rejecting the claim regarding rural houses and dated May 14, 1960, by the Chief Settlement Commissioner confirming the same and their decision to sell the land to the State Government. This petition was later withdrawn on April 20, 1961. They however continued in possession of the land. Respondent No. 3 then ordered the Tehsildar to evict the petitioners.

The petitioners filed the present petition under art. 227 of the Constitution on the ground that respondents Nos. 1, 3, 4 and 5 could not validly sell the land to respondent No. 2 under the rules and the Act and that they had learnt that the land was no longer required for the hospital. They pray that the said orders be quashed. During the pendency of this petition the State Government by its letter dated April 1, 1963, informed the petitioners that it had decided to release the land and acquire another land for constructing the hospital and this was again confirmed by another letter dated August 14, 1963. The matter had come up for hearing often but was adjourned from time to time for settlement. It seems the State Government was willing to transfer the land to the petitioners but as the Central Government and the Settlement Commissioner insisted on the full price settled for the bungalow and the land being paid by the State Government, the negotiations failed.

The question is whether under the Act and the rules the Settlement Commissioner had the power to sell the property. It is admitted by Mr. Advani that the petitioners' claims were with respect to rural properties—both agricultural land and house and shops. The property now involved is urban and consists of two Survey numbers 75 and 77 in one of which there seems to be a large bungalow. But it is admitted that the bungalow and its compound was let to the Government as separate entity and the agricultural land was leased to petitioners at Rs. 81 per year.

On behalf of the respondents the sale is sought to be justified under r. 23 of the Rules framed under the 1954 Act. On behalf of the petitioners it is contended that that rule has no application. Rule 23 reads thus :

"All acquired evacuee properties which are not allotable under rule 22 shall ordinarily be sold."

In interpreting a statute the Court tries to find out the intention of the Legislature. Normal rule of interpretation is that the intention of the Legislature is to

be gathered from the words used which must normally be given their natural grammatical meaning. But it may be that the words may take colour from the context in which they are used and acquire a larger or a smaller meaning than they ordinarily convey. It is for this reason that the rules of construction require that the Court should interpret the statute as a whole and also have regard to the objects of enacting the statute. See *Aurini Kumar Ghosh v. Arabinda Bose*¹ where it was said p. (40) °

"It is one of the settled rules of construction that to ascertain the legislative intent, all the constituent parts of a statute are to be taken together and each word, phrase or sentence is to be considered in the light of the general purpose and object of the Act itself." The same principles apply to the interpretation of statutory rules.

Under the Administration of Evacuee Property Act, 1950, properties of persons who were declared evacuees were taken over. The Act gave powers of management to Custodians of such properties. Under s. 10 (1) all powers were vested in the Custodian as were necessary or expedient for the purpose of "securing, administering, preserving and managing" any evacuee property. By sub-s. (2) he was given specific powers including one under cl. (c) of transferring property but not by sale except with the permission of the Government which would include power to either allot or lease the property. By s. 12 he was given power to cancel leases or allotments. It is not claimed that the power of sale is exercised under this Act. It would also appear that the property ceased to be such property once it became part of the compensation pool and the later Act of 1954 would govern its management.

The 1954 Act provided for the payment of compensation to displaced persons and rehabilitate them. The net amount of compensation was to be determined under s. 7. Section 8 is mandatory in language in that it provides that compensation shall be paid out of the compensation pool. The modes for the payment of the same are :

- (a) in cash;
- (b) in Government bonds;
- (c) by sale to the displaced person of any property from the compensation pool and setting off the purchase money against the compensation payable to him;
- (d) by any other mode of transfer to the displaced person of any property from the compensation pool and setting off the valuation of the property against the compensation payable to him;
- (e) by transfer of shares or debentures in any company or corporation;
- (f) in such other form as may be prescribed.

By sub-s. (2) power is given to the Central Government to frame rules for this purpose. By s. 14 a compensation pool is created. By s. 16 the Central Government is enabled to take measures for the management and disposal of the compensation pool in order that the same may be effectively utilized in accordance with the provisions of the Act. Section 17 relates to the functions of the managers of the properties in the compensation pool. Section 19 gives power to the manager to cancel or vary any allotment or lease granted either before or after the Act in respect of any evacuee property but subject to the rules framed under the Act and after giving a reasonable opportunity of being heard. Section 20 gives the managing officer or managing corporation a power to deal with the property subject to rules. Rules are framed under s. 40.

We now turn to the scheme of the rules. They are divided into several chapters. Chapter I defines various terms used therein. Chapter II deals with applications for compensation and their processing and Chapter III deals with enquires and verification of claims. Chapter IV deals with the question of determination of compensation, its scale and mode of payment. Rule 18 deals with computation of compensation. As it originally stood, it provided that it shall be determined by adding assessed value of all claims in respect of all kinds of the property of the claimant other than agricultural land. On February 20, 1960, it was amended so as to exclude agricultural land in rural areas only, retrospectively. How far Government can retrospectively in this manner apply a rule is a question which may arise. Chapter V relates to payment of compensation by transfer of property, the

modes of valuation, its transfer to a displaced person who is in occupation of the same and its consequences. Chapter V-A is new and is added on November 26, 1960, and relates to allotment of agricultural land in urban areas. Chapter VI deals with transfer of Government built property. Chapter VII deals with payment of compensation for rural houses and shops left in Pakistan. Chapter VIII deals with payment of compensation for agricultural lands in rural area and provides that it shall as far as possible be by allotting agricultural land. Chapter IX deals with allotment of groves and gardens and so on.

This analysis clearly indicates that the Central Government framed the rules subject-wise, devoting a Chapter to each kind of property. It dealt with the subject of rural houses left in Pakistan in Chap. VII and provided for allotment of similar houses in rural areas to displaced persons in the manner specified in the Chapter and in Chap. VIII it made provision for agricultural lands left in West Pakistan and provided that as far as possible payment for the same should be made by allotment of agricultural land. The heading of the Chapter was, until its amendment "Compensation in respect of verified claim for agricultural land". Rule 49 as it was originally framed applied to all agricultural land whether rural or urban. The other rules lay down the principles of allotment. If this is so, clearly r. 23 could not apply to agricultural land. Similarly the rule could not also apply to groves and gardens specially provided for in Chap. IX. Having regard to the scheme of the rules we have no hesitation in holding that r. 23 though widely worded applies only to such classes of properties as were dealt with by r. 22 but which could not be allotted under that rule, namely, urban houses, shops etc.

Mr. Vaidya has drawn our attention to the fact that the heading of Chap. VIII has been subsequently amended to read "Compensation in respect of verified claims for agricultural lands situated in a rural area." He, therefore, contends that urban agricultural land could not be said to be covered by this Chapter and, therefore, there was a power to sell such land under r. 22. This amendment has been made by notification dated February 11, 1960, Gazette of India Part II S on February 20, 1960. But then this can be of prospective operation and cannot change the meaning of rr. 22 and 23. It may be noticed that in r. 18 by the same notification addition of the words "in rural areas" was made retrospectively. Apart from the question whether Government can by rules retrospectively reopen claims already verified, the amendment to Chap. VIII in our view is not retrospective, as there is no clear indication that it was to be retrospective.

Mr. Vaidya then referred us to rr. 67 and 87 in support of his contention. Rule 67 gives power of sale to the Settlement Commissioner only if the agricultural land is "not required for allotment". The contention cannot apply in the present case since it was never alleged so far that it was not required for allotment. Rule 87 also does not help as it merely prescribes how sale of property was to be effected. The property must be saleable in order that r. 87 must apply.

Similar view was taken by a Bench of the Punjab High Court in *Bishan Singh v. Central Govt.*², where the scope of rr. 22 and 23 was confined as above. We agree with respect with the decision and hold that that is the true scope and effect of the two rules.

Mr. Vaidya then referred to s. 20 of the Act and argued that apart from the rules, this section gives power of sale to the manager. The section is made "subject to any rules that may be framed by the Central Government." It was not intended to give uncontrolled power to the officer to sell any property that he liked. Rules have to be framed under s. 8 which relates to payment of compensation and under s. 40 regarding the powers of respective officers and other matters. It is possible that if no rules at all were framed it would have been a different matter. But elaborate rules have been framed and yet no such power of sale has been given. The power of sale cannot, therefore, be exercised. In any event such an exercise of power would be conflicting with the rules framed under ss. 8 and 40 and therefore it could not be exercised. We, therefore, hold that the Settlement Officer had no power to sell the property under the rules and the Act.

Mr. Advani's second contention is that by notification dated November 17, 1960, Chap. VA has been added to the rules and makes provision for allotment of urban agricultural lands acquired under s. 12 of the Act. He says that even if the agreement to sell were valid, as no document has been executed and the property has not passed and since he is entitled to be allotted the land under the provisions of this chapter the proposed sale must fall through. Mr. Vaidya and Mr. Rane resist this contention on the ground that the State Government had deposited the price of the land and the bungalow before the rules came into force and the State Government is, therefore, entitled to performance of the agreement. In our view, mere agreement creates no title and it cannot be enforced against a third party who acquires independent right. Rule 34-D may in this connection be referred to. It is as follows :

"(1) Where any land to which this Chapter applies has been leased to a displaced person and such land consists of more than one Khasra, the aggregate value of which exceeds Rs. 10,000 such portion of the land, the value of which does not exceed Rs. 10,000, as the Regional Settlement Commissioner may select, shall be allotted to such person :

Provided that where any such land or any part thereof has been sub-leased to a displaced person and the sub-lessee has been in occupation of that land or part thereof continuously from the 1st January, 1956, such land or part thereof, as the case may be, the value of which does not exceed Rs. 10,000, as the Regional Settlement Commissioner may select, shall be allotted to such sub-lessee.

(2) In selecting the area for allotment under sub-rule (1), the Regional Settlement Commissioner shall have regard to the compactness of the area and other relevant matters.

(3) For the purpose of allotment of land under this rule, no Khasra shall be sub-divided."

It is admitted and borne out by the lease which is read to us, that petitioner No. 1 is a lessee. But it is said the value of the land is much more than Rs. 10,000 and therefore the petitioner is not entitled to be allotted the land. The answer to that is that the valuation is not made as required by the Act but is merely stated for the purposes of the petition. The bungalow which consists of about forty-four rooms and has a compound together with the agricultural land is purported to be sold to the State Government for Rs. 1,13,800. What is to be ascertained is the value of the agricultural land and that too honest and fair value. The petitioner would be entitled to that portion of the land the value of which does not exceed Rs. 10,000. It is wrong, therefore, to say that they are not entitled to any of the leased land.

It is next contended that as petitioner No. 1 had filed a similar application under art. 227 of the Constitution challenging these very orders, second petition is barred by the doctrine of *res judicata*. In any case it is urged that, as the said application was withdrawn as the claim in respect of rural houses was revived, they ought not to be allowed to urge the present claim. We are not impressed by either of the arguments. In *Daryao v. State of U. P.*³, the question was whether a petition under art. 32 to the Supreme Court is barred if a petition under art. 226 is dismissed by the High Court. It was held that a second petition would be barred if there is a prior decision on merits because that decision would continue to be binding on the party unless it is modified by a subsequent appropriate proceeding. If it is dismissed for want of prosecution or on the ground of laches or on the ground that the party has another remedy then the petition to the Supreme Court would not be barred. Where it is dismissed *in limine*, whether or not it is barred would depend upon the circumstances of each case; these principles apply to a second petition under art. 226 of the Constitution to the High Court. In para. 18 of the affidavit in reply it is not suggested that the application was heard on merits. In para. 11 of the petition the petitioners state that petitioner No. 1 withdrew the said petition in view of the fact that the original verified claim in respect of rural buildings was revived and on account of the main consideration that the lands were required for the Civil Hospital and that

"the petitioners were advised that in the event of the said lands were not required for a Civil Hospital the same will be permanently allotted to them at a reasonable price and that in any event they would be given suitable compensation for costly improvements effected by them."

In the counter affidavit it is denied that any such promise was made. Be that as it may, the said petition was not heard on merits nor had the Court expressed any opinion as a result of which the same was withdrawn. Apart from this as para. 13 of the petition shows, circumstances have changed as the State Government probably decided by the time the petition came to be filed to take another land for the hospital. Principles of *res judicata* will not, therefore, apply.

As to estoppel, the doctrine can only apply if some particular advantage had been obtained by the petitioners by the revival of their claim for rural buildings. The order is at exh. C in these proceedings. The claim for compensation regarding buildings was disallowed on the ground that the claimants had been allotted more than four acres of agricultural land. This was done under r. 65 of the rules. Exhibit E shows that on September 21, 1959, the Regional Settlement Commissioner recommended to the Chief Settlement Commissioner that the said claim be revived as the petitioner would lose the land as it was proposed to be sold to the State Government. Then came letter from Regional Settlement Commissioner to him on May 14, 1960 (exh. E-2) that the claim could not be revived as he would get the benefit of r. 54 (2) which we may state has no application. Finally on January 18, 1961, the Settlement Commissioner with delegated powers revived his claim in respect of rural buildings (exh. III). Therefore solicitor to the Government wrote (Exh. F) to the petitioner to let him know if under the circumstances he would withdraw his petition. This shows that revival of his claim was not conditional upon his withdrawal of the petition. Nor is it alleged in the counter affidavit that the understanding was that, if the claim was revived he would withdraw the petition. There can be no question, therefore, of estoppel. Apart from this, the order was inherently bad. Rule 65 has been interpreted by this Court to mean that the right to compensation is not lost under that rule merely because agricultural land is allotted. See *Totaram v. Regional Settlement Commr.*⁴ It also *prima facie* appears that the said r. 65 may even be *ultra vires* in that, it is in contravention of s. 8 of the Act, which provides that compensation shall be paid to the claimant in respect of his verified claims. Even before withdrawal of the previous petition in his reply to the Government Solicitor the claimant wrote to him that he should be granted the very land by way of compensation (see exh. F). The revival, therefore, of the rural claim does not come in his way.

Mr. Rane contended that under r. 22 allotment of land is not compulsory the words being "shall ordinarily be allotted". We are not concerned with r. 22. The petitioner claims the land under other rules which are applicable. Even if a discretion is vested in the Settlement Commissioner, the discretion has to be reasonably exercised. His claim, therefore, cannot be rejected. We are also not impressed by his argument that the petitioner has been shifting his ground. His contention is that the proposed sale is contrary to the rules and the scheme of the Act and, therefore, cannot be sustained.

Lastly, it is urged that the transaction is bona fide and we should not interfere. The circumstances have now changed. The State Government has clearly indicated that it has taken the decision of releasing the land and to acquire another land for the proposed hospital. It also appears that the petitioner would not have insisted on the land if it were wanted for the hospital. It would also appear that at least since 1953 he has been on the land and tended the fruit trees and in every probability has further improved the land. Under the circumstances we cannot refuse to interfere.

We, accordingly, set aside the orders dated April 12, 1960, and May 14, 1960, and direct the respondents not to dispossess the petitioners in pursuance of the said sale. We further direct that respondent No. 1 process his claim in accordance with the rules.

Having regard to the circumstances there will be no order as to costs.

Orders set aside.

Before Mr. Justice Tarkunde.

RAJMAL DAGADURAM SHETH v. KISAN VINAYAK GUJAR. *

Indian Limitation Act (IX of 1908), Art. 182 (5)—Civil Procedure Code (Act V of 1908), O. XXI, rr. 6, 7—Application for rectification of name of one of judgment-debtors in decree sent to executing Court—Whether such application covered by art. 182 (5) of Indian Limitation Act.

An application made by a decree-holder to the Court which passed the decree that the copy of the decree sent to the Court to which the decree was transferred for execution should be rectified so as to give the correct name of one of the judgment-debtors, is an application "to take some step in aid of execution of the decree" and is covered by art. 182 (5) of the Indian Limitation Act, 1908.

In deciding whether an application was "to take some step in aid of execution," the relevant question is whether the Court was requested by that application to take some step in aid of execution, and not whether the decree-holder in filing the application had acted in furtherance of execution.

*Rajaram v. Banaji Mairai*¹ and *Ratanchand v. Chandulal*,² explained.

THE facts appear in the judgment.

S. G. Seth, for the appellant.

M. A. Rane, for the respondents.

TARKUNDE J. This second appeal has been filed by a decree-holder whose Darkhast for the execution of his decree was dismissed by the Courts below on the ground of limitation. The decree was passed by the Court of the Civil Judge of Nasik and was transferred for execution to the Court of the Civil Judge of Sinnar. Three previous Darkhasts were filed by the decree-holder for the execution of the decree and the last of these Darkhasts was disposed of on April 15, 1958. Then on July 16, 1958, the decree-holder filed an application to the Nasik Court in which he stated that a mistake in the name of the third judgment-debtor had occurred in the copy of the decree which the Nasik Court had sent to the Sinnar Court along with its transfer certificate, and prayed that the record should be called for from the Sinnar Court and be sent back after correcting the name of the third judgment-debtor in the certified copy. This application was allowed by the Nasik Court on September 14, 1959. The present Darkhast was filed on March 19, 1962, that is, more than three years after the disposal of the third Darkhast but less than three years of the order passed by the Nasik Court on the aforesaid application of the decree-holder. It was the case of the decree-holder that his application to the Nasik Court was for taking a step in aid of execution of the decree and that his Darkhast was within time under art. 182 (5) of the Indian Limitation Act of 1908. This plea was not accepted by the Courts below in dismissing the Darkhast as barred by limitation.

Apart from authority, I have no difficulty in holding that the decree-holder's application to the Nasik Court fell within the scope of art. 182 (5) of the Indian Limitation Act of 1908. Article 182 (5) provides a period of three years from an application for execution of a decree from the date of the

"final order passed on an application made in accordance with law to the proper Court for execution, or to take some step-in-aid of execution of the decree or order".

The decree-holder's application was in accordance with law and was made to the proper Court. The only disputed question is whether the application was for taking some step in aid of execution of the decree. A reference may be made in this connection to O. XXI, r. 6, of the Civil Procedure Code which lays down that a Court which sends its decree for execution to another Court shall send a copy of the decree and certain certificates as specified in that rule. The provisions of rr. 6 and 7 of O. XXI show that in the normal course the transferee Court proceeds to execute the decree "without any further proof of the decree." A proper

*Decided, August 4/5, 1965. Second Appeal No. 1208 of 1964, against the decision of M.R. Waikar, Extra Assistant Judge, Nasik, in Civil Appeal No. 120 of 1963, confirming the

decree passed by M.B. Badkar, Civil Judge, J. D., Sinnar, in Darkhast No. 40 of 1962.

¹ (1898) I.L.R. 23 Bom. 311.

² (1933) 36 Bom. L.R. 115.

execution of the decree by the transferee Court is likely to be difficult if the copy of the decree sent by the Court which passed it contains material errors, such as errors in the name of the judgment-debtor, the amount to be recovered under the decree or the description of any property affected by the decree. When the decree-holder in the present case applied to the Nasik Court and prayed that the copy of the decree sent by the Nasik Court to the Sinnar Court should be rectified so as to give the correct name of the third judgment-debtor, he was asking the Nasik Court to take a step which was clearly in furtherance of the execution of the decree. His application, therefore, was "to take some step in aid of execution of the decree" and was covered by art. 182 (5) of the Indian Limitation Act, 1908.

In coming to the contrary conclusion, the Courts below raised an irrelevant question, namely, whether the decree-holder's application to the Nasik Court was itself a step in aid of execution, and proceeded to answer that question by the test whether it was necessary for the decree-holder to make such an application. In this connection, the learned Appellate Judge observed that there was no reason to suppose that execution of the decree could not have proceeded unless the mistake in the certified copy of the decree was rectified, and that in any case the decree-holder could have executed the decree against two of the judgment-debtors even if it could not be executed against the third judgment-debtor on account of the mistake which had occurred in his name in the copy of the decree. The learned Appellate Judge, therefore, held that the decree-holder's application to the Nasik Court was "unnecessary and redundant", and that the application "could not serve as a step in aid of execution".

Now, the correct question which arose for the decision of the Courts below on the wording of art. 182(5) was, not whether the decree-holder's application was itself a step in aid of execution, but whether the step which the decree-holder had requested the Nasik Court to take was a step in aid of execution. In other words, the question was whether the rectification of the copy of the decree as prayed for by the decree-holder amounted to a step in aid of execution. If that question had been raised by the Courts below, they could hardly have answered it by holding that the applicant did not request the Court to take a step in aid of execution of the decree. The wording of art. 182(5) makes it clear that it covers two types of applications—applications for execution of a decree or order, and applications to take some step in aid of execution of a decree or order. Both the types of applications are connected with the execution of a decree or order. In the former, the Court is approached for adopting any one or more of the modes of execution specified in the Civil Procedure Code, such as delivery of property, attachment and sale, arrest and detention, etc. In the latter, the Court is approached to take some step which is ancillary to execution and in furtherance thereof.

On behalf of the judgment-debtors Mr. Rane defended the conclusion of the Court below by relying on two cases decided by this Court. In *Rajaram v. Banaji Mairal*,¹ a Division Bench held that an application to the Court by a decree-holder asking for the return of the copy of a decree filed with a former *darkhast* is not a step in aid of execution of the decree. It will be noticed that what the decree-holder had asked the Court in that case to do was merely to return the copy of a decree which had been filed with the former *darkhast*. It was noted by the learned Judges who decided that case that, according to the rules of the Court, it was necessary for the decree-holder to file a certified copy of the decree along with his *darkhast*. Hence the step which the decree-holder had taken in applying to the Court to return the copy of the decree which he had filed with the former *darkhast* might have been a step taken for the purpose of further execution of his decree. What the Court, however, was concerned with was not whether in making the application the decree-holder took a step in aid of the execution of the decree, but whether the decree-holder had asked the Court to take some step in aid of execution of the decree. After referring to the terms of the corresponding art. 179(4) of the Limitation Act of 1877 which governed that case, Parsons J. observed in the course of his judgment (p. 312) :

"...The words of the enactment seem clear. They require an application to be made to

the Court for it to take some step in aid of execution of the decree. The return by it of a copy of a document cannot, in my opinion, be held to be a step in execution taken by the Court." Thus what was held by the Court in that case was that the mere return of a copy of a decree to the decree-holder was not so connected with the execution of the decree that it could be regarded as a step in aid of execution.

The other case on which reliance was placed by Mr. Rane was *Ratanchand v. Chandulal*,² where a single Judge of this Court held that an application to re-construct a decree which had been destroyed was not a step in aid of execution of the decree within the meaning of art. 182(5) of the Indian Limitation Act, 1908. In support of his decision the learned Judge observed that it was not necessary to have the decree or a copy of the decree in order to apply in execution, that in any case the decree-holders in that case had not stated that they did not have a copy of the decree with them, and further that it did not follow from the fact that the decree-holders had applied for a copy of the decree that they would necessarily have taken proceedings in execution. It will be noticed that here also the mere re-construction of the decree which had been prayed for by the decree-holders was not so connected with the execution of the decree as to constitute a step in aid of execution.

As observed above, the prayer which the decree-holder in the present case had made to the Nasik Court for rectifying the copy of the decree sent to the Sinnar Court amounted to a prayer that a step in aid of execution of the decree should be taken by the Nasik Court. The decree-holder's application to the Nasik Court was, therefore, covered by art. 182(5) of the Limitation Act, 1908. It must follow that the Courts below were wrong in holding that the decree-holder's *darkhast* was barred by limitation.

This second appeal is, therefore, allowed, the orders of the trial Court and the Appellate Court dismissing the *darkhast* are set aside, the *darkhast* is restored and the trial Court is directed to proceed with it in accordance with law. The judgment-debtors will pay the costs of the decree-holder throughout.

Appeal allowed.

[NAGPUR BENCH]

Before Mr. Justice Patel and Mr. Justice Wagle.

THE MAHARASHTRA STATE ELECTRICITY BOARD

v.

M/S. MADHUSUDAN DASS AND BROTHERS.*

Electricity (Supply) Act (LIV of 1948), Secs. 26, 46, 79, 70, 49—Indian Electricity Act (IX of 1910), Sec. 24(1)—Whether s. 24(1) of Act IX of 1910 applies to a Board.

The effect of s. 26 of the Electricity (Supply) Act, 1948, is that if the Board has laid supply mains and has commenced to supply the energy then it becomes a licensee to that extent and acquires all the powers and obligations under the Indian Electricity Act, 1910, and all the provisions of the latter Act apply except such as are excluded. Section 24 is not excluded and, therefore, s. 24(1) applies to the case of a supply of electrical energy by the Board to a consumer and the Board can discontinue the supply only if the conditions of s. 24(1) are satisfied, i.e. there must be neglect on the part of the consumer to pay the electrical charges.

The State Electricity Board (plaintiff) constituted under the Electricity (Supply) Act of 1948, supplied electrical energy to licensees and consumers under certain circumstances. M/s. Madhusudan Dass & Bros. (defendant) was a firm owning manganese mines at Mandri, in Ramtek Tahsil. Under an agreement between the Board and the defendant dated March 9, 1956, the defendant agreed to take electrical energy on terms stated therein. The contract was to be operative for a period of five years from the date on which

² (1933) 36 Bom. L.R. 115.

*Decided, April 21, 1965. First Appeal No. 139 of 1963, against the decision of Hifzul

Kabir Khan, Civil Judge, Senior Division, at Nagpur, in Special Civil Suit No. 40 of 1961.

the supply was started i.e. upto May 6, 1962. At the time when the contract was entered into between the parties, slab tariff system was in force and the rates fixed in the contract for the supply of the energy were in accordance with Part II of the High Tension Tariff. Under the tariff as then existing, for the first 5000 units of energy consumed the consumer had to pay 1.75 annas per unit, for the next 20,000 units he had to pay 1.65 annas per unit, for the next 75,000 units of energy he had to pay 1.50 annas per unit and in excess of the above consumption he had to pay 1.25 annas per unit. There was a minimum tariff prescribed in the sense that the consumer had to pay for 600 units per KW of highest recorded maximum demand over the year or for 30,000 units per year whichever was greater. In the contract, by clause 20, the rates were as stated in the schedule and by clause 22(a), the defendant guaranteed a minimum consumption which yielded an annual revenue of Rs. 3,281-4-0, and further agreed to pay this amount even if it did not consume that much electrical energy. By clause 30 certain powers were reserved to the Board to increase or reduce the tariff charges. Clause 34 provided that the Board had the right in case the consumer failed to comply with the terms of the agreement in addition to the rights possessed by it under the Acts, Rules and Regulations, to discontinue the supply after giving seven days' notice in writing to the defendant. The clause further provided that under certain circumstances the Board had the right to reconnect the supply, and also to recover charges inspite of the discontinuance of the supply.

By about the end of December 1958, the Board revised the tariff of the supply. In the revised tariff the whole system was changed to "two-part-tariff". It fixed what is known as a 'demand charge' per KVA in addition to the actual charges for the consumption of electrical energy. The demand charge was fixed at Rs. 10 per month per KVA for the first 200 KVA of the billing demand and thereafter on a sliding basis. The energy charge was reduced to 5 nP per unit for the first 100 units per month per KVA of the billing demand or 10,000 units whichever was greater. For consumption above that unitage, there were further sliding charges per unit. It defined the billing demand to mean the highest of the four alternatives mentioned therein. In the present case, there was no dispute that so far as Vidarbha Area was concerned, the minimum billing demand was 50 KVA. The plaintiff introduced the revised tariffs from January 1, 1959, and called upon the defendant to pay subsequent bills on the footing of the new tariffs. As the bills in the present case show, in the earlier period the maximum consumption of the defendant was never more than about 25,000 units of energy per year, with the result that the defendant paid the minimum guaranteed amount of Rs. 3,281-4-0 annually. Under the new tariff the "demand charges" came to Rs. 500 per month and the consumption charges were at 5 nP per unit of the energy consumed. The minimum, therefore, that the defendant was required to pay was something much more than Rs. 6,000 annually.

The defendant delayed the payments of the new charges on the ground that the charges were excessive and contrary to the terms of the contract. The Board gave notice for disconnecting the supply and actually disconnected the supply on April 13, 1960. The defendant, however, paid the arrears and the supply was reconnected on April 17, 1960. Then the defendant again did not pay and on September 29, 1960, the supply was again disconnected. Then it made a part payment on October 27, 1960, and the supply was, therefore, recommenced on November 2, 1960. It then paid the past arrears on December 30, 1960. It was again in arrears and, therefore, the supply was disconnected on January 18, 1961. Before disconnecting the supply, the Board gave notice to the defendant on January 4, 1961, which purported to be one under s. 24(I) of the Indian Electricity Act, 1910. As the notice was not complied with, the supply came to be disconnected as stated above. Thereafter the Board filed the present suit for recovering the arrears of the past supply and also the

minimum guaranteed demand, according to the new tariff. The statement of the claim was as follows:

- (a) Arrears in respect of the energy consumed upto
the date of disconnection at the new rates ...Rs. 5944.26 nP
 - (b) Minimum guarantee payment for the unexpired
period from 1.2.61 to 6.5.62 including hire charges
at the new rates ...Rs. 9841.45 nP.
 - (c) Surcharge for delayed payments calculated up to 15.8.61 ... Rs. 793.41 nP.
-
- Total Claim ... Rs. 16579.12 nP.

It gave deduction of Rs. 76.29 nP and the net claim made was Rs. 16,502.83 nP.

The defendant contended *inter alia* that it did not agree to the revised tariffs, which were applied from January 1, 1959, and that the plaintiff had no right to revise the tariffs under the contract between the parties and it was not, therefore, liable to pay the bills according to the revised tariffs. The defendant denied that there were any arrears in respect of the energy consumed by the defendant at any time or until the month of January 1961. It denied its liability to pay the surcharge of Rs. 793.41 nP. on account of the alleged delayed payment as there was no delay in the payment of the charges. The defendant relied upon the rights conferred upon it under the agreement between the parties. In para. 11 of the written statement it contended that

"The revision of the tariff and the application of the revised tariff to the contract in question was *ultra vires* of the powers of the Board under the Electricity (Supply) Act, 1948. It was in direct contravention of section 46 of the said Act as also of the rules made by the State Government under section 78 of the Act and regulations made by the Board under section 79 relating to principles governing the fixing of grid tariff as also to principles governing the supply of electricity by the Board to the persons other than licensees under section 48 of the Act."

By clause (b) of the same paragraph, it contended that clause 30(a) which gave unilateral power to the Board to vary the charges was void and the exercise of such power would amount to recession of the contract. It further contended that the billing demand charge had no relation to the minimum fixed under the agreement and, therefore, was not enforceable, that the disconnection of the supply on January 18, 1961, was wrongful and when the plaintiff claims the minimum guaranteed amount, it, in effect, claims compensation for wrongful disconnection effected by the plaintiff. The defendant also made a counter-claim that it had overpaid the plaintiff a sum of Rs. 4,289.94 nP.

The trial Judge held that the defendant had power of fixing the tariff under the Act, but that it was incompetent to apply the revised rates of tariff to the contract in suit. As one of the side considerations to this question, he held that clause 30(a) of the contract was void and unenforceable. It was on this footing that the Judge held that the revised tariff could not be enforced by the Board. In consonance with this finding, he held that the Board was not entitled to enforce the payment of Rs. 9,841.45 nP. as minimum guaranteed payment nor was it entitled to charge the surcharge of Rs. 793.41 nP. and he allowed the defendant's counter-claim of Rs. 4,289.94 P. on the basis of old contractual rates as over payment.

The defendant appealed to the High Court Bench at Nagpur.

M. N. Phadke, M. W. Puranik and V. M. Golwalkar, for the appellant.
J. M. Thakar and C. J. Thakar, for the respondent.

PATEL J. [His Lordship after setting out the facts, proceeded.] The question is whether the revision of the tariff for the supply of the energy on a different principle is *ultra vires* the Act and/or the rules under the Act. The contention is to be found in para. 11(a) of the written statement where these words are used. Mr. Thakar was not able to show how the revised tariffs

were in contravention of the provisions of the Act. When pressed to clarify his contention he said that the tariffs were not fixed in accordance with the regulations which is entirely a different matter. This clearly cannot mean that the Board has acted *ultra vires* the Act since we speak of an act being *ultra vires* when the maker of the act has no power or jurisdiction to do the thing. If the maker has got jurisdiction of doing the thing, but if it is done in contravention of the rules, one speaks of the act being only illegal. It is remarkable that though an allegation was made in para. 11 of the written statement in this connection, it was vague and no particular regulation was alleged to have been violated. Mr. Thakar has not been able to show in what manner any provision of any of the regulations has been violated. Plaintiff Board examined an engineer on its behalf but no questions have been put to him in support of the allegation that any provision of the regulations was violated while fixing the tariff. There is no substance, therefore, in this contention of Mr. Thakar.

Mr. Thakar contends that even if the Board has rightly revised the tariffs, the same could not be applied to the defendant because of the contract, that the unilateral power given to the Board by clause 30 to increase or decrease the charges for the supply was vague and indefinite and was therefore void, that such power which gave one of the parties to the contract to do something arbitrary was unenforceable and therefore the Board was not entitled to charge according to the new tariffs for the supply of the energy. In any case it is argued that it cannot claim the minimum demand charge under clause 34 of the contract as it has claimed for the unexpired period from February 1, 1961, to May 6, 1962, the Board having unjustifiably cut off the supply. He further contends that even if the Board were entitled to claim the minimum charges, under clause 22-A of the contract the defendant is liable to pay Rs. 3,281-4-0 only annually.

Mr. Thakar laid emphasis on cl. 30 of the contract as was done in the trial Court. He also referred to some other clauses which give the Board large powers and relied upon *Bennett v. Bennett*¹ and *Goodinson v. Goodinson*² in support of his contention that the clauses are void. We are only concerned with cl. 30 and not with others since the Board is not trying to enforce other clauses.

Much reliance was placed on cl. 30 in the trial Court and by Mr. Thakar even here. Clause 30(a) runs as follows:

"The rates and other charges set out in the schedule referred to in clause 20 hereof and the miscellaneous charges in the conditions of supply are those in force at the time of executing the agreement in the Southern Grid area. The consumer shall be eligible for whatever reduction in or rebate from these rates and/or in charges is granted by the Board and will be liable for whatever surcharge or increase upon them as may from time to time be charged by the Board or be liable to pay any new rate or tariff or amount which the board may in its discretion deem fit to charge in lieu of the payments fixed under this agreement."

Surprisingly enough, the words of clause 20 have been overlooked. Clause 20 runs as follows:

"The consumer shall pay to the Board every month, charges for the electrical energy supplied to the consumer during the preceding month at the Board's tariff applicable for the Southern Grid area, to the class of service and in force from time to time. A copy of the current H. T. tariff No. II Slab Tariff of Notification No. 5-921 4-2 dated 1.12.52 applicable to the consumer is set out in the Schedule attached to this agreement."

This clause provides in essence that the consumer would be liable to pay to the Board every month according to the tariff in force from time to time, that is, the prescribed rates for the supply in accordance with the tariff then in force. It is clear that cl. 30(a) is nothing but a corollary to the liabi-

lity created between the parties under cl. 20. It only prescribes the consequences of what can happen if the tariff rates are changed. The consumer would be entitled to reduction in the charge if the tariff rates were reduced. On the other hand, the consumer had to pay a higher charge if the tariff were increased. The real liability to pay according to the tariffs in force from time to time is created under cl. 20 itself which prescribes the charges.

The first question is whether the power given to the Board to change the tariffs is so arbitrary that it should be held to be unenforceable. Clause 30 has to be read with cl. 20, the effect being that the consumer must pay for the energy supplied at the prevalent tariff rates. The Act and the rules prescribe the principles and the manner of fixing the same. Tariff is not to be fixed for a particular individual but for all to whom the energy is supplied. It is, therefore, impossible to hold that cl. 30 read with cl. 20 gives arbitrary powers to the Board to vary the contract unilaterally and, therefore, is rendered void. It is not necessary to consider the matter in greater details, as in *Amalgamated Electricity Co. v. N. S. Bathena*³ a similar provision in a contract between a licensee and a consumer was upheld by the Supreme Court. In that case the judgment of J.C. Shah J. in this Court in *Babulal v. Chopda Electricity Supply Co.*⁴ where it was held that a term, such as this, which gave rights to a licensee to vary the charges for the supply unilaterally could not be enforced, was considered and was disapproved by the Supreme Court. The conditions prescribed for the exercise of the power of fixing the tariff or for revising it obtaining in that case are applicable in the present case as well. The Board has not got unbridled discretion in fixing the tariff. Under s. 46 of the Electricity (Supply) Act, 1948, the tariff has to be fixed or revised, in accordance with the regulations framed under s. 79 of the Act and it is to be done on the basis of certain principles. Having regard to the provisions of the Act, it cannot be said that the agreement of the consumer to pay according to the tariff which may be in force from time to time is illegal or void, and if that is so, it is impossible to hold that cl. 30 (a), which is merely a corollary to cl. 20, can be void and unenforceable. In view of this, it is not necessary to consider the other cases cited on behalf of the defendant by Mr. Thakar. He referred us to the decision of the Supreme Court in *Keshavlal v. Lalbhai T. Mills Ltd.*⁵ the relevant observation being in para. 8. The principle of this case has no application to the present case. In the present case the plaintiff is a statutory body which has no unbridled power to fix the tariffs according to its arbitrary choice. It has to be fixed according to the well defined principles contained in the Act as well as the regulations framed and the observations, therefore, made in that case have no possible application to the present case.

Mr. Thakar then contended that under cls. 20 and 30 of the contract he is not liable to pay the demand charges. He argues that even if the charges for the supply could be varied by the Board, the principle of the charges must remain the same and the Board would have no power to change the principle. In other words, he contends that the system of charging cannot be changed. There might have been some substance in the contention if the minimum billing demand charge were not a part of the tariff. In order to see whether the "demand charge" is a part of the tariff, we must go to s. 46 which enables the Board to fix the Grid tariff from time to time. Sub-section (3) of the Electricity (Supply) Act, 1948 says:

"The Grid Tariff shall be so framed as to include as part of the charge, and show separately a fixed kilowatt charges component and a running charges component:

Provided that if in respect of any area the electricity to be sold by the Board is wholly or substantially derived from hydro-electric sources, the running charges component may be omitted."

3 [1964] A.I.R. S.C. 1598.

L.R. 994.

4 [1955] A.I.R. Bom. 182, s.c. 56 Bom.

5 [1958] A.I.R. S.C. 512.

Sub-section (4) says:

"The fixed kilowatt charges component in the Grid Tariff may be framed so as to vary with the magnitude of maximum demand."

Sub-section (6) says:

"The Grid Tariff may contain provisions for—

(a) adjustment of price having regard to the power factor of supply taken or the cost of fuel or both;

(b) a minimum charge related to a past or prospective demand of a licensee on the Board."

Having regard to the terms of s. 46, it must be held that the demand charge is a part of the tariff, and if that is so, by cl. 20, the defendant is bound to pay this charge as well as the charge for the actual energy consumed.

It is then contended by Mr. Thakar that, in any event, after discontinuation of the supply, defendant was not liable to pay either the minimum charges fixed by the contract or any amount as the discontinuance of supply was not justified. He contends that as there was a *bona fide* dispute between them in that the defendant was contending on the one hand that it should be charged at the contractual rate, while the Board was insisting on applying the new tariff rate, the non-payment of the bill did not justify the Board in disconnecting the supply under s. 24(1) of the Indian Electricity Act, 1910, and that the disconnection of the supply being wrongful it could not claim the minimum charge. Mr. Phadke disputes this contention of Mr. Thakar. He contends in the first place that such a contention has not been raised in the written statement and as the question as to whether there was a *bona fide* dispute between the parties or not, is a question of fact the same ought not to be allowed to be raised now. Secondly, he contends that s. 24(1) of the Indian Electricity Act is not applicable in the case of the Board and, if that is so, it acted only under cl. 34 of the contract under which, the defendant having failed to pay the charges for the supply, the Board was entitled to discontinue the same and to demand the minimum charges which was the "minimum demand charge" fixed under the new tariff.

It is difficult to appreciate the contention that the question as to whether or not the supply was properly discontinued has not been raised in the pleadings. The defendant's contention was all along that he was prepared to pay the charges according to the contractual rate, the contract was for a period of five years and the Board had no right to apply the new tariff rates and that the charges under the new tariffs were excessive. In para. 1 of the written statement the defendant alleges that the disconnection of the supply on all these occasions was wrongful. As to the minimum charges in para. 2(b) of the written statement it says that the plaintiff wrongfully cut off the supply and hence it was not entitled to claim the minimum charges. True that it is not contended that the Board was not entitled to discontinue the supply under s. 24 of the Electricity Act as there was a dispute between the parties. But then law need not be pleaded. It is our duty to apply the law to facts proved and found. Though, therefore, the point was not argued in the Court below, we would not be justified in not allowing the defendant to argue the point.

The question is whether there was a *bona fide* dispute between the parties when the defendant failed to pay for the supply of energy and the supply was unjustifiably cut off. It is undoubtedly true that on two prior occasions, when the supply was discontinued, the defendant made full payment of the arrears and obtained reconnection of the supply. Even so, it cannot be denied in the present case that there was a genuine dispute between the parties. The defendant had entered into an agreement to take the supply and the plaintiff had agreed to supply the electrical energy for a period of five years. No doubt, cl. 20 which prescribes the rates shows that the rates were flexible in the sense that they were payable according to the tariff fixed by the Board from time to time. Even so, having regard to the terms of the contract and having

regard to the fact that the system of charging was changed by the new tariff, it could not be said that the defendant could not honestly believe that the Board would not be entitled to charge according to the new tariffs. Mr. Phadke contended that the defendant did not raise this dispute until after the last notice exh. 48 was given on January 4, 1960. But then, even prior to that the defendant had by exh. 47 challenged the right of the Board to levy the new tariff. Similarly, thereafter by exh. P-52 the defendant had already challenged the rights of the Board to revise the rates. Moreover, the decision of this Court in *Babulal's* case supported this stand. In view of the bona fide dispute between the parties it cannot be said that the Board was justified in cutting off the electric supply.

In *Corporation of Nagpur v. Nagpur E.L. & P.Co.*⁶ it was held that if there was a bona fide dispute between the parties as to what is payable, the failure to pay the dues does not amount to a neglect to pay within the meaning of s. 24(1) and action under s. 24(1) could not be taken by an electrical undertaking in such a case. If the Board, therefore, is obliged to act under s. 24(1), then in view of the dispute between the parties, it could be said that the Board was not justified in cutting off the supply. The question is whether s. 24(1) is applicable to the Board.

Section 26 of the Electricity (Supply) Act, 1948, applies some of the provisions of the Indian Electricity Act, 1910, to the Board and is as follows:

"26. Subject to the provisions of this Act, the Board shall, in respect of the whole State, have all the power and obligations of a licensee under the Indian Electricity Act, 1910 (9 of 1910), and this Act shall be deemed to be the licence of the Board for the purposes of that Act."

The first proviso excludes the application of certain sections and some clauses in the schedule to the Electricity Act, 1910, the sections being 3 to 11, subss. (2) and (3) of s. 21 and ss. 22, 23 and 27 of that Act and clauses I to V, VII and IX to XII of the Schedule to that Act. The second proviso applies clause VI of the Schedule in the Electricity Act to the Board in respect of an area where distribution mains have been laid by the Board and the supply of energy through any of them has commenced. The effect of s. 26 is that if the Board has laid supply mains and has commenced to supply the energy, then it becomes a licensee to that extent and acquires all the powers and obligations under that Act (Electricity Act of 1910) and all the provisions of that Act must apply except such as are excluded. As s. 24 is not excluded by the provisions it must apply to the Board and it has to act strictly in accordance with the same.

Mr. Phadke contends that the Board cannot be tied down to the limited power of cutting off the supply contained in s. 24 because it is not obligatory on it to supply electrical energy. Mr. Phadke relies on s. 70 of the Electricity (Supply) Act which, he says, exempts the application of the Electricity Act, 1910. It only says that no provision of the Indian Electricity Act, 1910, or of any rules made thereunder or of any instrument having effect by virtue of such law or rule shall, so far as it is inconsistent with any of the provisions of the Act, have any effect.

In order that the sections which are expressly applied by s. 26 should be excluded by s. 70 of this Act, the provisions thereof must be shown to be inconsistent with the provisions of the Electricity (Supply) Act. It is said that s. 49 of the Electricity (Supply) Act, 1948, vests a discretion in the Board to supply electrical energy to a consumer and is, therefore, in conflict with s. 24 of the Electricity Act and, therefore, s. 24 ought not to be applied. It is not possible to accept this contention. Section 49 itself provides that the Board may supply electricity to any person subject to the provisions of the Act and of the regulations made in this behalf and one of the provisions of the Act is s. 26 under which it has got the same powers and the obligations as a licensee. We cannot disregard the word "obligations" in s.

26. Once it has laid the mains and started the supply it is obliged to continue to do so as a licensee. Section 24(1), therefore, applies to the case of a supply of electrical energy by the Board to a consumer and, if that is so, it can discontinue the supply only if the conditions of s. 24(1) are satisfied, i.e. there must be neglect on the part of the consumer to pay the electrical charges. If cl. 34 gave wider power to the Board, to that extent, that power would be ineffective.

It is not also correct to say that the Board acted only under cl. 34 of the contract. When the defendant called upon the Board to refer the dispute to arbitration in accordance with the contract by exh. 47, the Board gave notice by exh. 48 under s. 24(1) of the Electricity Act threatening to disconnect the supply if the bills were not cleared. This shows that the Board itself acted in exercise of the powers vested in it under s. 24 of the Electricity Act.

[The rest of the judgment is not material to this report.]

[NAGPUR BENCH]

Before Mr. Justice Patel and Mr. Justice Wagle.

SARJUBAI MADANGOPAL BHANGADIA v. PUKHRAJ MOTILAL KOCHAR*

Civil Procedure Code (Act V of 1908), O.XLI r. 33—Trial Court refusing to pass decree in favour of plaintiff for non-production of succession certificate—Succession certificate produced before appellate Court—Whether appellate Court can reverse decree of trial Court.

If a plaintiff fails to produce a succession certificate in the trial Court and on that ground the trial Court refuses to pass a decree in his favour to which he is otherwise entitled, the appellate Court can reverse the decree of the trial Court if the succession certificate is produced before the appellate Court.

*Fateh Chand v. Muhammad Bakhsh*¹ and *Mt. Habib Fatma v. Mt. Arjumand Khatun*,² not agreed with.

Quilter v. Mapleson,³ *Attorney-General v. Birmingham, Tame, and Rea District Drainage Board*,⁴ *Kristnama Chariar v. Mangammal*,⁵ *Kanakayya v. Janardhana Padhi*,⁶ *Lachmeshwar v. Keshwar Lal*,⁷ *Rustonji v. Sheth Purshottam Das*⁸ and *Sakharam Mahadev Dange v. Hari Krishna Dange*,⁹ referred to.

ONE Sarjubai (plaintiff) was the widow of one Madangopal Raghunathdas, who died on May 19, 1953. Madangopal formed a joint family with Ramgopal and Ramchandra and they were running a joint family shop, but they were messing separately since about 1933. The plaintiff was the third wife of Madangopal who married her in the year 1943. At the time of his third marriage Madangopal was about 47 or 48 years old and the plaintiff was a young girl of about 14 or 15 years old. She alleged that because of this disparity in their ages and because it was the third marriage of Madangopal, when the proposal for the marriage was mooted her father insisted on Madangopal making a provision for her for the future and insisted that he paid a sum of one lakh rupees. Ultimately, it was agreed that he would pay a sum of Rs. 75,000 before the marriage. She said that accordingly before the marriage was celebrated, a sum of Rs. 75,000 was handed over by Madangopal to her father. After the marriage for about three years the money remained with her father, but later on in about 1947 when her father was ill and he came for treatment at the house of Madangopal the same was handed over to her. Out of that amount Madangopal deposited a sum of Rs. 50,000 on her behalf in the firm of Pukhraj (defendant) who was very well-known to her husband and who was keeping such

*Decided, April 26, 1965. First Appeal No. 88 of 1957, against the decision of B. V. Patwardhan, Additional District Judge at Wardha, in Civil Suit No. 8-B of 1954.

1 (1894) I.L.R. 16 All. 259, F.B.

2 [1927] A.I.R. All. 228.

3 (1882) 9 Q.B.D. 672.

4 [1912] A.C. 788.

5 (1902) I.L.R. 28 Mad. 91.

6 (1910) I.L.R. 38 Mad. 430.

7 [1941] A.I.R. F.C. 5.

8 (1901) I.L.R. 25 Bom. 606, s.c. 3 Bom. L.R. 227.

9 (1881) I.L.R. 6 Bom. 113.

deposits. The sum was kept with him on September 1, 1948, and the amount was to carry interest. On or about August 29, 1951, an account was made up between her husband and the defendant and it was ascertained that Rs. 42,000 were in balance with the defendant. For this amount the defendant passed a writing. She alleged that she had asked her husband to deposit the amount in her name but when she enquired about it she came to know that her husband did not follow the instructions but deposited the amounts in his own name, that her husband had no interest in the said amount and that it belonged exclusively to her. In the alternative she claimed that if the amount were held to belong to Madangopal, then after his death she being the sole heir of Madangopal she was entitled to the amount as heir and legal representative of Madangopal. She claimed Rs. 42,000 as being due on August, 29, 1951 and Rs. 7,560 on account of interest at six per cent. per annum. She claimed in all a sum of Rs. 49,000 and odd.

The defendant denied the plaintiff's allegations and raised various contentions. The trial Judge raised a number of issues including the following :

"8. Whether a succession certificate is necessary to draw up the decree?"

The trial Judge negatived the plaintiff's case that Madangopal had deposited Rs. 50,000 belonging to her in his own name and he further held that Madangopal had opened *Khatas* with the defendant and had deposited amounts in his own name, with the defendant but it had nothing to do with the plaintiff's claim. He, however, did not find what was due to Madangopal as he negatived the plaintiff's right to a decree on the alternative ground for the reason that she had not produced succession certificate. He, therefore, dismissed the plaintiff's suit.

The plaintiff appealed to the High Court Bench at Nagpur.

D. B. Padhye and *G. R. Bhangde*, for the appellant.

P. P. Deo and *G. B. Shidhaye*, for the respondents.

PATEL J. [His Lordship after stating the facts and dealing with points not material to this report, proceeded.] Mr. Padhye then contended that in any event the plaintiff is entitled to a decree as the heir of Madangopal as she has now obtained the necessary succession certificate. In this connection, it must be noted that in the trial Court the plaintiff had not produced succession certificate, nor had she made any application whatsoever for the same. It seems that during the pendency of the suit on February 22, 1955, the learned Judge had drawn the attention of the plaintiff's advocate to the fact that as regards her alternative claim she would have to produce a succession certificate. As at the date of the judgment she had not obtained succession certificate, he dismissed her suit without considering the alternative claim.

It is argued by Mr. Deo, that it is not within the power of the appellate Court to reverse the decree of the trial Court on the ground that she has now obtained a succession certificate. Mr. Deo relies on *Fateh Chand v. Muhammad Bakhsh*¹ and *Mt. Habib Fatma v. Mt. Arjumand Khatun*², where it is held that if the plaintiff failed to produce succession certificate in the trial Court, the appellate Court could not reverse the decree even if a succession certificate were produced before the appellate Court.

We fail to see why on first principles the appellate Court is not entitled to make a decree in favour of the plaintiff if she is otherwise entitled to have it and when she has produced the succession certificate. In England, an appeal is always regarded as rehearing of the suit and the appellate Court moulds its decree according to the circumstances. See: *Quilley v. Mapleson*³. This was accepted in *Attorney-General Birmingham, Tame and Rea District Drainage Board*⁴, where it was said (p. 788) :

"An appeal to the Court of Appeal is by way of rehearing, and the Court may make such order as the judge of first instance could have made if the case had been heard by him at the date on which the appeal was heard."

¹ (1894) I.L.R. 16 All. 259, F.B.

² [1927] A.I.R. All. 228.

³ (1882) 9 Q.B.D. 372.

⁴ [1912] A.C. 788.

As early as 1902 Bhashyam Ayyangar J. in *Kristnama Chariar v. Mangammal*⁵ under the older procedural Code held that hearing of the appeal was in the nature of rehearing of suit and this was reaffirmed under the present Code in *Kanakayya v. Janardhana Padhi*⁶ after full discussion. Order XLI, r. 33, of the present Code is similar to O. LVIII, r. 5, of the Rules of the Supreme Court. The reasoning, therefore, in *Quilter v. Mapleson* and *Attorney-General v. Birmingham, Tame and Rea District Drainage Board* for holding that appeal is in the nature of a rehearing of the suit applies.

In *Lachmeshwar v. Keshwar Lal*⁷ a question arose as to whether the Bihar Money Lenders Act which was enacted after the decision of the High Court but during the pendency of appeal in the Federal Court could be applied. Varadachariar J. (with whom Gwyer C. J. agreed) considered the question and affirmed the principles laid down in the Madras cases referred to above observing that (p. 18) :

"...There is no reason to suppose that the powers of this Court when acting as a Court of appeal are less extensive than those of the High Courts when hearing an appeal." In *Rustomji v. Sheth Purshottam Das*⁸ and *Sakharam Mahadev Dange v. Hari Krishna Dange*⁹ the Court took notice of subsequent events and moulded the decree necessitated by the change of circumstances.

The decision in *Fateh Chand v. Muhammad Bakhsh* was rendered under the old Code and there is no discussion about the powers of the Appellate Court under the procedural Code. It is said "no subsequent production of the certificate could show that the decree of the Subordinate Judge was contrary to law". The later case follows the earlier and the Madras decisions are not even noticed. We cannot, therefore, with respect, agree with the ratio of the decisions in those two cases. The production of the certificate therefore is a circumstance which must now be taken into account. The obstruction in her way now disappears and she be entitled to the decree if she succeeds on merits.

[The rest of the judgment is not material to this report.]

Decree set aside.

Before Mr. Justice Patel and Mr. Justice Bal.

DR. S. W. V. FREDRICKS *v.* KRISHNA SOPANRAO KAMBLE.*

Cantonments Electoral Rules, 1945. Rules 44, 45, 42—Election petition presented without depositing security deposit—Maintainability of petition.

Rule 44 of the Cantonments Electoral Rules, 1945, is mandatory and, therefore, an election petition presented without depositing the security deposit as required by the rule is not competent and cannot be heard.

*K. Kamaraja Nadar v. Kunju Thevar*¹ and *Chandrika Prasad v. Shiv Prasad*², explained.

THE facts appear in the judgment.

C. R. Dalvi, for the petitioners.

PATEL J. These two petitions arise out of elections to the Cantonment Board, Kirkee, held on February 9, 1964. Results of the elections were declared on February 10, 1964, at which the petitioners in both the cases were declared elected in respect of their respective Wards. The opponent in each case, who was a candidate in his respective Ward, filed on February 17, 1964, an election petition challenging the election of the respective petitioner. At the time of presenting the election petition, the deposit which is required to be made under r. 44 of the Election Rules framed under the Act, was not made. Ultimately, on September 4, 1964, the learned

5 (1902) I.L.R. 26 Mad. 91.

6 (1910) I.L.R. 36 Mad. 439.

7 [1941] A.I.R. F.O. 5.

8 (1901) I.L.R. 25 Bom. 606, s.c. 3 Bom. L.R. 227.

9 (1881) I.L.R. 6 Bom. 113.

*Decided, June 28, 1965. Special Civil Applications Nos. 1821 of 1964 and 1822 of 1964.

1 [1958] A.I.R.S.C. 687.

2 [1959] A.I.R. S.C. 827.

Judge framed the issues in the presence of both the sides, and at that time it was brought to the notice of the learned Judge by the respective petitioners that deposits as required by r. 44 were not made. The respective advocates of opponent No. 1 in each case then made an application that they should be allowed to make the deposit, and they were allowed to do so, even though the petitioners opposed. After the deposit was made, the petitioners insisted that the learned Judge should decide the preliminary issue as to whether the election petitions were competent, inasmuch as the opponents had not complied with r. 44. The learned Judge returned the finding in opponents' favour. These petitions seek to challenge this finding. The question now before us is whether or not the election petition can be heard as there is a breach of r. 44 in view of the opponent not having deposited the security deposit as required by it.

We may refer to the relevant rules viz. rr. 42, 43, 44 and 45, in this connection. They are as follows :

42. No election shall be called in question except by an election petition presented in accordance with these rules.

43. A petition calling in question the validity of an election or the return of a particular candidate may be presented in writing to the District Judge of the District within which the election has been held (or where there is no District Judge, to such Judicial Officer as the State Government may appoint in that behalf), within seven days after the date on which the result of the election was declared either by a person who was a candidate at the election or by not less than five persons entitled to vote at the said election :

Provided that no such petition shall be presented on the ground either that the name of any person qualified to vote has been omitted from the electoral roll or that the name of any person not so qualified has been inserted in the roll.

44. Every petition shall be accompanied by a deposit of one hundred and fifty rupees in cash or in Government promissory notes of equal value at the market rate of the day as security for the costs likely to be incurred.

Provided that where such petition relates to the election of a candidate belonging to the Scheduled Castes or the Scheduled Tribes, the amount of such deposit shall be seventy-five rupees only.

At the conclusion of the inquiry, the deposit or, if the petitioner has been directed under Rule 46 to pay costs, the balance, if any of the deposit after deduction of those costs, shall be refunded to the petitioner.

45. Where a petition has been presented under rule 43 and the security deposited as required by rule 44, the District Judge (or the officer appointed in accordance with rule 43), or any Judicial Officer subordinate to him and not below such rank as the State Government may by notification prescribe in this behalf to whom the District Judge may transfer the petition, shall after notice to all candidates for the ward concerned at the election (other than such of them as may be petitioners) hold such inquiry as he deems necessary.

It is to be noticed that under r. 42, the election petition is to be presented in accordance with the Rules. The Rules prescribe the manner in which it is to be presented and the condition which has to be complied with, the condition being that there shall be a deposit as required by r. 44. The language of r. 44 is mandatory, and unless there is any indication in the body of the Rules read as a whole or in the rule itself that the word "shall" was not intended to have the mandatory meaning, the Court would not be justified in construing the word "shall" as "may". If at all, the provisions of r. 45 indicate that the direction is mandatory inasmuch as it provides that the District Judge shall enter into the inquiry "where a petition has been presented and the security deposited as required by Rule 44." If the word "shall" in r. 44 was not intended to be mandatory, the wording would have been "after a petition has been presented under Rule 43 and the security deposited as required by Rule 44." This is the only rule which has a bearing on the construction of r. 44, and the only construction to which it can lead is the one indicated by us.

In this connection, it must also be remembered that elections are not to be set aside as a matter of course. To be a candidate at the election, to be elected as a Member of the Board and to have the election of a particular candidate set aside are matters of right created by the statute, and in order that any one should be enabled to take advantage of the statute to have the same set aside, its terms must be

strictly complied with; and this is more so when one has to remember that elections ought not to be set aside very readily. That this was the intention of the framers of the Act and the Rules is shown by the provisions of the Rules which require several matters to be proved before an election could be set aside.

The learned trial Judge, however, relied on two decisions of the Supreme Court which, according to him, favour the construction of the Rule adopted by him. These decisions are in *K. Kamaraja Nadar v. Kunju Thevar*¹ and *Chandrika Prasad v. Shiv Prasad*². Both these cases arose under the Representation of the People Act, 1951. Under this Act, deposit had to be made under s. 117 which is as follows:

"The petitioner shall enclose with the petition a Government treasury receipt showing that a deposit of Rs. 1,000 has been made by him either in the Government Treasury or in the Reserve Bank of India in favour of the Secretary to the Election Commission as security of the cost of the petition."

In the first case, it is not that the Supreme Court construed the word "shall" to mean "may". It only observed (p. 697) :

"...the words 'in favour of the Secretary to the Election Commission' used in s. 117 are directory and not mandatory in their character."

And holding so, it held that as the deposit was, in fact, made but only in the name of the Election Commission, there was substantial compliance with the section, and, therefore, the petition was not liable to be dismissed, the deposit having been made at the time of the election petition and the relevant chalan having accompanied the same. While dealing with this point, the learned Judge observed (p. 697) :

"...What is of the essence of the provision contained in S. 117 is that the petitioner should furnish security for the costs of the petition, and should enclose along with the petition a Government Treasury receipt showing that a deposit of one thousand rupees has been made by him...."

It is no authority for the proposition that the word "shall" may be read as "may". In the second case, again, the deposit was made and the relevant chalan was presented along with the election petition as required by the Act. It was, however, stated in column two

"security deposits for Election Petition of Bargi Assembly Constituency No. 97, District Jabalpur, Madhya Pradesh, refundable by order of the Election Commission of India, New Delhi."

An objection was taken to the latter words, and it was contended that it should not be regarded as deposit under s. 117. The Supreme Court rejected this contention on the ground that the deposit was made, that it clearly indicated the purpose for which it was made, and the words which were subsequently added did not render the deposit any the less one under s. 117. This again is no authority for saying that the word "shall" can be construed as "may".

In our view, the learned Judge was in error in holding that the deposit could be made at any time before he took up the hearing of the case. In this view of the matter, the petitions succeed. We set aside the order made by the learned Judge below and dismiss the election petitions of the petitioners in both the cases.

In each case, opponent No. 1 will pay the costs of the petitioner.

Election petitions dismissed.

1 [1958] A.I.R.S.C. 687.

2 [1959] A.I.R.S.C. 827.

[NAGPUR BENCH]

Before Mr. Justice Abhyankar.

SHAMJI DEOJI v. NAMDEO BAPUJI DHANDE.*

Bombay Tenancy and Agricultural Lands (Vidarbha Region and Kutch area) Act (Bom. XCIX of 1958), Secs. 52,† 10††—Berar Regulation of Agricultural Leases Act (XXIV of 1951), Sec. 9‡—Berar Agricultural Leases Rules, 1952. Rule 9‡‡—Landlord terminating tenancy under s. 9(1) of Act XXIV of 1951 and obtaining possession of land—Landlord selling land two years after obtaining possession—Application by tenant under s. 52 of Bom. Act XCIX of 1958—Whether tenant entitled to claim restoration of possession from transferee—Applicability of s. 52.

The word "landlord" in s. 52 of the Bombay Tenancy and Agricultural Lands (Vidarbha Region and Kutch area) Act, 1958, is restricted to those landlords who had terminated the tenancy under s. 9 of the Berar Regulation of Agricultural Leases Act, 1951, and who were in possession of land on the date of the coming into force of the aforesaid Tenancy Act and on the date on which the cause of action for the ex-tenant to claim restoration of possession accrued.

Section 52 of the Tenancy Act postulates a case of the landlord who entered into possession after terminating the tenancy under s. 9 of the Berar Regulation of Agricultural Leases Act but also continued to hold the ownership of the property as a tenure-holder after the Tenancy Act came into force and was in a position to comply with the provisions thereto; s. 52 cannot apply to a person who lawfully came on land prior to the coming into force of the Tenancy Act.

THE facts are stated in the judgment.

**Decided, February 25, 1965.* Special Civil Application No. 21 of 1964.

†Sec. "52. (2) After the tenant has recovered possession under sub-section (1) he shall, subject to the provisions of this Act, hold such land on the same terms and conditions on which he held it at the time his tenancy was terminated.

(3) If the landlord has failed to restore possession of the land to the tenant as provided in sub-section (1), he shall be liable to pay such compensation to the tenant as may be determined by the Tahsildar for the loss suffered by the tenant on account of eviction.

(4) If at any time the tenant makes an application to the Tahsildar and satisfies him that the landlord has failed to comply within a reasonable time with the provisions of sub-section (1), the tenant shall be entitled on a direction by the Tahsildar to obtain immediate possession of the land and to such compensation as may be awarded by the Tahsildar for any loss caused to the tenant by eviction and by failure on the part of the landlord to restore or give possession of the land to him as required by sub-section (1)."

††Sec. "10. (1) A person who or whose predecessor-in-title held land as tenant or protected lessee on the first day of January 1953 or thereafter and who has subsequently been dispossessed by a surrender of tenancy before the date of the commencement of this Act may within a period of one year from the date of the commencement of the Bombay Tenancy and Agricultural Lands (Vidarbha Region and Kutch Area) (Amendment) Act, 1960, apply to the Tahsildar for the restoration of his tenancy on the same terms and conditions on which he held the land before such surrender unless the land has been put to a non-

agricultural use on or before the appointed day.

(2) On receipt of such application the Tahsildar shall enquire into the circumstances in which and the procedure under which such dispossession took place and if he is satisfied that such dispossession took place as a result of surrender and the consent of the tenant was procured by fraud, deceit, false representation or undue influence or pressure of any kind whatsoever or was otherwise in contravention of the provisions of the law applicable for the time being, he shall order the restoration of the possession of the land and the tenancy thereof to the tenant.

(3) Sub-sections (1) and (2) shall have effect notwithstanding that another person may be in possession of the land as a protected lessee or a tenant or otherwise, and where such other person is so in possession he shall be liable to be evicted."

‡Sec. "9. (6) If on re-entering upon any land after termination of the lease of a protected lessee in accordance with this section, a landholder fails at any time during such period as may be prescribed to utilise the land for the purpose for which the lease was terminated, the dispossessed lessee may apply to the Revenue Officer to put him in possession of the land from the commencement of the agricultural year next following; and the Revenue Officer shall, after hearing the landholder and making such enquiry as he deems fit, put the lessee in possession of the land if he is satisfied of the failure and also award him such sum by way of compensation as the Revenue Officer may consider sufficient."

‡‡"Rule 9. The period for the purpose of sub-section (6) of section 9 shall be two years from the date of re-entry by the landholder."

V. R. *Mamohar*, for the petitioner.

C. S. *Dharmadhikari*, for respondent No. 1.

ABHYANKAR J. The petitioners Shamji and Kisan purchased S. N. 110, having an area of 23 acres and 20 gunthas situate at village Bechkheda, from respondent No. 2 Udhao on foot of a registered sale deed dated February 23, 1957. They were in possession of this property when respondent No. 1 Namdeo filed an application purporting to be made under s. 32 of the new Tenancy Act on May 15, 1959. That application is at page 23 of the Paper Book. In that application Namdeo alleged that he was cultivating the field in dispute as a protected lessee for the year 1951-52 to 1954-55. The field was let out to him by Udhao, respondent No. 2, in his capacity as manager of the joint Hindu family of which his sons Vasant, Shyam and Jayant, respondents Nos. 3 to 5, were also members. Actual lease was given by Vasant who was the eldest son because Udhao was then in service in December 1954, which is obviously a mistake; actual date being November 24, 1954. Vasant sent a notice under s. 9 of the Berar Regulation of Agricultural Leases Act terminating the tenancy of Namdeo on the ground that he needed the land for personal cultivation. In consequence of this notice, possession was given. As a matter of fact, Vasant started proceedings for possession by an application dated April 2, 1955, before the Sub-Divisional Officer and during the pendency of this application, on June 13, 1955, a petition jointly signed by Vasant on behalf of all the land-holders, and Namdeo, the tenant, came to be filed stating that the parties had settled the dispute amicably. The land-holders gave up the right to lease money for the agricultural year 1954-55 and the non-applicant had given up the right of cultivation and had placed the field in possession of the landholders. There is no date mentioned in this application when the landholders were placed in possession of the property.

The land-holders cultivated the land at home for the years 1955-56 and 1956-57 and sold it, as already stated, to the two petitioners under a sale-deed dated February 23, 1957. There is an averment in the written statement filed by the petitioners in para. 7 that their vendor, viz. previous land-holder, cultivated the land in question personally for two years after it was taken from Namdeo and then it was sold to the petitioners in 1957. On the other hand, the averment of Namdeo in para. 4 of his application under s. 52 was to the effect that the land-holder sold the said field to opponent No. 5, i.e. petitioner No. 1, in the year 1956, which he alleged was within two years from dispossession of Namdeo. There is no dispute that this averment, besides being vague as to the date of delivery of possession, was also wrong with regard to the date of sale. Neither counsel has been able to show from record whether there is any statement or evidence showing the date on which possession was delivered by Namdeo to the previous landlord.

In para. 8, Namdeo also averred that after termination of the tenancy of Namdeo, the original land-holder re-entered upon the land and cultivated it personally for sometime but before the expiry of two years from the date of re-entry, sold it and put the transferee, i.e. the petitioner, in possession of the land. Originally, only petitioner No. 1 was impleaded as non-applicant to this application, but subsequently, petitioner No. 2, who was a co-purchaser seems to have been allowed to be impleaded. Namdeo thus founded his claim to restoration of possession on the basis of the provisions of s. 52 of the new Tenancy Act on the allegation that his land-holder had obtained possession after termination of his tenancy for personal cultivation, that he had not cultivated for the requisite period of two years, that he had sold the land to the petitioners and, therefore, he was entitled to restoration of possession.

Out of the original land-holders, non-applicants Nos. 1 and 2 Udhao and Vasant, resisted the application on the ground that possession was taken as a result of the compromise between the parties after termination of the tenancy and by a notice under s. 9(I) of the Berar Regulation of Agricultural Leases Act

and that they had cultivated the field for two years 1955-56 and 1956-57. In para. 5 they averred that it was not necessary for the then land-holders to obtain any refusal from the ex-tenant prior to the sale to the petitioners because there was no such law in existence when the sale of the field was effected, that the sale was legal and valid and its validity could not be challenged in the present proceedings. They reiterated that respondents Nos. 1 and 2 had used the land for the purposes stated in the notice for the requisite period from the date possession was given. They raised an alternative contention that the tenancy was terminated not by notice under s. 9 of the Berar Regulation of Agricultural Leases Act but as a result of the compromise between the parties after which they cultivated the land for two years before the sale in 1957 to the petitioners.

The petitioners who came on land after termination of the proceedings and compromise denied the allegations regarding the notice proceeding before the revenue officer probably because they were not parties to it, but they reiterated that they purchased the land after the previous land-holder had cultivated it personally for two years and it was not necessary to offer tenancy to Namdeo because there was no such provision in any law requiring the land-holder to do so when sale was effected. As an alternative contention, they pointed out that on proper construction of s. 52 of the new Tenancy Act, if reference to the land-holder included successor-in-interest of the previous land-holder then the land was in personal cultivation of the 'land-holder', namely the petitioner, and it could not be said that the land-holder had ceased to cultivate it personally.

The Naib-Tahsildar held that Namdeo delivered possession of the field to Vasant for personal cultivation on termination of the tenancy and as a result of the compromise. In para. 8 of his order, the Naib-Tahsildar has discussed the question whether the previous landlord sold the land within two years of obtaining of possession. The discussion is much too brief and the Naib-Tahsildar observed that Udhao admitted that he sold the field on February 23, 1957, which is also the date of the sale-deed and from this statement of Udhao he inferred that the field was sold within two years from dispossession of the applicant Namdeo. I have already pointed out that there is no material or averment on record to indicate on what date actual possession was obtained by Udhao and Vasant. The recital in the compromise petition to which reference has been made only states that the non-applicant, i.e. Namdeo, had given up his rights of cultivation over the field and had placed the said field in possession of the applicant, i.e. the landlord, but makes no mention as to when possession was actually delivered. This date was required to be established specifically by Namdeo if he wanted to make out a case of non-compliance with the provisions of s. 9(6) of the Berar Regulation of Agricultural Leases Act. Under r. 9 of the Rules framed under that Act, the period for the purpose of sub-s. (6) of s. 9 was put to be two years from the date of re-entry by the land-holder. If it was the contention of Namdeo that the sale was effected within the period of less than two years from the date of re-entry of the landlord, it was incumbent on Namdeo to establish this date of re-entry. The learned counsel for respondent Namdeo has not been able to show from the record any material or evidence to indicate what this date of re-entry is. On the other hand, the petitioners as well as the ex-landlords have claimed that the ex-landlords cultivated the field for two years. In the absence of any such evidence as to the date of re-entry, the Naib-Tahsildar could not have found that the sale was effected within the period of two years from the date of re-entry. The Naib-Tahsildar then goes on to observe in para. 9 of his order that the landlord did not obtain from Namdeo any refusal in writing to accept the tenancy on the same terms and conditions nor offered him a writing to give possession of the field to him. But these observations seem to have been made without bearing in mind that at the date on which the sale was effected the new Tenancy Act was not even conceived.

The sale is of February 25, 1957, and there was no law in force which required a landlord, who had obtained possession on terminating the tenancy on the ground of personal cultivation, and who had cultivated the land for two years, to offer it to the tenant before selling it to someone else. The right of sale which is inherent in every owner of a property, unless there is any breach of law, was untrammelled by any such legislation on the date of sale in favour of the petitioners. The Naib-Tahsildar, however, ordered restoration of possession to Namdeo under s. 52(1) of the new Tenancy Act.

The petitioners challenged this order by an appeal before the Sub-Divisional Officer. The Sub-Divisional Officer has observed in para. 4 of his order that the possession of the field was delivered by Namdeo on June 13, 1955, according to the compromise petition, a certified copy of which was on the record. This statement is obviously incorrect because the compromise petition does not state that possession was delivered on the date of the petition. In fact, it recites the fact of delivery of possession having been already given. The Sub-Divisional Officer held that the notice under s. 9 of the Berar Regulation of Agricultural Leases Act could only be given by a recorded occupant. As Vasant was not a recorded occupant, he could not give notice under s. 9. He also observed that possession was given to Vasant and the field having been sold on February 23, 1957, Namdeo could have applied for restoration if the landlord had failed to cultivate the land personally for two years. But Namdeo did not so apply within the prescribed time under the Berar Regulation of Agricultural Leases Act; instead he moved the Naib Tahsildar under s. 52 of the new Tenancy Act by an application on May 16, 1959, and such application was held tenable. The Sub-Divisional Officer held that the application was not tenable at the instance of Namdeo because Vasant was not competent to serve a notice terminating the tenancy on Namdeo. Therefore, the notice had to be completely ignored. As there was no valid notice terminating the tenancy, the possession could not be said to have been obtained by the landlord as a result of the termination of tenancy under s. 9 of the Berar Regulation of Agricultural Leases Act and, as this condition was not satisfied, Namdeo could not invoke the provisions of s. 52 of the new Tenancy Act for being restored to possession. He, therefore, allowed the appeal and dismissed the application of Namdeo.

Namdeo moved the Maharashtra Revenue Tribunal in revision against the order of the Sub-Divisional Officer rejecting his application. The Tribunal has allowed the revision application and granted relief to the ex-tenant Namdeo and it is this order which is impugned in this petition.

In para. 2 of its order, the Tribunal has observed that as a result of the alleged surrender the non-applicant tenure-holder Udhao took possession of the suit land on the same day i.e. June 13, 1955. This observation is obviously incorrect, firstly because, the field was not obtained as a result of surrender but on account of the termination of the tenancy after notice under s. 9(1) of the Berar Regulation of Agricultural Leases Act was given and also because there is no proof that possession was obtained by the previous landholder on June 13, 1955. All the revenue authorities seem to have fallen into the same error as to the date when re-entry was effected by the landholder after termination of the lease. After adverting to the conflicting decisions of the subordinate revenue authorities the Tribunal has referred to the points in controversy between the parties in para. 4 of its order. The Tribunal held that the notice given by Vasant was on behalf of the joint family, that it was acted upon and the tenancy was terminated as a result of that notice. It also held that the tenancy was terminated because the landholder desired the land for personal cultivation. An argument seems to have been advanced before the Tribunal that as a result of compromise Namdeo surrendered his rights in favour of the landholder and possession was taken privately and not in pursuance of the notice under s. 9(1) of the Berar Re-

gulation of Agricultural Leases Act for termination of the tenancy. With regard to this submission the Tribunal observed as follows:

"The antecedents of the case are so glaring that it cannot but be observed that non-applicant tenure-holder Udhavrao wanted the suit land for personal cultivation and the proceedings before the Court were cut short under the device of surrender. So it makes no difference whether he got the possession due to surrender or under an order of the Court. The fact remains that the suit land was needed for his personal cultivation. But for the notice and the possession proceedings, the so-called surrender would not have seen the light of the day. In other words, the so-called surrender was a part and parcel of the proceedings under section 19 read with section 9 of the Berar Leases Act."

It is difficult to reconcile this finding with the issues which have been raised for decision in para. 4 or with the averments of the parties before the Court. The Berar Regulation of Agricultural Leases Act did make a provision in s. 6 for surrender of a holding by a protected lessee. It was nobody's case that Namdeo had surrendered the leasehold rights under s. 6; on the other hand, it was specifically averred by Namdeo that notice under s. 9 was given terminating the tenancy. Thereafter, an application for possession was filed by the land-holder and during the pendency of enquiry on the basis of such application the parties arrived at a settlement. It is, therefore, difficult to see how possession could be said to have been obtained by the landlord as a result of surrender if that expression is to have any legal consequence in the light of the provision of the Tenancy Act. What seems to have taken place is that after possession proceedings were commenced by the landlord after terminating the tenancy under s. 9(1), the parties settled the dispute and possession was surrendered. Surrender of possession cannot be equated to surrender of tenancy. What was surrendered was possession and not surrender of tenancy rights which were already terminated by issue of a valid notice by the landlord under s. 9(1) of the Berar Regulation of Agricultural Leases Act. Obviously, some confusion has been caused as a result of the argument addressed before the Tribunal when no case of surrender of tenancy was pleaded or proved by either party up to that stage. The operative finding however which has been given by the Tribunal on point No. 3 that possession of the suit land was taken by the tenure-holder Udhao on the ground of personal cultivation must be affirmed on the material on record.

The Tribunal then proceeded to consider whether the tenure-holder was guilty of contravention of s. 9(6) of the Berar Regulation of Agricultural Leases Act. The Tribunal observed that applicant Namdeo parted with possession on June 13, 1955. I have already pointed out that there was no legal basis for this finding because nobody has averred to that effect nor is there any evidence as to the actual date of re-entry of the land-holder. Obviously, all the authorities seem to have been misled into thinking that possession was delivered by Namdeo on the date on which the compromise petition was presented because the compromise petition bears that date. But the compromise petition itself recites that possession had been delivered without disclosing the date of delivery of possession. It was for Namdeo to establish that there had been contravention of s. 9(6) of the Berar Regulation of Agricultural Leases Act and the rules made thereunder. Namdeo failed to lead evidence proving the date of re-entry of the landlord and this failure must result in a finding on that count being against him. On the assumption that possession was delivered or parted with by Namdeo on June 13, 1955, the Tribunal held that the field was transferred by sale before completion of two years from the date of delivery of possession. If that basic fact has not been proved by Namdeo, the finding that the sale was in contravention of the provisions of s. 9(6) cannot be sustained as Namdeo has failed to prove the date of re-entry.

The Tribunal then quoted the provisions of s. 52 of the new Tenancy Act and observed that the contesting opponents, viz. ex-landlords or petitioners, did not contend that Namdeo had refused in writing to accept the tenancy on

the same terms and conditions, and therefore, the Tribunal refused to consider that point. Thus, the Tribunal restored the order of the Naib-Tahsildar on the short ground that Namdeo whose tenancy was terminated under s. 9(1) delivered possession on June 13, 1955, and the landlord who had obtained possession had parted with the property within two years thereof and, therefore, Namdeo was entitled to be restored to possession of the property under the first part of s. 52 of the new Tenancy Act.

The learned Member of the Tribunal then proceeded to consider whether any other provision of the new Tenancy Act was attracted by the facts as disclosed in the case. It is not clear whether either party invited the Tribunal to travel beyond the pleadings and give a finding on an issue which was not raised till then. The Tribunal then referred to s. 10 of the new Tenancy Act and observed that Namdeo who was a protected lessee having lost his remedy under s. 19(2) of the Berar Regulation of Agricultural Leases Act for restoration of possession of the land of which he was dispossessed except in accordance with the provisions of the Leases Act, was not without a remedy. It was held that he was entitled to file an application for restoration under s. 10 of the new Tenancy Act on the footing that he had surrendered his tenancy otherwise than in accordance with the provision of the Berar Leases Act. It is admitted by counsel appearing for respondent Namdeo that it was not his case before the Naib-Tahsildar or the Sub-Divisional Officer nor any facts were pleaded to show that Namdeo had surrendered his tenancy or possession otherwise than in accordance with the provisions of law, or that he was dispossessed as a result of such illegal surrender and, therefore, was entitled to restoration of possession under s. 10 of the new Tenancy Act. It is difficult to see how the Tribunal could have considered this question for the first time sitting as a Court of revision without any pleadings to that effect, any evidence or any finding being recorded by any of the subordinate authorities. The Tribunal has clearly acted in excess of its jurisdiction as a revisional Court in entertaining the plea for the first time before it, the plea which does not raise a pure question of law at all and which depended on various facts being proved as required by s. 10 of the new Tenancy Act. The learned counsel for the appellant has not attempted to support the order of the Tribunal on the basis of this finding of the Tribunal applying the provisions of s. 10 of the new Tenancy Act. It is, therefore, enough to say that the Tribunal could not have for the first time allowed the application of Namdeo on the basis that Namdeo was dispossessed and that he could claim restoration of possession under s. 10 of the new Tenancy Act.

The question that falls for consideration therefore is whether on the material on record Namdeo was entitled to claim restoration of possession invoking the provisions of s. 52 of the new Tenancy Act. That section is as follows:

"52. (1) Where after terminating the tenancy of any land under section 9 of the Berar Regulation of Agricultural Leases Act, 1951, or under section 38, 39 or 39A of this Act, the landlord has taken possession of such land and he fails to use the land for the purpose specified in the notice given under the said section 9 or as the case may be, section 38, 39 or 39A within one year from the date on which he took possession or ceases to use it at any time for any of the aforesaid purposes within twelve years from the date on which he took such possession, the landlord shall forthwith restore possession of the land to the tenant whose tenancy was terminated by him, unless he has obtained from the tenant his refusal in writing to accept the tenancy on the same terms and conditions or has offered in writing to give possession of the land to the tenant on the same terms and conditions and the tenant has failed to accept the offer within three months of the receipt thereof:

Provided that no refusal of the tenant shall be valid unless it has been verified before the Tahsildar in the prescribed manner."

I have already shown that there is no warrant for the conclusion of any of the authorities below in the absence of evidence or plea to that effect, that the previous landlord had effected an entry on land after termination of the

tenancy under s. 9(1) of the Berar Leases Act within two years of February 23, 1957. In fact, Namdeo has failed to establish the date of re-entry. On the other hand, it has been averred by the ex-landlord as well as the petitioners that after termination of the tenancy by notice the landlord was in possession of the property for two years and cultivated it for the years 1955-56 and 1956-57. It is however contended that after the coming into force of the new Tenancy Act, which puts s. 52 on the statute book, it was necessary for the landlord not to cease to make the same use of the land for a period of 12 years from the date of re-entry on the land. In other words, if a landlord like Udhao had obtained possession after terminating the lease under s. 9(1) of the Berar Leases Act, parted with possession after two years by sale or other valid mode of transfer then permissible, the moment s. 52(1) came into force the ex-tenant could claim restoration of possession from whosoever is found on land if the land was not to be found in personal cultivation of the ex-landlord. It is difficult to accept this interpretation of s. 52 of the new Tenancy Act. It has not been shown that there was any legal impediment under the provision of any statute or any other principle which in any manner curtailed the right of Udhao as owner of the property to dispose it of by sale or by other legal mode of transfer. The petitioners purchased the property in 1957 and there was no legal impediment to their acquiring property from Udhao merely because the property was previously under the tenancy of Namdeo but whose tenancy rights were terminated by a valid notice under s. 9(1) of the Berar Regulation of Agricultural Leases Act. It cannot, therefore, be said that the petitioners came on the land or acquired the rights in the property otherwise than by legal method. On the date the new Tenancy Act came into force, the property was owned by the petitioners and was in their personal cultivation. Only argument that was open to the contesting respondents in this case was to put an interpretation on s. 52 and in particular on the word "landlord" as meaning successors-in-title of original landlord. In other words, what is contended is that the word "landlord" in s. 52(1) means not only the landlord who had terminated his tenancy of the land under s. 9 and taken possession of the land from his tenant but also his successors-in-title and because the ex-landlord or the land-holder who had terminated the tenancy was not personally cultivating the land either on the date the Act came into force or had made himself incapable of cultivating the land personally for a period of 12 years from the date he effected re-entry, ex-tenant like Namdeo had been granted the right to be restored to possession by evicting whosoever was introduced on land even though by a valid transfer effected prior to the coming into force of the new Tenancy Act. There are several difficulties in accepting this interpretation.

The section, in the first place, begins by referring to termination of the tenancy of any land under s. 9 of the Berar Regulation of Agricultural Leases Act. Such termination could be made by the landlord by issuing a notice under s. 9. Then the section speaks of the failure to use the land for the purpose specified in the notice. One of purposes which could be specified in the notice under s. 9 is the purpose of personal cultivation. So the failure to use the land for the purpose specified in the notice means failure personally to cultivate the land. But this failure must be within one year which words could only be appropriately read in conjunction with other contingency viz. notice of termination under s. 38 or 39 of the new Tenancy Act. So the failure referred to in the first part of the section must be failure to cultivate personally according to the notice under s. 9(1) and according to the provisions of s. 9(6) of the Berar Regulation of Agricultural Leases Act. Further requirement of the section is not only that there must be user of the land according to the notice for which the tenancy has been terminated but such user must not cease for 12 years next following the date on which possession was taken. This requirement could be satisfied only by that category of landlords who had obtained possession and would be continuing on land as landlord. The section creates

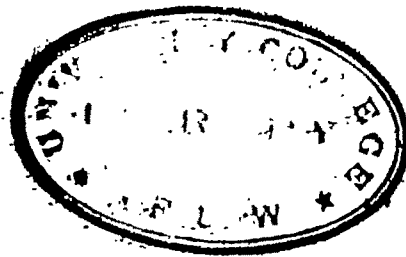
a right in the ex-tenant of such land to claim restoration at any point of time within a period of 12 years from the date he was dispossessed. The section also creates an obligation on such landlord that the moment such landlord ceases to cultivate the land personally, forthwith to restore possession of the land to the tenant from whom he obtained possession and whose tenancy he terminated. Now, this requirement is possible only by a landlord who is in possession and who is in a position physically to restore possession to the tenant whose tenancy such landlord had terminated under s. 9 of the Berar Regulation of Agricultural Leases Act. It is difficult to see how the landlord who had already transferred ownership of the property for a consideration in favour of another person could at all forthwith transfer possession of property when he had no dominion or control over such possession or property. There is a further requirement in the section which permits a landlord to retain possession if he has obtained from the tenant refusal in writing to accept the tenancy on the same terms and conditions. Even this condition is impossible of fulfilment because the person who can give the tenancy rights is now the transferee of land who has come on land prior to the coming into force of the Act and not the ex-landlord. All these difficulties are created because the interpretation that is sought to be put on s. 52 postulates that the Legislature anyhow wanted the ex-tenant to be restored to land the moment the ex-landlord transferred the land and was not in personal cultivation. I do not think that such effect is intended by the provisions of s. 52 of the new Tenancy Act.

In this connection it is worth while to compare the provision made by the Legislature in a somewhat similar contingency. Under s. 10 of the new Tenancy Act provision is made for restoration of possession to tenants who are dispossessed after January 1, 1953, in certain circumstances. That provision lays down that a person either himself or whose predecessor-in-title held land as tenant or protected lessee on the first day of January 1953 and thereafter and who has subsequently been dispossessed by a surrender of tenancy before the date of the commencement of this Act may apply within a period of one year from the date of the commencement of the Bombay Tenancy and Agricultural Lands (Amendment) Act, 1960, to the Tahsildar for the restoration of his tenancy on the ground that dispossession took place as a result of surrender procured by fraud, deceit, false representation or undue influence or pressure of any kind or was otherwise in contravention of the provisions of the law applicable. Sub-section (3) of s. 10 specifically provides that relief shall be given to such ex-tenant notwithstanding that another person may be in possession of the land as a protected lessee or a tenant or otherwise, and where such other person is so in possession he shall be liable to be evicted. Thus, where the Legislature intended to create an overriding right in favour of the ex-tenant who could successfully challenge his dispossession because it was not in accordance with law, that right could be enforced not only against the ex-landlord but against any one who was introduced on land by the landlord either as tenant or as successor-in-title, in other words, a transferee. A comparison of these two provisions will, therefore, clearly show that s. 52 could not be interpreted to affect the rights of persons like the petitioners who had already acquired ownership of property long before the new Tenancy Act came into force. The word 'landlord' in s. 52, therefore, must be construed as restricted to those landlords who had terminated the tenancy under s. 9 and who were in possession of land on the date of the coming into force of the new Tenancy Act and on the date on which the cause of action for the ex-tenant to claim restoration of possession accrued. The requirement that such landlord shall forthwith restore tenant to possession postulates the landlord's physical possession of the property as well as any legal dominion over it. If by legal process of transfer, the landlord's title becomes vested in some other person it is not possible to hold that such person will be liable to restore possession and the ex-tenant to enforcement of s. 52 of the new Tenancy Act.

whole
ing to person who gives [redacted] is pertain-
liability to pay compensation for [redacted] with and
show that the section postulates a case [redacted] should all go to
into possession after terminating the tenancy [redacted] of the Berar Regulation
of Agricultural Leases Act but also continued to hold the ownership of the
property as a tenure-holder after the new Tenancy Act came into force and
was in a position to comply with the provisions thereto. It cannot possibly
apply to a person who lawfully came on land prior to the coming into force of
the Act. It will be difficult to suggest that the transfer effected which was
lawful prior to the coming into force of the new Tenancy Act would become
onerous and impose duties on transferees by this legislation being put on the
statute book and after a valid transfer in the manner effected in this case.

Thus, the result is that the petition is allowed and the orders of the Naib-
Tahsildar as well as the Tribunal are set aside. Namdeo is not entitled to re-
stitution of possession. His petition is liable to be dismissed. In the circum-
stances, however, there will be no order as to costs.

Petition allowed.



could
crops
interpreted
because an order s. 30(1) may come to be made in a
year in which the crops.

Sonajee Krishnajeo Majumdar v. Nathu Yadav Patil and R. M. Paranjypte v. A. M. Mali,* referred to.

THE facts appear in the judgment.

K. H. Deshpande, for the petitioner.

B. N. Phadke and V. M. Golwalkar, for respondents Nos. 4 to 6.

ABHYANKAR J. This is a tenant's petition under art. 227 of the Constitution. One Narayan was the landlord of two fields Survey No. 16/2, area 14 acres and 29 gunthas at village Akkalkot, and Survey No. 105/1, area 7 acres and 12 gunthas, of village Akola. Both the fields were being cultivated by the petitioner under a lease granted by Narayan.

On May 4, 1961, Narayan gave a notice to the petitioner that he had failed to pay the lease money for the year 1960-61. The lease money was not paid for both the fields. By the notice the petitioner was called upon to pay the amount of lease money within a period of three months. In spite of the notice the petitioner did not pay the amounts of rent in arrears.

Narayan, therefore, filed an application on September 27, 1961, for possession under s. 36 read with s. 19 of the new Tenancy Act. In those proceedings the petitioner admitted that Rs. 159 were due from him to the land-

*Decided, April 7, 1965. Special Civil Application No. 454 of 1963.

"30(1) Where any tenancy of any land held by any tenant is terminated for non-payment of rent and the landlord files any proceeding to eject the tenant, the Tahsildar shall call upon the tenant to tender to the landlord the rent in arrears together with the costs of the proceeding, within three months from the date of the order, and if the tenant complies with such order, the Tahsildar shall, in lieu of making an order for ejectment, pass an order directing that the tenancy had not been terminated and thereupon the tenant shall hold the land as if the tenancy had not been terminated :

Provided that if the Tahsildar is satisfied that in consequence of total or partial failure of crops or similar calamity the tenant has been unable to pay the rent due, the Tahsildar may, for reasons to be recorded in writing, direct that the arrears of rent together with the costs of the proceedings if awarded, shall be paid within one year from the date of the order and that if before the expiry of the said period, the tenant fails to pay the said arrears of rent and costs, the tenancy shall be deemed to be terminated and the tenant shall be liable to be evicted."

1 [1959] Bom. 629, s.c. 61 Bom. L.R. 156.
2 [1962] A.I.R. S.C. 752, s.c. 64 Bom. L.R. 569.

The learned counsel for the petitioner referred to a Division Bench decision of this Court reported in *Sonajee Krishnajeo Mujumdar v. Nathu Yadav Patil*.¹ That decision pertains to interpretation of ss. 29 and 25 of the Bombay Tenancy and Agricultural Lands Act, 1948. The learned counsel for the respondents referred to the decision of the Supreme Court in *R. M. Paranjyee v. A. M. Mali*² which has interpreted the effect of sub-s. (2) of s. 25 of the Bombay Tenancy and Agricultural Lands Act, 1948. In view of the principle on which that case is decided, it must be held that the statute itself having given a right to the defaulting tenant to a further grant of time within which to pay the amount of rent, there was hardly any further power in the Tahsildar to extend that time over again in the guise of exercising powers, as it were, afresh under the proviso. The proviso and the main sub-s. (1) of s. 30 had to be read together and are a part and parcel of the same scheme under which the statute permits the defaulting tenant to get an extended period for payment of arrears of rent, ordinarily as a matter of course for three months, but in case of failure to make payment due to failure of crops or similar calamity, up to a period of one year. This proviso cannot possibly be interpreted as creating a further *locum penitentiae* without payment of rent merely because an order passed by the Tahsildar under s. 30(1) may come to be made in a year in which there may be failure of crops. Once this argument is accepted, it would lead to somewhat startling results. It would mean that the tenant would be entitled to claim relief by way of further extension of time by a year from the date fixed for payment of arrears of rent under sub-s. (1) of s. 30, on account of failure of crops in the year in which the Tahsildar comes to pass the orders. I do not think that the Legislature intended any such result to follow from the proviso to sub-s. (1) of s. 30 of the new Tenancy Act.

The result is that the petition fails and is dismissed, but there will be no order as to costs.

Petition dismissed.

1 [1959] Bom. 629, s.c. 61 Bom. L.R. 156.

2 [1962] A.I.R. S.C. 753, s.c. 64 Bom. L.R. 569.

SUPREME COURT.

Present: Mr. Justice K. Subba Rao, Mr. Justice J. C. Shah and Mr. Justice S. M. Sikri.

THE UNION OF INDIA v. INDIA FISHERIES PRIVATE LTD., BOMBAY*.

Indian Income-tax Act (XI of 1922), Sec. 49E—Indian Companies Act (VII of 1913), Secs. 228, 229—Applicability of s. 49E vis-a-vis insolvency rules—Whether Department gets priority over other unsecured creditors where its claim proved in liquidation.

Section 49E of the Indian Income-tax Act, 1922, applies when insolvency rules do not apply. Therefore, once the claim of the Department is proved in liquidation proceedings, the Department cannot by exercising the right under s. 49E of the Act get priority over the other unsecured creditors.

THE facts appear in the judgment.

Niren De, Additional Solicitor General of India, with *R. Ganapathy Iyer* and *R. N. Sathay*, for the appellants.

A. V. Viswanatha Sastri, with *T. A. Ramachandran* and *J. B. Dadachanji*, *O. C. Mathur* and *Ravinder Narain*, for the respondent.

SIKRI J. This appeal pursuant to a certificate of fitness granted by the High Court of Maharashtra at Bombay under art. 133 (1) (c) of the Constitution is directed against the judgment of the said High Court in a petition under art. 226 of the Constitution filed by the respondent.

The Indian Fisheries (P) Ltd.—hereinafter called the respondent—was a private limited company and was directed to be wound up by an order of the Bombay High Court, dated October 11, 1950, and a Court Liquidator was appointed as the Official Liquidator thereof with all powers under s. 179 of the Indian Companies Act, 1913 (VII of 1913) to be exercised by him under s. 180 without sanction or intervention of the Court save and except in case of sales of immovable property belonging to the respondent. For the assessment year 1948-49, the respondent was assessed on December 8, 1950, the tax being assessed at Rs. 8,737-15-0. On or about March 15, 1951, the Income Tax Officer lodged a claim in respect of this tax with the Official Liquidator. That claim was adjudged and allowed as an ordinary claim and certified as such on April 2, 1952. In August, 1954, the Official Liquidator declared a dividend of 9½ annas in a rupee and paid to the Income Tax Department a sum of Rs. 5,188-3-0 against the claim made by the Income Tax Officer as an ordinary creditor. Thus a balance of Rs. 3,549-12-0 still remained payable to the Income Tax Department from the assets of the respondent.

For the year 1955-56, the Department made a demand from the respondent on June 22, 1954, for a sum of Rs. 2,565-6-0 as advance tax. This was paid by the Official Liquidator. On a regular assessment being made for the said year, only Rs. 1,126-12-0 was assessed as payable by the respondent. After adjusting this sum against the advance payment of Rs. 2,565-6-0, Rs. 1,460-1-0 became refundable to the respondent, inclusive of interest. Instead of refunding the said balance to the respondent, the Income Tax Officer set off the said amount against the balance of Rs. 3,549-12-0 which was still outstanding in respect of the income-tax demand for the year 1948-49. The respondent filed a revision petition to the Commissioner of Income-tax, but the said petition was rejected by the Commissioner on September 21, 1959, holding that the action of the Income Tax Officer was perfectly justified under the provision of s. 49E of the Income-tax Act.

On November 25, 1959, the respondent filed a petition under art. 226 of the Constitution and prayed for a writ, direction or order for setting aside the orders of the Income Tax Officer and the Income Tax Commissioner. He further prayed for any